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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REPLYING AFFIDAVIT

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INTRODUCTION

I, the undersigned

NICOLE FRITZ

do hereby make oath and state that:

1. I am duly authorised to depose to this replying affidavit on behalf of the Applicants, and I deposed to the founding and supplementary affidavits in this matter.

2. The averments made herein are to the best of my knowledge true and correct and are, unless indicated by the context, within my personal knowledge. Where I make legal submissions, I do so on the basis of advice that the Applicants received from their legal representatives.

3. I have read the answering affidavits filed on behalf of the Respondents in this application. I respond to those affidavits below. To the extent that I fail to respond to any averment in this affidavit which is inconsistent with what I have set out in my founding and supplementary affidavits in this application, it must be taken to be denied rather than admitted.

4. Terms that are defined in my founding and supplementary affidavits bear the same meaning in this replying affidavit, except where the context otherwise indicates.

5. The answering affidavits submitted by the Respondents are in large part an attempt ex post facto to expand on and to justify the reasons previously submitted by the Fourth Respondent in terms of the record of proceedings under rule 53 for refusing to initiate an investigation and the acceptance and endorsement thereof by the First Respondent.

6. Their responses demonstrate that their refusal to initiate an investigation is, in general terms, based on a combination of the following grounds:

6.1. An investigation into the Torture Docket submitted by the Applicants would negatively impact on South Africa's foreign relations with Zimbabwe;

6.2. The crime in question is an "entirely foreign matter" and any action on the part of the South African authorities would constitute an infringement of Zimbabwe's sovereignty;

6.3. The ICC Act or any other law does not place any obligation on the Respondents to initiate an investigation into crimes contemplated by this Act;

6.4. Even if the abovementioned grounds were not relevant an investigation is:

6.4.1. not possible because South African law does not provide for the investigative machinery to investigate crimes contemplated in the ICC Act;

6.4.2. the Respondents have limited investigative capacity or lack the legal authority to investigate crimes contemplated in the ICC Act; and

6.4.3. the information in the Torture Docket submitted by the Applicants provides no basis for the initiation of an investigation

7. The Respondents also argue as a preliminary point that the Applicants lack the necessary *locus standi* to bring this application and maintain that PAJA is not applicable to the impugned decisions. The Fourth Respondent also raises as a preliminary point that the Zimbabwe Human Rights Commission is the appropriate avenue for the Applicants to have pursued.

8. As I will demonstrate further below each of these "grounds" is without merit.

9. On the contrary, the Respondents' reliance on the abovementioned grounds is further proof on their own version that a number of considerations that they were legally obliged to take into account when seized with the Applicants' request, read with the evidence provided, were ignored.

10. Before dealing in a line-by-line fashion with the Respondents' averments, it is accordingly necessary for me to highlight the following issues, the bulk of which I have previously explained in my founding and supplementary founding affidavits, but which the Respondents have demonstrably failed to appreciate:

10.1. *First*: the legal context created by the ICC Act and the obligations upon the Respondents that arise when making decisions in terms of and pursuant to the ICC Act;

10.2. *Second*: the investigative authority and the concomitant obligations vested in the Respondents in terms of the Constitution, ICC Act, NPA Act and South African Police Services Act 68 of 1995 (SAPS Act);

10.3. *Third*: the supporting affidavit of Brigadier Marion and the unjustified reliance placed thereon by the Respondents; and

10.4. *Fourth*: the *locus standi* of the Applicants.

11. I deal with each immediately below.

The legal context created by the ICC Act and the obligations upon the Respondents when making decisions in terms of and pursuant to the ICC Act

12. I have already dealt at length with the legal context created by the ICC Act in paragraphs 80 to 92 of my founding affidavit and at paragraphs 53 to 60 of my supplementary affidavit. I am constrained to submit that the Respondents' answering affidavits demonstrate a failure properly to have understood that legal context.

13. In their answering affidavits the Respondents have advanced a number of purported justifications for their refusal to initiate an investigation. These "justifications" provide further support for the review relief sought by the Applicants because they demonstrate –

on the Respondents' version – a failure to appreciate the purpose and objects of the ICC Act and binding international law.

14. The ICC Act explicitly confers extraterritorial jurisdiction for crimes against humanity regardless of whether the crime was committed in South Africa or abroad. Section 4(3)(c) of the ICC Act deems a crime contemplated in the Act to have been committed in South Africa for the purposes of conferring jurisdiction on South African courts.

15. The ICC Act, in providing for universal jurisdiction at a national level, is part of the regime foreseen by the Rome Statute. The Rome Statute is premised on the international community's commitment to combat impunity for a limited number of narrowly defined crimes that under our legislation are described as "priority" crimes.

16. Parliament's enactment of the ICC Act evinces a recognition by South Africa that certain core values and the existence of overriding international interests commonly shared and accepted by the international community require an enforcement mechanism that transcends the interests of sovereignty, and that at the very least any decision not to prosecute or investigate international crimes must be supported by cogent reasons.

17. The Respondents' contention that any investigation on their part would offend Zimbabwe's sovereignty demonstrates a fundamental misunderstanding of the Rome Statute, the ICC Act and international criminal law.

18. The Respondents also maintain that the ICC Act does not place any obligation on the Respondents to initiate an investigation. It will be reiterated below that this is not the case. Specific obligations are in fact placed on the Respondents and their members.

19. In failing properly to appreciate the obligations imposed by the ICC Act, its purpose and objects and the crime of torture as a crime against humanity, the Respondents' decision not to institute an investigation was taken unlawfully. I therefore maintain that the impugned decision was vitiated by material errors of law and falls to be reviewed and set aside in terms of PAJA and/or in terms of the principle of legality.

The investigative authority and concomitant obligations vested in the Respondents in terms of the Constitution, ICC Act, NPA Act and the SAPS Act

20. This is the first occasion in a review in the High Court that the provisions of the ICC Act have been invoked. The affidavits of the Respondents demonstrate a failure by the authorities to deal with a request submitted in terms of the ICC Act read with the Presidential Proclamation, the NPA Act and the SAPS Act. This is evident from the delays, referrals and reasons proffered for ultimately refusing to initiate an investigation. Instead of complying with their obligations to ensure the realisation of the purpose and objects of the ICC Act, the Respondents have adopted the most parsimonious interpretation possible of their roles and obligations in the investigation of international crimes. Indeed, through the limited and insular roles they perceive for themselves, the Respondents have not only set an unlawful and artificial bar to their investigation and prosecution of crimes against humanity, they have effectively rendered the ICC Act nugatory.

21. In answer the Respondents submit that the Applicants were not justified in directing their request for an initiation of an investigation to the Second Respondent (the Head of the PCLU) because the Second Respondent and the NPA have no authority in law to initiate investigations.

22. Not only is that contention at odds with a view expressed by the Second Respondent (and to which I return further below), I am advised that it is also fundamentally flawed. It is based on a misinterpretation of the law and demonstrates a failure on the part of the Respondents to appreciate and fulfil the investigative roles vested in the NPA and the SAPS and their members when seized with a request in terms of the ICC Act. I am advised that full legal argument will be presented in this regard at the hearing. It suffices to mention that:

22.1. The First Respondent maintains that they have no investigative power, despite the PCLU, in terms of the Presidential Proclamation, being responsible for managing and directing investigations contemplated in the ICC Act, and notwithstanding the fact that the NPA's own Prosecutorial Guidelines envisage such investigative powers and the oversight role that the NPA is able to exercise in the investigation of high-priority cases.

22.2. I am further advised that the SAPS Act identifies crimes contemplated in the ICC Act as priority crimes. In terms of section 17A of the SAPS Act the Directorate for Priority Crimes Investigation (the Directorate) is responsible for the investigation of these crimes. Section 17B of the SAPS Act requires the Directorate to ensure that it implements, "*where appropriate, a multi-disciplinary*

approach and an integrated methodology involving the cooperation of all relevant Government departments and institutions."

22.3. Section 17D(3) gives the Head of the Directorate discretion, if he or she "*has reason to suspect that a national priority offence has been committed, to request the National Director of Public Prosecutions to exercise the powers of section 28 of the NPA Act*." The Fourth Respondent and the relevant members of the SAPS have not demonstrated that they had no reason to suspect that national priority offences had been committed. Indeed, in the light of the Torture Docket and other reports regarding international crimes committed in Zimbabwe it would be disingenuous for them to suggest that there is no reason to suspect that torture as a crime against humanity was committed in Zimbabwe. The Respondents rely on the supporting affidavit of Brigadier Marion as an ostensible reason for not initiating an investigation. I deal with the affidavit of Brigadier Marion elsewhere in this affidavit. For the present purposes it warrants mention that Brigadier Marion identified what he perceived to be deficiencies in the Torture Docket. I deny that such deficiencies – such as they were – could ever have been a basis for the Respondents to avoid their responsibilities under the relevant legislation. But in any event, to the extent that Brigadier Marion's concerns had any merit, it is inexplicable that the Head of the Directorate did not exercise his discretion to request, as he was entitled in law, the NPA for assistance or to enquire from the Applicants whether they could assist, or for the SAPS themselves to undertake their own investigations to remedy whatever defects they perceived. Indeed, it is telling that the Respondents never once interviewed or sought to interview any of the witnesses referred to in the Torture Docket, and never conducted any of their

own investigations outside of that contained in the Torture Docket. The failure to exercise that discretion is further proof that the Respondents failed to appreciate the nature of the obligation upon them to take whatever steps were open to them meaningfully to investigate and if necessary prosecute torture as a crime against humanity.

22.4. Section 17F of the SAPS Act further envisages a "multi-disciplinary approach". Section 17F(1) provides that "*Government departments shall, when required to do so, take reasonable steps to assist the Directorate in the achievement of its objectives*." The Directorate's objective is to investigate priority crimes.

22.5. Section 17F(4) of the SAPS Act requires that the "*National Director of Public Prosecutions must ensure that a dedicated component of prosecutors is available to assist and cooperate with members of the Directorate in conducting its investigations*." I submit that the PCLU, in terms of the Presidential Proclamation, is the body that in law is available to assist the Directorate in conducting its investigations.

23. Therefore, the Presidential Proclamation read together with the NPA Act and the SAPS Act envisage the "multi-disciplinary" involvement of both the NPA and SAPS in the investigation of crimes contemplated in the ICC Act. The Respondents have attempted to compartmentalise these functions, despite clear authority to the contrary and in resisting this review application adopt an attitude facially at odds with the legislation under which they are meant to operate.

24. I am advised that further legal argument will be advanced in this regard at the hearing. For now it is sufficient for me to reiterate the following: the law requires investigative cooperation between the SAPS and the NPA and the adoption of a multi-disciplinary approach to ensure that priority crimes are properly investigated. Parliament has clearly indicated that priority crimes, such as those contemplated in the ICC Act are, given their seriousness, deserving of special attention. I submit that the Respondents may not frustrate the legislature's intention in adopting the ICC Act by attempting to shield themselves behind unduly narrow interpretations of their responsibilities.

25. While the NPA's response through the Second Respondent to the Applicants' request was at first appropriate and consistent with the relevant obligations I have already described, in its later acceptance of the reasons proffered by SAPS it ultimately failed properly to involve itself in the investigation phase of the Applicants' request and thereby through the First Respondent also abdicated its responsibility in respect of these crimes.

26. I am advised that in light of the above, and as will be expanded on in legal argument, that the NPA and its members do have a role to play in the investigation of crimes contemplated in the ICC Act. The PCLU, in its management and direction of investigations of crimes contemplated in the ICC Act, is required to work closely with the Directorate, who in terms of the SAPS Act is responsible for investigations of priority crimes. The Respondents' reference to "established practices" of the NPA and the SAPS are not relevant to the ICC Act crimes and their investigation. The investigation and prosecution of these priority crimes are not to be made subject to or small-drawn by whatever existing practices may be in place. The short point is that the Respondents are obliged to practice (or develop practices in line with) what the law requires of them. In

this regard Parliament has put in place a structure for the investigation and prosecution of these crimes, a structure that in the present circumstances was at worst wilfully ignored, or at best woefully misunderstood.

27. By failing to act in accordance with the investigative roles conferred on the NPA and the SAPS I therefore maintain that on the Respondents' version:

27.1. The First Respondent incorrectly construed his authority to initiate an investigation as being contingent on the initiation of an investigation by the SAPS. The First and Second Respondent were empowered and obliged to work closely in a multi-disciplinary fashion with the SAPS in the investigation of these priority crimes;

27.2. The Fourth Respondent, through the Directorate, did not apply his mind to the request and the evidence presented therewith. The Fourth Respondent thus failed properly to exercise his discretion in failing to enlist the assistance of the First Respondent;

27.3. It is unfortunate, with respect, that the first time a "multi-disciplinary" approach has been adopted by these Respondents in relation to the crimes in issue has been in their collective opposition to this application and their mutually reinforcing attempts to justify why individually and jointly they avoided their duties. This collective exercise in avoidance of responsibility is ultimately unlawful. That is because their basis for not instituting an investigation was vitiated by a material error of law and is reviewable in terms PAJA.

27.4. In this regard I also restate my submissions made in paragraphs 61 to 67 of my supplementary affidavit.

28. In light of the above and in response to the issues raised in the answering affidavit of the First Respondent at paragraph 7 and repeated in the answering affidavit prepared on behalf of the First, Second and Third Respondent at paragraph 15 I am advised and submit that:

28.1. The Applicants were justified in directing their request for an initiation of an investigation to the PCLU in its capacity as a component of the NPA and not the SAPS and I stress that in any event the request was ultimately submitted to the SAPS.

28.2. It is clear that the NPA does have the authority in law to initiate an investigation, or at the very least in a multi-disciplinary fashion to be involved in such an investigation, including in an oversight role.

28.3. Although the First Respondent was permitted to refer the Applicants' request for an initiation of an investigation to the Fourth Respondent, the NPA was required to remain actively involved in the consideration and investigation of the Applicants' request and was not permitted to abdicate its responsibility.

28.4. The Acting National Commissioner, on behalf of the Fourth Respondent, may only decline to initiate an investigation on the basis of proper reasons and by

failing to ensure that the Directorate acted in accordance with the SAPS Act, the Acting National Commissioner relied on reasons vitiated by an error of law rendering the decision unjustified.

28.5. I furthermore maintain that the delays in making a decision constitute a breach of section 179 and 237 of the Constitution.

The supporting affidavit of Brigadier Marion and the unjustified reliance placed thereon by the Respondents

29. The Respondents rely heavily on the supporting affidavit of Brigadier Marion to justify their refusal to initiate an investigation. I am advised and submit that their reliance is misplaced.

30. In the first place, it is patent from the opening portions of Brigadier Marion's affidavit that he was asked the wrong question. He tells this Court (at para 4, record 1227) that his brief was to study the documents in order to establish whether the material "constituted a Court-driven investigation into the allegations which [the First Applicant] sought to be investigated". That incorrect starting position led Brigadier Marion to a further incorrect enquiry: namely, whether the material in the docket was appropriate for 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*" (at para 7, record 1228). The appropriate question for Brigadier Marion to answer is whether the material

constituted a sufficient basis to initiate an investigation. That is a question that Brigadier Marion patently never asked himself and therefore never answered.

31. I observe that in any event even on Brigadier Marion's own version it was open to the Respondents to undertake further investigation based on the information which was provided to them in the Torture Docket. Brigadier Marion states in the last sub-paragraph of paragraph 14 (record 1254): "*Were I to take the dossier compiled by the First Applicant to a South African prosecutor, I have no doubt that he or she would not be prepared to make a decision on the matter, but direct that the further investigations outlined above, be conducted."* (emphasis added).

32. Brigadier Marion's apparent hesitation to do so is based on the fact that much of the information would have to be gathered in Zimbabwe. As previously outlined, this is not necessarily the case as many of the victims are in South Africa or are available to come to South Africa in order to speak to an investigator.

33. Brigadier Marion appears unwilling to even explore this option due to questions of 'partiality' caused by the Applicants' investigation. This is not a sufficient reason to refuse to at the very least speak to the complainants of such crimes. In fact, speaking to the complainants and comparing the information with the statements collected by the Applicants must be a useful and minimum exercise in determining the validity of the allegations. Indeed, Brigadier Marion does not, and cannot, reject what is stated in the docket as being untrue. I stress that neither Marion nor any of the other Respondents ever sought to interview the witnesses referred to in the Torture Docket; nor did the

Respondents or Marion ever conduct their own investigations to corroborate the information contained in the Docket.

34. I deny that the conduct of the Applicants in investigating the crimes committed against the victims included in the docket prevents the Respondents from initiating their own investigation. It appears a sad misallocation of resources that Brigadier Marion was appointed in February 2010 to assist in resisting this application, and yet the Respondents made no similar investigative skill and expertise available at the outset in order to engage the Applicants' request made some two years earlier.

35. The fact of Brigadier Marion's affidavit alone is confirmation that the Applicants are entitled to their review relief and is a basis for an appropriate costs order against the Respondents for their failure until this Court application was launched to respond properly to the Applicants' request for an investigation.

36. Brigadier Marion's deposition and the detailed content contained therein demonstrate the capacity within the police to conduct an investigation into the crimes concerned. In a domestic setting, the police often encourage members of the public to report crimes and make statements for the police to investigate. It is at odds with the purpose and objective of the ICC Act and the responsibilities of the South African state in terms of the Constitution that such civic responsibility is discouraged for crimes committed on a regional or international level. Yet that is precisely what the Respondents purport to do in their answering papers.

37. Brigadier Marion's affidavit also points to another fatal flaw in the Respondents' refusal to conduct an investigation, that being that "*it would not be practical to expect SAPS to conduct such an extensive and time-consuming investigation, even if it had a legal basis upon which to do so*" (paragraph 20 – Brigadier Marion's affidavit). This is tantamount to the police refusing to conduct an investigation into the most serious of crimes because it would be too expensive or time-consuming. The legislature has clearly directed that state organs be responsible for conducting such investigations and potential prosecutions and it is the responsibility of those state organs to manage their own resources in order to fulfil this responsibility. The lack of state resources to fulfil constitutional and statutory responsibilities will be further addressed during legal submissions. Suffice it to say that the Constitutional Court has consistently stressed that administrative difficulties are no excuse for the State's failure to fulfil its obligations. I submit that this must particularly be so in relation to the investigation and prosecution of "priority" crimes. Indeed, the Respondents' approach makes a mockery of the meaning of "priority".

38. I deny that statements produced in the press have in any way compromised this investigation. If there were any truth to the claim then I submit that it is axiomatic that the Respondents would have raised such concerns with the Applicants at the time the statements were made. Their failure to do so is consistent with their failure properly to consider the Applicants' request at the time it was sent to them.

39. I specifically deny the allegation made in paragraph 23 that it was the First Applicant who has placed the Harvest House incident in the public domain. The Harvest House "incident" was widely reported on by the media in Zimbabwe and elsewhere at the time it occurred and was thus clearly "in the public domain" before the First Applicant's

submission of the Torture Docket. The First Applicant was approached regarding information on this matter of obvious public interest. To the extent that the Applicants' request to the Respondents contributed towards greater transparency and accountability in respect of the "incident", I submit that the Applicants acted responsibly as a member of civil society and a concerned public interest organisation.

40. I furthermore deny that the conduct of the Applicants in any way placed the victims in the docket in danger or violated the agreement between the PCLU and the Applicants regarding the identity of victims in the media, and I furthermore deny that the Applicants released the names of the victims.

41. I further observe that Brigadier Marion has relied on the Movement Control System database of the Department of Home Affairs in order to determine whether specific persons were in South Africa at any time after the events at Harvest House. Although this information may be construed as hearsay as the records are held by a different department (although apparently accessible by him), Brigadier Marion states that certain parties implicated in the docket (both perpetrators and victims) have been present in South Africa at different times. Of course, there is no explanation given for why this type of investigation was not done earlier in response to the Applicants' request that the named perpetrators be in**v**estigated. What Brigadier Marion has confirmed is that the State has the wherewithal at its disposal to perform this type of investigatory work.

42. I further note that Brigadier Marion's belief is that eleven of the alleged torturers have never been to South Africa but he does not deal at all with the fact that the Movement Control System records only those persons who report to an immigration officer upon

arrival at the border. It is a fact that there are large numbers of undocumented people, particularly from Zimbabwe, who are in the country and would never have been recorded on the database. This Court may take judicial notice of the fact that the Department of Home Affairs has initiated a special project in September 2010 specifically to document undocumented Zimbabwe nationals. It cannot be discounted therefore that some or all of the eleven alleged perpet**r**ators may have been in South Africa or come to South Africa on a regular basis. In any event, it is not sufficient for the Respondents to complain that some of the perpetrators may not have come to South Africa. The only relevant point is that one or more do or have come to South Africa – and Brigadier Marion's evidence confirms that this is the case.

43. I will refer later to the Canadian response to Zimbabwean policemen implicated in torture. On the Respondents' version the Canadian's denied visas to such policemen to travel to Canada. Brigadier Marion's evidence confirms that visas must have been issued to those perpetrators that travelled to South Africa. There is no explanation for why such visas were issued to individuals to travel to South Africa, or why the Respondents together with other relevant Organs of State did not consider similar action to their Canadian counterparts as a means of action against the alleged perpetrators, given that Zimbabwean citizens are issued visas on arrival in South Africa.

44. Lastly, Brigadier Marion states that much of the evidence-gathering would have to be done in Zimbabwe. I deny that this is so, not least of all because of the evidence already contained in the Torture Docket. I have furthermore carefully considered the affidavits by the Respondents. There is no suggestion that the Government of Zimbabwe has ever been approached with a request that the South African authorities be allowed to conduct

such investigations, or for mutual legal assistance. Even if there was evidence that a request was made but no assistance was forthcoming from Zimbabwe, that could never be a basis for refusing to initiate an investigation. The ICC Act envisages universal jurisdiction, but does not make the exercise of that jurisdiction contingent on the assistance of a foreign State. On the contrary, the very notion of universal jurisdiction is predicated on the assumption that such assistance may not be forthcoming.

45. The Respondents in general and SAPS in particular have adopted in answer a defeatist and obstructionist attitude that no investigations are possible. That is an expedient explanation because the attitude has been adopted without any of the Respondents ever speaking to or taking statements from the victims of the crimes or offering to meet with the Applicants, or indeed performing their own investigations beyond that contained in the Docket.

46. In short, to the extent that Brigadier Marion's affidavit is of any assistance, it is that it highlights how with sufficient will there is within the SAPS the means to investigate these crimes.

The *locus standi* of the Applicants

47. As a further preliminary discussion I point out that the Respondents contend that the Applicants do not have the necessary *locus standi* to bring this application. It is alleged that no right contained in the Bill of Rights has been infringed or is threatened due to the

Respondents' conduct and therefore the Applicants cannot rely on the provisions of section 38 of the Constitution to bring this application.

48. It is also suggested that even if the Applicants can demonstrate that a right has been infringed, the only rights affected are those of the torture victims who are Zimbabwean citizens and not present in South Africa and are therefore not entitled to the protection of the Bill of Rights because the protections afforded by the Constitution cannot be applied extraterritorially.

49. I am advised that the narrow interpretation afforded by the Respondents to section 38 of the Constitution is not consistent with the jurisprudence on standing. Moreover, I submit, and it will be so argued, that even at common law the Applicants would have standing in this matter.

50. I also point out that section 4(3)(c) of the Act deems that all crimes contemplated in the ICC Act, wherever they may occur, are committed in South Africa. For the purposes of standing it is therefore legally irrelevant that the victims were tortured in Zimbabwe. The victims are to be regarded as being tortured in South Africa and are therefore to be afforded the protections guaranteed in the Bill of Rights and the right to have the crime of torture adjudicated in a South African court. Any interpretation to the contrary would render the ICC Act redundant, and would make a mockery of the universal jurisdiction principle that Parliament has endorsed.

51. I therefore maintain that the Applicants have the necessary standing to bring this application and restate my submissions made in my founding affidavit at paragraphs 12 to 19.

The hearsay regarding the Minister and Deputy Minister and the conspicuous absence of a confirmatory affidavit from the Second Respondent

52. The First Respondent refers in his affidavit (at paras 23 to 25, record 1312) to a meeting held between himself and the Minister and Deputy Ministers of Justice and Constitutional Development at which meeting those Ministers apparently informed the First Respondent of political reasons why the Applicants' Torture Docket should not be investigated.

53. The "evidence" about what was said by the Minister and Deputy Minister at the belated meeting is inadmissible hearsay. There is no confirmatory affidavit from either individual and no basis is made out for an exception to the hearsay rule.

54. The Respondents are hereby expressly invited to file such confirmatory affidavits prior to the hearing of this matter.

55. I furthermore note that at various places in the Respondents' answering affidavits (highlighted further below) the deponents purport to distance themselves from the views expressed by the Second Respondent, the Head of the PCLU, including his view that the

PCLU was seriously considering launching an investigation and that the PCLU may in this context require specific assistance with the investigation.

56. This is particularly surprising, since Mr Simelane contends that his affidavit is "on behalf of" the Second Respondent.

57. I note that there is no confirmatory affidavit from the Second Respondent, the Acting Special Director who sits as the Head of the PCLU. More intriguing is that after the answering affidavits were filed the Applicants received a notice from the Second Respondent's office stating that the Second Respondent abides the decision of this Court.

The applicability of PAJA to the impugned decisions

58. The Respondents contend that PAJA does not apply to the impugned decisions because:

58.1. The decision not to initiate an investigation/prosecution is not reviewable in terms of PAJA; and

58.2. If the decision is reviewable the Applicants are not entitled to invoke PAJA because they have not shown that the impugned decisions adversely affect the rights of any person and have a direct, external legal effect.

59. I am advised that this issue will be the subject of legal argument at the hearing.

60. I maintain that the decision not to institute an investigation constitutes administrative action as defined in PAJA and the decision falls to be set aside on the grounds referred to in paragraph 99 of my founding affidavit.

61. In relation to the Applicants' alleged failure to show that the impugned decisions do not have a direct external legal effect and adversely affect the rights of any person it will, during legal argument, be shown that this allegation is without foundation. It suffices to mention that in failing to initiate an investigation:

61.1. The Respondents have acted contrary to the ICC Act despite having a legal obligation to give effect to its objects and purposes.

61.2. The failure to initiate an investigation has rendered the rights conferred by the ICC Act on the torture victims to have their perpetrators brought to justice in a South African court illusory.

62. Even if PAJA is found not to be applicable I maintain that the impugned decisions demonstrate and the Respondents' answering affidavits confirm that the Respondents failed to act in accordance with their obligations under the ICC Act, sections 179 and 205 of the Constitution, the NPA Act and the SAPS Act. They therefore acted in violation of the constitutional principle of legality. I am advised that full legal argument will be provided at the hearing in this regard. The requirement of legality exists independently of, and does not depend on section 33 of the Constitution and PAJA. In terms of the principle of legality the Respondents must act in good faith and must not misconstrue their powers.

As demonstrated in my founding and supplementary affidavit and now confirmed in answer the Respondents have not acted in good faith and have misconstrued their powers.

63. I now turn to deal in an *ad seriatim* fashion with the individual averments in the answering affidavits filed by the Respondents. I repeat that I deal only with those averments that call for a response. My failure to respond to any averment should not be construed as an acceptance thereof but should on the contrary be understood to be a denial of the averment.

Affidavit of the First Respondent

AD PARAGRAPHS 1 TO 6

64. I admit the contents of these paragraphs.

AD PARAGRAPH 7

65. I take note of the contents of this paragraph.

AD PARAGRAPH 8

66. I deny the contents of this paragraph to the extent that the First Respondent denies that the decision not to prosecute was taken by him on 19 June 2009. His decision to accept the reasons proffered by the Fourth Respondent as a basis for not initiating an investigation amounted to a decision not to prosecute. I maintain that the impugned decision can be imputed to the First and Second Respondent, and indeed the First Respondent explains

that he "agreed with" the decision of the Acting National Commissioner. That agreement meant by force of logic that the NPA decided not to prosecute or, for that matter, in a "multi-disciplinary" manner to be involved in such an investigation, including in an oversight role.

67. Even if I am wrong in this regard, it is clear from my founding papers that the impugned decision is one that was taken either by the First, Second, and/or Fourth Respondents.

AD PARAGRAPHS 9 TO 16

68. These paragraphs dealing with the investigative powers vested in the NPA have been dealt with at length in the introductory section of this affidavit. I deny them to the extent that they are inconsistent with what I have said herein or in my founding papers. I will respond only to those submissions which warrant a reply.

AD PARAGRAPH 9

69. The content of this paragraph is noted.

AD PARAGRAPH 10

70. It is startling to read the insinuation that the First Applicant in some way erred by seeing "*fit not to submit its request to the Directorate of Special Operations, but to the Second Respondent*".

71. It is by now common cause on the papers that the Second Respondent accepted the Torture Docket. There was never any suggestion at the time or thereafter by the Second Respondent that the First Applicant had erred by submitting the docket to the Second Respondent for the attention of the Priority Crimes Litigation Unit. Indeed, the NPA Spokesperson publicly confirmed that the request had been received and was receiving the Unit's attention. I attach in this regard as Annexure **NFreply1** a media report to that effect, available on http://www.e-tools.co.za/newsbrief/2008/news0716.txt. Naturally, if it was so obviously the case that the Second Respondent was disabled in law from deciding on the request, then one would have expected at that time a statement to that effect from the Second Respondent's Office directing the First Applicant in the correct direction.

72. In any event, for the reasons given earlier I submit that a multi-disciplinary approach to the investigation of priority crimes in the ICC Act entails that the Second Respondent was perfectly entitled to play an integral role in the investigation of such crimes. Even if I am wrong, the facts show that ultimately the Applicants requested a decision from the SAPS.

AD PARAGRAPHS 12, 13 AND 14

73. I have dealt with the investigative power vested in the NPA elsewhere in this affidavit. I have also dealt with the proper interpretation to be afforded to the NPA Act read with sections 179 and 205 of the Constitution and section 17 of the SAPS Act. I have also already dealt with what is expected of the NPA when it supervises, directs and coordinates specific investigations, in conjunction with the SAPS, of crimes contemplated in the ICC Act.

74. I note the admission in paragraph 13 that the Directors of Public Prosecutions manage and direct investigations and that to that extent the PCLU is no different. I further note that the PCLU was designated as the component of the NPA responsible for the offences set out in the Proclamation and that the other Directors of Public Prosecutions were excluded from dealing with such matters. In those circumstances I reiterate that it was reasonable for the First Applicant to approach the PCLU in making its request in the Torture Docket.

75. I am advised that further legal argument will be presented in this regard. Suffice it to say that the First Respondent has missed the point: it is not whether the PCLU was given the exclusive "special investigative power" to initiate an investigation, but whether the PCLU was able to initiate that investigation either alone or acting in a multi-disciplinary and responsible fashion alongside the SAPS.

AD PARAGRAPHS 15 AND 16

76. I have no knowledge of the averments contained herein but do not dispute them insofar as they are not inconsistent with what I have said elsewhere herein or in the founding papers.

AD PARAGRAPH 17

77. I take issue with the First Respondent's concern "*whether the South African Authorities could legitimately entertain an entirely foreign matter*". I have, in the introductory section of this affidavit, dealt with the purpose and objects of the ICC Act, and deny the characterisation of this crime as an "*entirely foreign matter*".

78. Save for the above I note the contents hereof. I note in particular that the First Respondent indicates that he first became aware of the request of the First Applicant on 18 March 2008.

AD PARAGRAPH 18

79. I accept the contents of sub-paragraphs 18.1 through 18.3.

80. In respect of sub-paragraph 18.4. it is obvious, with respect, that the First Applicant's reasonable assumption was that in making its request to the PCLU (in the first Respondent's words "*the component of the NPA responsible for the offences set out in the Proclamation*") the PCLU would take the necessary steps to ensure that the request was properly attended to by whatever means appropriate, including the multi-disciplinary approach described by the Respondents that exists between the SAPS and the NPA in relation to priority crimes.

81. I deny the remainder of paragraph 18 to the extent that it is inconsistent with what I have set out herein or said previously in the founding papers.

AD PARAGRAPHS 19 AND 20

82. The deponent says that he "*immediately appreciated that an investigation ... would have extremely serious consequences*". He does not say when this immediate appreciation dawned on him, or when he acted upon it.

83. I deny that the First Applicant had sought to persuade the NPA that a prosecution was inevitable before the investigation was initiated. As the deponent himself records earlier in paragraph 18 (record 1309), "*it was contended [by the First Applicant] that a prosecution would be inevitable* ***once the investigation had been initiated***".

84. Nowhere in the correspondence, founding affidavit and supplementary affidavit did the Applicants submit that a prosecution was inevitable. All that the Applicants sought to do was – to the best of their ability – provide assistance to the NPA in the form of evidence contained in the Torture Docket. That information was presented as a basis for the NPA to consider prosecution of the matter, and an obviously incidental aspect of that request was that the NPA in conjunction with the appropriate organ of state ensure that the crimes were investigated.

85. The judgments and experience referred to in paragraph 20 are interesting but not directly relevant to this application. The legal context created by the enactment of the ICC Act requires a proper understanding of international law and involves a number of considerations which may not be applicable to the domestic situations referred to by the First Respondent. I therefore refer to the introductory section of this affidavit where I have dealt with the legal context in which this application has arisen and should be considered.

86. I note the remainder of these paragraphs to the extent that they are not inconsistent with what I have set out herein or said previously in the founding papers.

AD PARAGRAPHS 21

87. The content of this paragraph is noted.

88. It is startling to read that the deponent authorised the Second Respondent and his immediate superior to travel to the ICC to seek the advice of the ICC Prosecutor. This from the same deponent who wishes this Court to believe (see paragraph 20, record 1310) that "*I was of the view that any consideration of the merits as to whether a prosecution should be instituted, should only take place once a decision to institute an investigation had been taken and the investigation finalised*", and who in the same paragraph concludes that in his view "*all the issues which fell within the mandate of the NPA, raised by the First Applicant, could only be considered upon the conclusion of an investigation*" (emphasis added).

89. On his own version the First Respondent has demonstrated that issues which fell within the mandate of the NPA, raised by the First Applicant, certainly could be considered prior to the conclusion (let alone initiation) of an investigation, if needs be by a visit to the International Criminal Court in The Hague.

AD PARAGRAPH 22

90. I submit that the content of this paragraph demonstrates *two important feature*s of this matter.

91. First, on the First Respondent's own version he has confirmed that the Head of the PCLU – that is, the Head of the "*component of the NPA responsible for the offences set out in*

the Proclamation" to the exclusion of "*the other Directors of Public Prosecutions*" – believed that it was for the head of the NPA to "*decide whether to initiate an investigation*".

91.1. In those circumstances it is difficult to understand, with respect, how the First Applicant could be faulted for making its request to the prosecuting authorities. Indeed it is clear that the Second Respondent understood the request correctly: namely, that it was a request to the PCLU to decide whether to prosecute (a request cast in deliberately broad terms), which request naturally entailed the PCLU in a multi-disciplinary manner interacting with the SAPS in respect of the necessary investigation for such a prosecution.

91.2. That is, the Second Respondent was clearly attempting to fulfil his mandate to direct and manage investigations in terms of the ICC Act. It is apparent that the First Respondent discouraged and prevented him from doing so.

91.3. I submit further that the Second Respondent's unwillingness to take political considerations into account is consistent with fundamental principles observed by independent and impartial prosecuting authorities. Unlike the Second Respondent, the First Respondent on his own version actively and unlawfully sought to take such political considerations into account.

AD PARAGRAPHS 23, 24 AND 25

92. I submit that a period of just under six months to hold a meeting is patently a delay that is unreasonable and which falls foul of the Constitution.

93. In any event the "evidence" about what was said by the Minister and Deputy Minister at the belated meeting is inadmissible hearsay. There is no confirmatory affidavit from either individual and no basis is made out for an exception to the hearsay rule. I repeat the earlier invitation for the Respondents to file such confirmatory affidavits prior to the hearing of this matter.

94. Even if the evidence were admissible, I am surprised to read that the First Respondent – the Acting Director of National Prosecutions at the time and required to uphold the independence of the institution – would believe that South Africa's role as SADC mediator in Zimbabwe should have a bearing on the functioning of the NPA and its prosecutors. I am also surprised to read that the relevant Ministers would apparently attempt to influence the independent investigation and prosecution of crimes against humanity by the National Director of Public Prosecutions, and that the First Respondent would be open to such influence.

AD PARAGRAPHS 26 TO 31

95. I draw particular attention to the First Respondent's evidence that he instructed the Acting Special Director in his office to request the Second Respondent to canvass certain further information from the First Applicant.

96. I also highlight the deponent's reference at paragraph 26 to the letter (Item 29 at page 280-282 of the First Respondent's Record) and his acceptance (also at paragraph 26) that

the letter claims "*that the PCLU is seriously considering launching an investigation and that the PCLU may in this context require specific assistance with the investigation*". I submit that his attempts to distance himself from the contents thereof are unconvincing, and I note that there is no confirmatory affidavit from the Acting Special Director referred to in paragraph 26 confirming that he acted inconsistently with his instructions in so drafting the letter. In any event the letter confirms that the First Applicant was correct to believe that the PCLU was the appropriate body to address its request.

97. From paragraphs 26 and 27 it is now clear that by 17 December 2008 (some nine months after the Torture Docket request was made) the First Respondent had not done anything to progress the investigation of the crimes by the SAPS. He tells this Court (at paragraph 27) that "*[o]n 17 December 2008, I also formally requested the Acting National Commissioner to attend to the issue of having the allegations documented by the First Applicant, investigated*". This is an unreasonable delay. If he believed that the NPA could not do anything until an investigation was completed, and if he further believed that the SAPS was the only body that could perform that investigation, then there is no meaningful explanation from the First Respondent to explain why such a formal request was not made to the SAPS from as early as March 2008 or why the First Applicant was not informed of his view.

98. It is also significant to highlight that the deponent discloses to this Court that the Second Respondent – a highly respected and experienced prosecutor responsible by Presidential appointment to manage the investigation and prosecution of ICC crimes – was not happy with the manner in which SAPS had dealt with the matter. It is incredible that the First Respondent tells this Court that "*I did not attach any weight to his views*". It is

unthinkable that the National Director of Public Prosecutions (Acting) could refuse to take into account the Second Respondent's views in his own decision-making in relation to what he himself describes as the first matter "*where consideration had to be paid to the application of Section 4(3)(c) of the domestic Rome Statute (sic)*". On this basis alone it is clear that in arriving at his decision the First Respondent failed to take into account a materially relevant consideration – namely, the views of the Head of the PCLU. On his own version he "*saw no reason to debate the matter further with the Second Respondent*", and he has confirmed that he abdicated his own decision for that of the SAPS and political officials. I respectfully submit that on his version alone there is a basis for this Court to intervene and to issue the mandamus relief sought by the Applicants.

99. I deny the remainder hereof to the extent that it is inconsistent with what I have said herein or elsewhere in the founding papers.

AD PARAGRAPH 32

100. I have already responded to the reasons advanced by the Fourth Respondent and accepted by the First Respondent in my supplementary affidavit in this application. I do not intend to repeat myself and deny these averments for the same reasons as before.

AD PARAGRAPH 33

101. In response hereto I refer again to my submissions made in paragraphs 30.5 to 30.7 in my founding affidavit. I maintain that the Respondents' concerns that the Torture Docket falls short of a thorough Court-directed investigation are not only without substance, they

also confirm that Brigadier Marion was asked the wrong question. I accordingly deny the averments herein.

102. *Sub-paragraph 33.1:* I note that the First Respondent considered that a Court-directed investigation be conducted, prior to making a decision to prosecute and point out that this belief is inconsistent with his emphatic assertions elsewhere that the NPA could not involve itself in any investigation.

103. *Sub-paragraph 33.1.1*: In alluding to these difficulties the First Respondent misses the point of the information contained in the Torture Docket. That information was provided as a basis for the Respondents to perform their own investigation. No attempt was even made by the First Respondent to ascertain the presumed impossibility of conducting an investigation. We know from his own evidence that it was only after some nine months had elapsed that he in December 2008 formally requested the SAPS to investigate the allegations in the Torture Docket.

104. *Sub paragraph 33.1.2*: Whatever difficulties are presented in such investigations, such difficulties are never a basis for not complying with one's obligations. In any event, at the very least it was incumbent on the Respondents to consider the affidavits and supporting evidence in the Docket and to meet with the witnesses referred to therein. That was demonstrably not done.

105. *Sub-paragraph 33.1.3*: I have already dealt with the affidavit of Brigadier Marion and the allegations made therein and stress that he has been asked the wrong question. He never once appears to ask the right question: whether the material contained in the Torture Docket was sufficient to trigger the Respondents' duties to initiate an investigation into

crimes against humanity. There is no suggestion by the Respondents that the First Applicant has acted for an ulterior motive or that the Torture Docket is spurious or was compiled in bad faith. Quite clearly it was a document prepared as a necessary basis for the Respondents to consider opening their own investigations into the crimes and was not intended to be a replacement for such an investigation in the event that the Respondents believed that further investigation was necessary. Nothing in the Torture Docket prevented the Respondents from taking the requisite steps to perform their own Court-directed investigation. The First Respondent, as indicated in the introductory section of this affidavit, should have, with the cooperation of the Fourth Respondent, done everything in his power to, at the very least, speak to the witnesses. This was not done despite availability of the witnesses for further questioning.

106. *Sub-paragraph 33.2*: Whilst it may have been necessary, at a later stage, to conduct investigations in Zimbabwe (which we do not admit), the first stage of the investigation would require questioning the witnesses, which is an exercise that could have been performed in South Africa. This was not done, and there is no explanation for this failure.

107. *Sub-paragraph 33.2.1:* I accept the contents of this paragraph but do not understand how the MLA mechanisms are a basis for justifying the impugned decisions.

108. *Sub-paragraph 33.2.2:* To the extent that the deponent is implying that the Applicants have requested or suggested that evidence be gathered illegally, I deny such an implication.

109. *Sub-paragraph 33.2.3:* The First Respondent's contention that actions and decisions taken pursuant to the ICC Act would amount to unwarranted state intervention and an infringement of sovereignty again illustrate a lack of understanding of the ICC Act. I have already dealt with the legal context created by the ICC Act and the considerations that should have informed the impugned decisions.

110. *Sub-paragraph 33.3*: I deny these averments for the reasons given in the founding papers. The only reason the First Applicant offered to assist in gathering evidence is because it appeared clear after months of inaction that without such an offer there would be no movement on the case by the relevant State authorities. But to the extent that the First Respondent had concerns about such assistance, that was no basis for ignoring the evidence already contained in the Torture Docket and the legal obligations arising there from, and it was no basis for the Respondents refusing to do the job themselves consistent with those obligations.

111. *Sub-paragraph 33.4:* For the same reasons as earlier I deny the contents of this paragraph. I reiterate that there is no admissible evidence about any investigation prejudicing or undermining our country's international relations. There is also no evidence provided to suggest that the investigation requested by the Applicants would prejudice the investigation of crimes in South Africa. The deponent appears to have overlooked that Parliament has recognized the importance of investigating and prosecution these priority crimes, and that the crimes are indeed South African crimes since under the Act they are deemed to have been committed in South Africa. On this basis too the First Respondent has committed a further material error of law.

AD PARAGRAPHS 34 AND 35

112. I note the concession by the First Respondent that he did not take into account the Rome Statute or the ICC Act when he took his decision. For the reasons already given this was a fundamental error on the First Respondent's part.

113. Save for that, I deny the averments herein for the reasons given previously. I take particular issue with the suggestion that the material provided by the First Applicant fell short of a proper investigation as contemplated by the NPA's policy. That is not the appropriate test: the question is whether there was a sufficient basis for the Respondents to initiate an investigation into crimes against humanity. I submit that demonstrably there was such information in abundance in the Torture Docket. To the extent that further investigation was required, it was incumbent upon the Respondents to undertake such investigations.

AD PARAGRAPHS 36 TO 37

114. To the extent to which these paragraphs deal with the applicability of PAJA to the impugned decisions and the *locus standi* of the Applicants I restate my submissions made in the introductory section of this affidavit. I reiterate that PAJA is applicable to the impugned decisions and ample evidence, justifying the setting aside of the First Respondent's decision, exists. If PAJA is found not to be applicable the impugned decisions can be reviewed in terms of the principle of legality. I am advised that these are matters for legal argument.

AD PARAGRAPHS 40 TO 42

115. I note the belated contention "*that the request should have been referred to the Acting National Commissioner sooner than it was in fact done*". I submit that this concession is properly made, particularly when one recalls that it took the First Respondent nine months to refer the request.

116. I do not know on what basis the deponent can then say that he is of the view that in any event the outcome would have been the same. No justification is provided for this assertion.

117. It is surprising that as one of his responses to the accusation of delay the First Respondent in paragraph 40.1 would point a finger at the First Applicant having "*waited until 14 March 2008 before submitting its request to the NPA*". The First Applicant is not a deep-pocketed and specially-trained investigative unit. Little surprise that it took a number of months to painstakingly and carefully gather the evidence that it did in the Torture Docket. In addition thereto, it took the step of seeking independent legal advice on the best means by which to lodge its request. What is more, unlike the First Respondent, the First Applicant is not held to the constitutional standard of ensuring prompt and effective compliance with obligations.

118. I note in paragraph 40.2 that the First Respondent says that the material contained in the Torture Docket was "*extensive*".

119. In paragraph 40.7 and elsewhere in the deponent's answering affidavit much is made of the Applicants' failure to respond to a letter dated 12 May 2009. The First Applicant did not deem it necessary to respond to yet another letter ignoring our request for a final

decision to be taken. In the First Applicant's letter dated 20 April 2009 (Record, p 179) the Applicants called on the state to respond to its request, and if the decision made was in the negative, to furnish reasons. The First Applicant placed on record that should no "meaningful" response be forthcoming it would be compelled to approach the High Court for appropriate relief. The letter referred to in this paragraph provided no response to the First Applicant's letter. Instead the First Respondent again failed to comply with another deadline asked for by the Applicants. This letter cannot be construed as a meaningful response to the First Applicants' request and therefore did not warrant mention, let alone a response.

120. The deponent is correct when he states in paragraph 42 that the First Applicant's request was in fact made on 14 March 2008 and not 16 March 2008. The mistake arises from a typographical error which was inadvertently carried through into other portions of the affidavit. So too, it is correct that the ICC Act came into effect on 16 August 2002. I submit that nothing turns on these points.

121. I deny the remainder of these paragraphs. I stand by my submissions in relation to the delay made elsewhere in this affidavit and in my founding and supplementary affidavit.

AD PARAGRAPH 44

122. I deny that the First Applicant's objectives are irrelevant to this application.

AD PARAGRAPH 45

123. I deny the contents of this paragraph. At the heart of the Applicants' request to initiate an investigation in South Africa is the commission of crimes against humanity in Zimbabwe. The collapse of the rule of law in Zimbabwe has facilitated state sponsored violence, leaving victims with no means to secure redress. The First Respondent's contention that this situation is not relevant to the application demonstrates that the Respondent failed to take into consideration a factor that should have informed the decision not to institute an investigation, namely, the absence of legal recourse in instances where an abuse of power, constituting a crime against humanity, is sourced in state actors.

AD PARAGRAPH 46

124. I deny the contents of this paragraph. The legal basis of this application has been dealt with in detail in this affidavit and the founding papers of this application.

AD PARAGRAPH 48

125. The Second Applicant and its members are concerned about the situation in Zimbabwe. Where state sanctioned torture goes unpunished, the Second Applicant is clearly an interested party and shares the concerns of the First Applicant. The founding papers have consistently referred collectively to the First and Second Applicant as the Applicants (see paragraph 12 of Applicants' Founding Affidavit). The founding, supplementary and this affidavit have been deposed to on behalf of both the First and Second Applicant.

AD PARAGRAPHS 49 TO 51

126. The objectives of the Second Applicant outlined in paragraph 11 of the Founding Affidavit in this application provide an overview of the Second Applicant. Nowhere in the Founding Affidavit do the Applicants submit that all its objectives are relevant to this application.

127. All communication in the period relevant to this review was made by the First Applicant on behalf of the Second Applicant. The Second Applicant has been kept abreast of all communication preceding and during this application.

AD PARAGRAPHS 52 TO 55

128. I have already dealt with the *locus standi* and the rights of the Applicants and the legal basis upon which the impugned decisions fall to be reviewed and set aside elsewhere in this affidavit. This will be the subject of full legal argument.

AD PARAGRAPH 56

129. I deny the averments made herein which are, with respect, baseless. The press statements referred to in this paragraph do not with any specificity identify the witnesses. No evidence to suggest that the witnesses can be readily identified through the media reports or in the founding papers has been presented in this regard.

AD PARAGRAPH 57

130. I submit that the citizens of any country have a legitimate interest in their country's commitment to combating impunity for crimes against humanity, regardless of where the crime occurs. As it turns out the ICC Act deems the crimes mentioned in the Torture Docket to have been committed in South Africa. The Respondents' denial that the South African public would be concerned by South Africa's failure to observe and give effect to the ICC Act and its obligations in international law is as unfortunate as it is inaccurate.

AD PARAGRAPHS 58 TO 61

131. I deny the contents of these paragraphs for the reasons previously given.

AD PARAGRAPH 62

132. A failure in itself does not place South Africa in breach of its international and domestic obligations so long as the failure is justified. It has been demonstrated throughout the pleadings in this application that the Respondents have failed to justify their decisions not to accede to the Applicants' request.

AD PARAGRAPH 63

133. The contents of this paragraph are denied for reasons already dealt with in this affidavit.

PARAGRAPH 65

134. It is the inadequacy of these reasons that form part of the basis of this application. I note that earlier in his affidavit at paragraph 40.8 the First Respondent concedes that "*the First Applicant was not provided with full reasons as had been requested*". For that reason alone I am advised and thus submit that whatever the outcome of this application, the Applicant is entitled to its costs in having to launch an application in the High Court in order to ensure that reasons were provided.

AD PARAGRAPHS 67, 68, 70, 71

135. I reject the assertions made in these paragraphs for reasons given previously.

AD PARAGRAPH 75

136. The Torture Docket was compiled with the full cooperation of the victims and they were fully aware that the docket was intended to provide the basis for an investigation and prosecution.

AD PARAGRAPH 76

137. I refer again to the Applicants' arguments on anticipated presence. The affidavit of Brigadier Marion points out that at least three of the perpetrators have entered South Africa lawfully on more than one occasion.

AD PARAGRAPHS 84 AND 85

138. I maintain that the adequacy of the Torture Docket was never questioned by the Respondents until this application was launched. The most that was ever said is what the First Respondent now repeats: that the allegations would have to be investigated. The implication of that response was that the allegations were accepted at face value as providing a basis upon which to build an investigation should this be deemed necessary. Certainly there was never a suggestion by the Respondents that the allegations were spurious or made in bad faith or for an ulterior purpose.

AD PARAGRAPH 87

139. The content of this paragraph is denied. I refer to the introductory section of this affidavit where I set out the obligations imposed on the Respondents when requests in terms of the ICC Act are made. The matters are in any event of a legal nature and further argument will be addressed at the hearing.

AD PARAGRAPH 88

140. The reports mentioned are plainly relevant to assist this Court in understanding the contextual situation in which the crimes complained of in the Torture Docket were being committed in Zimbabwe and that there are recent and continued acts of such a nature.

AD PARAGRAPH 89

141. It is axiomatic that an acknowledgement of receipt is not a formal response of a substantive kind. And obviously off-the-record discussions between counsel for the First

Applicant and the Second Respondent and his office (discussions pursued on both sides in good faith with a view towards expediting an investigation of the crimes) do not constitute a formal response.

AD PARAGRAPH 91

142. I dispute the content hereof for the reasons given earlier. It suffices to point out that the First Respondent's delay is to be assessed objectively, and he himself concedes earlier in his affidavit that with hindsight he sees that he should have moved faster to request the SAPS to formally investigate.

AD PARAGRAPH 92

143. I deny the assertions made in this paragraph for the reasons given previously.

AD PARAGRAPHS 93 TO 99

144. I stand by my assertions in my founding affidavit for the reasons previously given.

AD PARAGRAPH 100

145. I submit that further communication between the Applicants and the Respondents would have yielded the same result. Given the amount of time that has passed since the initial request was made, speedy resolution of the issues is required. The persistent refusal on

the part of the Respondents properly to apply their minds to the First Applicant's request left the Applicants with no other choice but to pursue legal action.

AD PARAGRAPHS 101 TO 117

146. The submissions made in these paragraphs are noted and have already been dealt with elsewhere in this affidavit.

AD PARAGRAPHS 118 TO 147

147. I note that the responses in these paragraphs repeat submissions already dealt with. I do not intend to deal *seriatim* with these paragraphs. It suffices to mention that:

147.1. Where reference is made to the acceptance of the National Director's assessment of the issues I restate my responses to his contentions made elsewhere in this affidavit.

147.2. Where reference is made to the supporting affidavit of Brigadier Marion I restate my responses to his contentions and the Respondents' reliance thereon made elsewhere in this affidavit.

147.3. In relation to those issues I do not respond to directly I stand by my submissions made in this affidavit and my supplementary affidavit.

Affidavit prepared on behalf of the First, Second and Third respondent

148. In responding to the averments in Mr Simelane's affidavit I deal only with those averments that call for a response. Again, I reiterate that to the extent that I do not deal with an averment it should be taken to be denied.

149. At the outset I highlight that Mr Simelane was not the NDPP at the time the impugned decision was taken. He thus cannot offer alternative or supplementary reasons to those given by the Respondents under oath under Rule 53 for their failure to investigate/prosecute, and cannot through his ex-post-facto reasoning resist the review relief sought by the Applicants. I am advised that Mr Simelane's affidavit is at best an exercise in attempting to resist the mandamus relief sought by the Applicants. But I respectfully contend that it fails in relation to that exercise too.

AD PARAGRAPH 2

150. For reasons that I will come to, I do not accept that the affidavit by the deponent is on behalf of the Second Respondent.

AD PARAGRAPH 9

151. I note that at no stage was the deponent provided with a decision and reasons as contemplated by section 5(5) of the ICC Act, and I note the various correspondence referred to by the deponent. Aside from the above I deny the contents of this paragraph and refute the suggestion that the NPA did not make a decision not to prosecute. I have already dealt with the First, Second and Fourth Respondents' refusal to accede to the

Applicants' request. I stress that the First Respondent's unjustified acceptance of the reasons proffered by the Fourth Respondent for refusing to institute an investigation amounts logically to a decision not prosecute.

152. The First Respondent's decision to accept the reasons provided by the Fourth Respondent, coupled with the reasons submitted by the Fourth Respondent, ought to have been forwarded to the Third Respondent, who in turn was required, in terms of section 5(5) of ICC Act, to forward those reasons to the Registrar of the ICC.

AD PARAGRAPH 10

153. I deny that citing the Director General: DOJ&CD constitutes a misjoinder. The ICC Act designates the Director General: DOJ&CD as the **Central Authority** of the ICC Act. The ICC Act clearly requires that the Director General: DOJ&CD be informed of all requests made and activities carried out in terms of and pursuant to the ICC Act. It is therefore submitted that a failure to cite the Director General: DOJ&CD would in fact constitute a non-joinder.

AD PARAGRAPH 11

154. The contents of this paragraph are noted.

AD PARAGRAPHS 12 TO 21

155. The issues raised in these paragraphs are the same as those raised by the First Respondent in his answering affidavit in this application. I have already dealt with the investigatory powers and roles of the Respondents at length in the introductory section of this affidavit and my founding and supplementary affidavit in this application. I therefore deal only with those submissions that warrant a response.

AD PARAGRAPH 12

156. I deny the content of this paragraph. Although the initial decision was taken by the Fourth Respondent, as indicated in the introductory section of this affidavit, the law requires a more active role on the part of the NPA. The First Respondent's acceptance of the Fourth Respondent's refusal means that the First Respondent was party to the decision to refuse to initiate an investigation and relied on that decision to separately conclude that he would not initiate a prosecution.

AD PARAGRAPH 16

157. I take issue with the submission that "*the only possible link to South Africa in the material submitted by the First Applicant was the claim that the persons, whom the first applicant implicated, visited South Africa on a regular basis.*" This statement again ignores the very purpose and objects of the ICC Act and South Africa's duty to give effect to its objectives. It furthermore ignores the fact that Parliament through the ICC Act has expressly declared that the crimes complained of are deemed to be committed in South Africa. I submit that the Respondents have unlawfully trivialised the request made by the Applicant. I have already dealt with the legal context in which decisions are made in terms of and pursuant to the ICC Act (*supra* paragraphs 6 and 7). I reiterate that in light

of this context factors that should have informed the impugned decisions were overlooked or ignored by the Respondents.

158. I accordingly deny the content hereof to the extent that it is inconsistent with what I have said earlier herein or in the founding papers.

AD PARAGRAPHS 17 TO 20

159. Aside from denying the contents of paragraphs 19 and 20, I note the remainder of these paragraphs. I have already dealt in length with the issues raised in these paragraphs elsewhere in this affidavit. I note the deponent's acceptance that "*given the fact that the nature of the request for an investigation fell wholly within the mandate of SAPS, the referral should have taken place as soon as practicably possible after receipt of the request*".

AD PARAGRAPHS 21 TO 37

Mandamus to compel a reconsideration of the request for the initiation of an investigation

AD PARAGRAPH 21

160. I deny the contents of this paragraph for the same reasons I have previously expressed. I take particular issue with the statement "*currently there is no legal mechanism available which would give either myself, the Second Respondent or any other member of the NPA the legal right to initiate an investigation."* The deponent has failed to deal with or

understand the duty of the NPA and its members to coordinate, manage and direct an investigation.

AD PARAGRAPH 22

161. The content of this paragraph is noted. I have already dealt in detail with the respective roles of the Respondents and their members in terms of the SAPS Act.

162. There is no explanation provided by the deponent for why the Respondents have failed to utilise the SAPS Act to initiate an investigation.

AD PARAGRAPH 23

163. I note the contents hereof.

163.1. It is most telling, I submit, that Mr Simelane has (whether on the Second Respondent's urging or otherwise) taken over the further management of the matter. It appears that the Second Respondent, the most senior and experienced official in the NPA who is specifically charged with the management and direction of investigations and prosecutions of ICC crimes, has been sidelined in this application, and apparently some time before this application was launched.

163.2. I submit that the reason for this appears from the answering affidavits of the Respondents, and that is apparently because the Second Respondent expressed an independent view different to that of the other Respondents, including that there was a basis for the NPA (consistent with the multi-disciplinary approach I spoke of

earlier) to investigate the matter, there was no difficulty with the anticipated presence requirement, and there was a basis for the First Applicant and the Respondents mutually to seek ways of investigating the claims in the Torture Docket.

164. For these reasons I dispute that the Mr Simelane's affidavit is "*on behalf of*" the Second Respondent.

AD PARAGRAPH 24

165. I have already dealt with the duty on the First, Second and Fourth Respondents to cooperate in such a manner so as ensure the purpose and objectives of the ICC Act and the duties imposed by the NPA Act and the SAPS Act are fulfilled. It is a duty apparently accepted by the Second Respondent, but one that the First and Fourth Respondents have failed to appreciate.

AD PARAGRAPHS 26 TO 27

166. I deny the contents of these paragraphs. I reiterate my submissions made elsewhere in this affidavit dealing with the context created by the ICC Act.

167. It is noted that Mr Simelane is concerned about arresting Cabinet Ministers and Heads of Departments, but by treating all the perpetrators including lower ranking policemen on the same basis("*the arrest and prosecution of these persons*") he has inaccurately overstated the concern. To the extent that Zimbabwe's sovereignty is a factor for the prosecuting arm of Government to take into account (something I deny for the reasons I

have given earlier), there is no consideration given by Simelane to focusing attention only on one or more lower ranking perpetrators. Certainly the Respondents never approached the First Applicant to discuss such an option, or the impact that such an investigation/arrest/prosecution may have had as a deterrent to the torture that was committed by or with the higher approval of others in Zimbabwe.

168. On Mr Simelane's own version political considerations loom large in his decision-making. These political considerations have unfortunately blinded Mr Simelane to the legal fact that under the law an obligation is placed on the Respondents to cooperate and to exhaust all options available that could facilitate an investigation of priority crimes.

AD PARAGRAPHS 28 AND 29

169. I deny the content of these paragraphs to the extent that it is inconsistent with what I have said herein or in the founding papers. I have already dealt with the sovereignty concerns raised by the Respondents. I am advised that full legal argument will be made in this regard.

170. I note that the deponent describes elaborate procedures for procuring evidence in a foreign state but not once in the Respondents' papers do they tell this Court that any of those procedures were even attempted. Certainly none of those procedures were ever discussed with the Applicants as a possibility.

AD PARAGRAPH 30

171. I note the contents hereof and draw this Court's attention to the manifest material error of law on display in the deponent's affidavit.

172. Mr Simelane appears to have missed the point that Parliament has promulgated the ICC Act. That is that where the ICC has "*extremely limited opportunities to itself become seized with the alleged offences described by the First Applicant*", South Africa is expected to close that impunity gap. That is precisely why the ICC Act provides for universal jurisdiction. Unfortunately the Respondents' have failed to understand the ICC Act. Their failure means that they have left that impunity gap wide open in respect of torture victims in Zimbabwe.

AD PARAGRAPH 31 TO 36

173. These paragraphs are replete with legal argument that will best be dealt with at the hearing of the matter and I deny them to the extent that the averments therein are inconsistent with what I have said herein or previously in the founding papers.

174. In amplification of that denial:

174.1. I deny the conclusions that the deponent attempts to derive from his discussion of the Canadian and British legislation, and I assert that the deponent's conclusions regarding the ICC Act are legally flawed. I furthermore repeat that his conclusions manifest material errors of law that justify a review of the impugned decisions.

174.2. While I agree (as stated by the deponent in paragraph 32) that the NPA has a discretion whether or not to institute and conduct criminal proceedings (and assert that the Applicants have never contended as implied that South Africa applies a system of compulsory prosecution), the fact remains that the discretion was improperly and unlawfully exercised.

174.3. I submit that various legislative models domesticating the Rome Statute exist in a number of foreign jurisdictions. It is inevitable that different jurisdictions will adopt differing legislation and no single model is to be preferred over another. Regardless of the legal framework created in other jurisdictions and their differences, underlying principles are common to all models.

174.4. I deny that section 4(3)(c) is merely a "*jurisdiction founding provision*". The section is an express indication from Parliament that it intends to close the impunity gap in relation to ICC crimes, including by affording the South African authorities the power of universal jurisdiction. I submit that the high threshold contended for by the deponent (in paragraph 33) that proof of the commission of a crime is required in order to invoke the provisions of the Act is an incorrect reading of the ICC Act that serves ostensibly to justify the Respondents' failure to investigate the crimes in the Torture Docket. The SAPS Act vests the Respondents with investigative powers in relation to priority crimes such as those contemplated in the ICC Act. The Respondents are charged with determining whether the commission of a crime has taken place, and once established the South African courts can then hear the matter. I submit that the Respondents have failed to understand the purpose of SAPS Act, the NPA Act and the Presidential Proclamation which were clearly intended to

complement the enforcement, implementation and application of the ICC Act. Certainly section 4(3)(c) was never intended to be used in the inverted fashion contended for by the deponent: that is, as an up-front excuse for how difficult it may be to close the impunity gap in respect of crimes committed abroad, thus justifying inaction by the Respondents.

174.5. I note that the deponent records (in paragraph 34) that this matter is "*the first occasion for the South African authorities to have to consider the application of Section 4(3)(c) of the domestic Rome Statute (sic).*" For the reasons I have already given I submit that the inaction of the Respondents (with the exception of the Second Respondent) does them little honour on this first occasion.

174.6. While I note the factors listed in paragraph 34 that are apparently taken into account by the Royal Canadian Mounted Police, I deny that these factors were properly considered by the Acting National Commissioner or that the Fourth Respondent properly appreciated the duty placed upon him by the ICC Act, the SAPS Act, or the Rome Statute.

174.7. I stress that the Respondents (with the exception of the Second Respondent) did not even get to the first phase of a criminal investigation described in paragraph 34.3.4, since through their prevarication and inaction they did not even begin "*to seek cooperation with international institutions or other countries where leads or evidence can be found*"; and they failed even to interview or request an interview with the witnesses mentioned in the Torture Docket. They must have known that

such cooperative steps were available to them, since as the First Respondent confirms under oath he considered sending the Second Respondent to the International Criminal Court for discussions with the ICC Prosecutor – but in the end the Minister failed to authorise the trip.

174.8. I deny for the reasons given previously the statement in paragraph 34.3 (record 1466) that the persons sought to be investigated "*hold senior positions within the Government of the requested State*". Some do, but not all. Mr Simelane does not at all appear to have considered the possibility of focusing attention only on one or more lower ranking perpetrators. I repeat that the Respondents never approached the First Applicant to discuss such an option, or the impact that such an investigation/arrest/prosecution may have had as a deterrent to the torture that was committed by or with the higher approval of others in Zimbabwe.

174.9. I am advised that Mr Simelane misconceives the nature of a universal jurisdiction investigation. The question is what are our obligations under law, and what reasonable alternatives could have been exhausted to give effect to those obligations. And of course, one cannot test Mr Simelane's theory about the Zimbabwean Government's response because the simple truth of the matter is that there were no formal or informal steps taken to seek cooperation with Zimbabwe.

174.10. I note that in the Canadian example mentioned by Mr Simelane (at paragraph at 34.4) the Canadian authorities denied the three Zimbabwean Police Officials visas and concluded that they had "*credible research showing that the police force in*

Zimbabwe has often been implicated in widespread and systematic human rights violations including torture, assault and arbitrary detention". Given all the apparent difficulties that Mr Simelane has raised with investigating and/or prosecuting a case against Zimbabweans, and his reference to the Canadian experience, there is surprisingly little thought or discussion by him given to the possibility of, through a multi-disciplinary approach between the SAPS and the NPA working with other Government Departments such as Home Affairs, denying visas to the Policemen that – on the Respondents' version – travelled to South Africa.

AD PARAGRAPH 37

175. For reasons stated above I deny that the conclusions reached in this paragraph are tenable in South African law. Further legal argument will be advanced in this regard at the hearing of the matter.

AD PARAGRAPH 38

176. The contents of this paragraph are denied.

177. The Applicants have never suggested that they are professional investigators of international crimes against humanity or police officers. This is clearly a function of the police and prosecution team as provided for in the various statutes alluded to above.

178. What the Applicants have done is they have responsibly and diligently gathered the evidence necessary for the responsible organs of state to initiate and fulfil their investigative responsibilities. I refer to my submissions made in reference to Brigadier Marion's affidavit above. I accordingly deny that Mr Simelane is entitled to whatever "uncomfortable sense" of what he believes the "Applicants have in mind" (paragraph 38, record 1473).

179. Suffice it to say that the Applicants are focused on the rule of law and that an investigation be properly conducted. The arguments refuting this responsibility by the Respondents fly in the face of this fundamental tenet of our law.

AD PARAGRAPH 39

180. Section 7 of the Criminal Procedure Act provides for a private prosecution. I submit that the provisions of section 7 are not relevant to this application. I have already dealt with the *locus standi* of the Applicants in the introductory section of this affidavit.

AD PARAGRAPHS 40 AND 41

181. I deny the contents hereof for the reasons given earlier herein and in the founding papers.

182. I deny in the strongest terms that the Applicants are treating this application as a publicity stunt. I have already dealt with the contention that the media coverage allows the victims to be readily identified. No evidence has been presented in this regard. I therefore reject the allegations made in this paragraph.

AD PARAGRAPH 42

183. I have already dealt with the investigating powers vested in the Second Respondent in the introductory section of this affidavit. I deny the contents of this paragraph.

AD PARAGRAPHS 44 AND 45

184. I repeat what I said earlier about Brigadier Marion's affidavit and deny the contents hereof to the extent that it is inconsistent therewith.

185. Brigadier Marion's affidavit demonstrates that some of the perpetrators have entered South Africa on more than one occasion. I therefore deny that the Applicants' claim that several of the implicated parties travel to South Africa is "*unsubstantiated speculation*"

AD PARAGRAPH 46

186. I deny the allegations made against the Applicants in this paragraph.

187. I repeat again that the Applicants endeavoured to present the responsible state authorities with the evidence necessary to form a basis to initiate an investigation and possible prosecution. The Respondents are again in an unseemly fashion placing the blame for their failure to conduct an investigation on the Applicants; and in the process they have failed to ask the correct questions which is whether there was sufficient material in the

Torture Docket to trigger an investigation into torture as a crime against humanity. I submit that manifestly there was such information.

AD PARAGRAPHS 47 AND 48

188. I maintain that the evidence in the Torture Docket forms an adequate basis for an investigation to be initiated. I repeat that there was not even an attempt to interview the witnesses referred to in the docket or to request such an interview. And there was no independent investigation performed by the Respondents outside of the information contained in the Docket.

189. I deny the averments herein to the extent inconsistent with what I have said earlier.

AD PARAGRAPH 49

190. While I do not take issue with the submission that the NPA's Prosecution Policy requires that "*a decision whether or not to institute a prosecution should only be taken after the police docket has been studied in order to establish that the complaint has been properly investigated"*, I have stated on numerous occasions that the decision to accept that an investigation is not possible in the present case is flawed and demonstrates that the NPA did not adequately assess the reasons provided by the Fourth Respondent.

191. Mr Simelane says that a "*key criterion to be considered when making a decision is whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution*". With respect, this misses the point. I am at a loss to understand

how the NPA could come to its conclusion without any multi-disciplinary investigative steps taken at all by the SAPS or the NPA. I submit that the NPA's attempts at justifying its inaction are without merit. They shifted the burden to the Applicants to present "sufficient and admissible evidence" for the purposes of ensuring "*a successful prosecution*". That is not the standard. The question is whether there was sufficient evidence to justify an investigation. In that regard the Respondents failed to do any form of investigations themselves, and then when challenged complained that the Applicants had not presented "*sufficient and admissible evidence*" to ensure a successful prosecution.

192. I deny the contents hereof to the extent inconsistent with what I have said herein or in my founding papers.

AD PARAGRAPH 50

193. The reports were attached to the founding papers to demonstrate that the crimes of torture are an ongoing concern in Zimbabwe and to assist in providing a contextual picture of the widespread and systematic nature of these crimes. I note that these reports are consistent with that which the Canadian authorities have concluded and which Mr Simelane himself quoted: that there is *"credible research showing that the police force in Zimbabwe has often been implicated in widespread and systematic human rights violations including torture, assault and arbitrary detention*".

AD PARAGRAPH 51

194. The allegations in this paragraph are denied for the reasons previously given.

AD PARAGRAPH 52

195. The contents of this paragraph are denied, again for the reasons previously given.

196. I submit that the Applicants cannot be expected to keep the Respondents abreast of every single report issued regarding the widespread violence in Zimbabwe, and would in any event have expected the Respondents – seized with the matter – to be aware of the ongoing situation in Zimbabwe. I submit that a proper investigation by the Respondents would have revealed these reports, had they chosen to comply with their investigatory obligations.

197. It is most ironic for Mr Simelane to make the complaint that he does in his paragraph, it being recalled that elsewhere in his affidavit he contends that the reports are meaningless and inadmissible in a criminal trial (which the Applicants dispute).

PARAGRAPH 54

198. I deny the contents of this paragraph and stand by my submissions made in the founding papers. I stress that on a proper interpretation of the NPA Act and SAPS Act, dealt with in the introductory section of this affidavit, the NPA's involvement in investigations is, "*authorised by law or consistent with local practice*".

AD PARAGRAPH 58

199. I deny the contents hereof to the extent inconsistent with what I said earlier herein or in the founding papers.

200. I note that Mr Simelane does not tell this Court whether the Respondents have taken any steps subsequent to their receipt of the Torture Docket to initiate discussions with the Government of Zimbabwe around rendering assistance to South Africa regarding any proposed investigation, whether under section 31 of the Act or through other informal mechanisms. I also note that Mr Simelane does not tell this Court whether the President considered or was asked to consider entering any agreement with Zimbabwe under section 27 of the Act to enable the South African authorities to investigate crimes against humanity in Zimbabwe.

201. Mr Simelane has pointedly failed to tell this Court what, if anything, the Respondents have considered doing in an effort to investigate priority crimes in Zimbabwe, and instead has contended himself merely with pointing out each and every apparent legal or practical impediment to such investigation.

PARAGRAPH 59

202. I deny that the Applicants misinterpreted "*a jurisdiction founding provision as being one that makes investigations/prosecutions mandatory*".

203. I maintain that in the present case the Respondents were presented with an opportunity to begin their investigation intra-territorially by interviewing witnesses in South Africa. I contend however that the obstacles referred to by the Respondents could only justify a refusal to initiate an investigation if those obstacles were shown to be insurmountable. No such obstacles were raised with the Applicants or debated with them for their input. And other than the attempts by the Respondents to ex post facto raise a number of apparent obstacles to the investigation of these crimes, there is no evidence from them to demonstrate what steps, if any, were taken to overcome the obstacles. This Court and the Applicants (and, for that matter, the Respondents) simply do not know the true nature of these challenges because in truth the Respondents have simply assumed the insuperability thereof. I therefore submit that none of the Respondents have demonstrated that an investigation and prosecution in South Africa is not possible. All they have done is convince themselves that it will be difficult. If difficulty were the touchstone for whether or not to investigate priority crimes of whatever nature, then I respectfully submit that the bulk of priority crimes would not be investigated.

AD PARAGRAPH 60

204. I deny the contents of this paragraph. I am advised that legal argument will be made in respect of the issues raised.

AD PARAGRAPHS 61 AND 62

205. The averments made in these paragraphs are denied. I have been advised that legal argument will be presented where necessary.

Answering Affidavit of the Fourth Respondent

AD PARAGRAPHS 5 TO 16

206. The contents of these paragraphs are noted.

207. I note in particular that it was only on 5 January 2009 that the Fourth Respondent received a letter dated 15 December 2008 from the First Respondent informing the Fourth Respondent of the allegations in the Torture Docket that "*require further investigation*".

208. I further note that by 5 January 2009 the Fourth Respondent had not received the Torture Docket (see paragraph 7, record 1096); nor by 7 January 2009 (see paragraph 8, record 1097). I also note that because of the First Respondent's delay in providing the Docket to the Fourth Respondent, the Fourth Respondent says that his office was afforded "*little time … to deal with the contents thereof*" (see paragraph 7, record 1097).

AD PARAGRAPHS 17 TO 27

209. I deny the contents of these paragraphs and note with concern the narrow interpretation afforded by the Fourth Respondent to section 38 of the Constitution. As has been demonstrated in the introductory section to this replying affidavit, and in my founding and supplementary affidavits, I maintain that both the First and Second Applicant have the necessary standing to bring this application. I am advised that further legal argument will be presented in this regard.

AD PARAGRAPH 28

210. The content of this paragraph is noted and I reiterate that the request was broadened to include the Fourth Respondent once the First Respondent (belatedly) informed the Applicants that the requested investigation fell within the mandate of the SAPS.

AD PARAGRAPHS 29 AND 30

211. I note the contents of these paragraphs.

AD PARAGRAPHS 31 TO 33

212. I deny the legal conclusions sought to be drawn by the deponent in these paragraphs. I have already dealt with the rights implicated by the decision not to institute an investigation and the effect of the decision in the introductory section to this replying affidavit. I am advised that legal argument as to the applicability of PAJA to the impugned decisions will be presented at the hearing.

AD PARAGRAPH 34

213. I dispute the contents of this paragraph. I submit that the Fourth Respondent has misunderstood the Applicants' request and has inappropriately and incorrectly suggested that before the Respondents' duties were triggered the Torture Docket material had to be sufficient to ensure a successful prosecution. That is not so, since this case is about whether the evidence contained therein was sufficient to trigger a duty on the Respondents' to initiate an investigation. The Applicants' request has been dealt with

fully in my founding and supplementary affidavits. The Applicants were justified in submitting their request for an investigation and prosecution to the First and Second Respondents. I submit that on this basis the Respondents have perpetrated a further material error of law in believing that the test in issue is whether the material in the Torture Docket constituted sufficient evidence to ensure a successful prosecution.

214. It must be stressed that it was the First Respondent and Second Respondent that deemed it necessary to refer the Applicants' request, for investigation, to the Fourth Respondent. The decision not to initiate an investigation means that a prosecution cannot follow and the Fourth Respondent's decision therefore has a direct external legal effect.

AD PARAGRAPH 35

215. I deny the contents of this paragraph and I am advised that full legal argument as to the reviewability, in terms of PAJA, of the impugned decision will be made. In the event that PAJA is found not to be applicable I submit that the decision is reviewable in terms of the principle of legality.

AD PARAGRAPHS 36 TO 41

216. I submit that the establishment of the Zimbabwe Human Rights Commission ("*the ZHRC*") has no relevance to this application and was not "conveniently" or "inexplicably" or otherwise overlooked by the Applicants.

217. Firstly the ZHRC was only sworn in on 31 March 2010. Section 100R(8) of Amendment 19 requires an Act of Parliament to confer power on the ZHRC. The Fourth Respondent

neglects to mention that the Act conferring power on ZHRC has not been passed. To date only the ZHRC Bill has been prepared. No legislative framework in which the ZHRC is to carry out its functions is currently in existence.

218. Furthermore reports in the media indicate that the ZHRC will not investigate human rights abuses that occurred prior to December 2008. The Zimbabwean Minister of Justice and Legal Affairs, Patrick Chinamasa, was quoted saying, "*[t]his commission <u>will not</u> have powers to investigate human rights violations ... before the enactment of the amendment number 19, unless such violations have continued after the amendment 19."*. I attach a number of media and civil society reports to this effect hereto marked Annexure **NFreply2**. The Torture Docket documents acts of torture committed in 2007 and would therefore not be eligible for investigation.

219. I submit that on the Fourth Respondent's own version in answer he has demonstrated a failure to properly consider the facts relevant to this application; alternatively has pressed into service irrelevant and inaccurate facts in an attempt to resist the relief sought by the Applicants. What is more, even if the Fourth Respondent's version were accurate (which is denied), there is no explanation at all for why the question of the ZHRC was not raised with the Applicants prior to the launching of this application. Had it been, the Applicants might have been able to disabuse the Respondents' of their misunderstanding regarding the ZHRC.

220. I note with concern that the contents of these paragraphs further illustrate the Fourth Respondent's failure to properly consider the Torture Docket and his lack of appreciation

for the gravity of the crimes in question. Even if the ZHRC were permitted to investigate the complaints made in the Torture Docket, it is inexplicable why the Fourth Respondent is of the view that the establishment of ZHRC precludes the application of the ICC Act. I have already expressed my concern at the Respondents' failure to appreciate the purpose and objectives of the Rome Statute and the ICC Act in the introductory section of this affidavit. It is also troubling that the Fourth Respondent would (in paragraph 40 record 1124) equate the international crime of torture to a mere "predicament".

221. In light of the Fourth Respondent's misunderstanding of the true facts regarding the ZHRC, I take exception to the various slurs directed at the Applicants in these paragraphs for their alleged failure to refer to the ZHRC in this application or to draw its existence to the attention of the Respondents.

AD PARAGRAPH 42

222. The Fourth Respondent's submission that the requested *mandamus* not only negates "*the provisions of the amendment of the Zimbabwean Constitution but also international treaties dealing with human rights*" is, with respect, nonsensical and I cannot meaningfully respond thereto. Furthermore the Fourth Respondent's assertion that the torture victims "*have sufficient remedies in Zimbabwe to address their concerns*" is unsubstantiated and no evidence has been provided to indicate such availability. The only mechanism proffered by the Fourth Respondent is the ZHRC.

223. However as indicated above the ZHRC is precluded from assisting the victims in the present case. In any event, even if it were there is absolutely no basis for the Fourth

Respondent to allege that the existence of the ZHRC would be a bar to the Applicants making a request to the Respondent for an investigation under the ICC Act. There is nothing in the ICC Act or any other law which suggests that the mere fact of an alternative "justice" or "reconciliation" mechanism is a trump to the exercise of jurisdiction by South African authorities over individuals accused of priority crimes.

AD PARAGRAPHS 44 AND 46

224. I deny the averments herein where inconsistent with what I have said herein or in the founding papers.

225. I deny the submissions made by the Fourth Respondent in these paragraphs. Section 205 describes, in general terms, the objectives, role and function of the SAPS. Section 205 requires national legislation to establish the powers and functions of the SAPS. Section 205 is therefore not, contrary to the Fourth Respondent's contention, the only source of the SAPS' powers and functions.

226. I also do not understand why the Fourth Respondent denies any possibility of extraterritorial police investigations but then goes on to discuss the mutual legal assistance instruments identified in my supplementary affidavit in this application. Clearly these instruments do envisage extraterritorial investigations. One of the objectives of the SAPS is to prevent, combat and investigate crime. The ICC Act criminalises the act of torture as a crime against humanity and goes further by deeming the crime of torture, regardless of where it is committed, to have been committed in the territory of South Africa. As indicated in the introductory section of this affidavit, the SAPS Act also

established an investigative Directorate to deal with priority crimes which include crimes against humanity.

AD PARAGRAPH 46

227. The contents of this paragraph are noted. I note that Mr Dramat in his confirmatory affidavit confirms that his Directorate was mandated to investigate acts of torture such as those in the Torture Docket from 6 July 2009. His unit was accordingly not in existence at the time that the First Applicant made its request to the South African authorities for investigation of the Torture Docket.

228. However, what is relevant is that after this application was launched he was apparently approached on 2 February 2010 (see para 6, record 1204) for an opinion on the incorrect and irrelevant question whether the docket constituted a complete court directed investigation; and that he then appointed Brigadier Marion to perform that task. It is telling that on the Respondents' own version the type of investigation and analysis that has now been done by Brigadier Marion was not effected until after the application was launched and clearly, with respect, as an attempt to resist the relief sought by the Applicants in their notice of motion. In any event, for the reasons given earlier I deny that Brigadier Marion's conclusions are correct or that he was asked the right question.

AD PARAGRAPH 47

229. In light of what has been stated elsewhere in this affidavit I deny the contents of this paragraph. In any event, the Applicants did not suggest that the SAPS are "clothed" with

extra-territorial powers to be exercised in a foreign state. There are, however, clearly mechanisms available to facilitate an investigation of this sort.

AD PARAGRAPHS 49 AND 50

230. I deny the contents of these paragraphs and submit that the averments herein are an attempt by the deponent (or his legal representatives) to remedy the difficulties arising from what the Fourth Respondent previously said in his reasons under rule 53.

231. The Fourth Respondent's characterisation of the Applicants' argument in terms of section 4(3)(c) of the ICC Act as "*specious*" again reflects a misunderstanding of the purpose and objectives of the ICC Act. I have dealt with section 4(3)(c) elsewhere in this affidavit and my founding and supplementary affidavit and it is not necessary to repeat myself. I do however stress that section 4(3)(c) of ICC Act deems a crime identified in the ICC Act to have been committed in the territory of South Africa and the crime in question must be treated as such and would therefore fall within the ambit of the MLA Act.

232. I submit that on the Fourth Respondent's own version he has confirmed that he is labouring under a material error of law worthy of this Court's correction.

AD PARAGRAPH 51

233. I stand by what I said in my supplementary founding affidavit. Therein I noted that while South Africa has signed and ratified the SADC Protocol, Zimbabwe has merely signed. The point is that Zimbabwe is alive to the possibility of MLA and may well have responded to a request for assistance, given the importance of the SADC Protocol within

the region. As I stated, it was incumbent on the Respondent at the very least to make a request. If the request is not answered or is declined that is a different matter, but to simply presume non-cooperation as a reason for not investigating constitutes a lack of good faith.

AD PARAGRAPHS 52 TO 55

234. The Fourth Respondent has highlighted another mechanism available to SAPS. However, its failure to pursue this tool is premised on the untested assumption that cooperation by the Zimbabwean authorities will be withheld on the basis of some or other assumed "political nature" of the offence or investigation, without ever approaching Zimbabwe.

235. I in any event deny that the crime in question is of a political nature. Further legal argument will be directed in this regard at the hearing of the matter.

AD PARAGRAPHS 57 AND 58

236. I deny the contents hereof for the reasons given earlier and stand by my assertion that the Respondents have misunderstood the Applicants' case. In any event, it was only after this application was launched that the Respondents took the time to consider the Torture Docket and to thereafter (in an attempt to resist the relief sought by the Applicants) compile a list of apparent inadequacies in the Torture Docket. None of those inadequacies were drawn to the Applicants' attention prior to the application being launched, which is not surprising given that it was only after the application was launched that the Respondents performed the exercise. In any event, for the reasons given earlier, those inadequacies are an attempt to focus on the wrong question: the issue is not whether

the material was sufficient for a successful prosecution, but whether the material was a proper basis for an investigation to be opened into crimes against humanity.

AD PARAGRAPHS 59 TO 61

237. I draw attention to the significant statement (para 59, record 1137) that it was only after having been served with the application that Dramat was approached for an opinion on the Torture Docket. There is no explanation for why it took that long for him to be approached or why he was not approached before the application was launched.

238. I further note the deponent's view (para 59, record 1137) that in a "*comprehensive supporting affidavit Brigadier Marion sets forth all the deficiencies in the docket which still have 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 has a reasonable prospect of success*".

239. I stress that on the Respondents' version they continue to ask the wrong question regarding a successful prosecution when the real issue is whether there was a sufficient basis for an investigation. In any event, there is no explanation for why the ostensible deficiencies in the docket that were still to be investigated were not previously drawn to the Applicants' attention prior to the application being launched and notwithstanding repeated attempts by the Applicants to engage the Respondents on the progress or otherwise being made in relation to the Torture Docket.

240. I furthermore deny the contents of these paragraphs insofar as they purport to draw conclusions based upon the affidavit of Brigadier Marion. I have already dealt with the supporting affidavit of Brigadier Marion in the introductory section of this affidavit and the misplaced reliance thereon by the Respondents.

241. I furthermore deny the averments made in paragraphs 60 and 61. Further legal argument will be addressed thereon at the hearing of this matter.

AD PARAGRAPHS 62 TO 64

242. The contents of these paragraphs are noted. I note that on the deponent's own version the reasons he gave for the impugned decision are those given in Annexure NFsupp2; and I note that it was only thereafter that he apparently took his "*composite decision*" whether "*the SAPS would have been entitled lawfully to initiate and conduct an investigation into the allegations made in the docket*".

AD PARAGRAPHS 65 TO 67

243. The content of these paragraphs is noted. I submit that the assertions made are not relevant to this application.

AD PARAGRAPHS 68 TO 69

244. As indicated in my supplementary affidavit no evidence showing that an investigation in Zimbabwe would have a "*detrimental and prejudicial effect between the various police forces of SADC countries if it was disclosed that South Africa was contemplating an*

investigation" and on "*the cooperation between the respective police forces of Zimbabwe"* and South Africa has been presented. I therefore submit that this assertion is mere speculation on the part of the Fourth Respondent presented as an ex post facto justification to avoid the relief sought by the Applicants.

245. In any event, the effect of the averments by the Fourth Respondent is that any attempts by South Africa to investigate international crimes committed by rogue policemen, no matter how substantial the evidence, will never be possible because of the consequences that may entail for cooperation between the respective polices forces of South Africa and Zimbabwe. I submit that on the Fourth Respondent's version the ICC Act has become a nullity and impunity has been secured for those members of the Zimbabwean police that are implicated in international crimes.

AD PARAGRAPHS 70 AND 71

246. I deny the contents of these paragraphs for reasons given herein and in the founding papers.

247. In particular I refer the Court to the content of our offer of support outlined in my supplementary affidavit in this application. Furthermore I submit that the reasons proffered by the Fourth Respondent for refusing to initiate an investigation, specifically its concern for South Africa's relations with Zimbabwe, demonstrates a lack of objectivity and independence on the part of SAPS. The SAPS, in carrying out its functions, is required to act objectively and impartially and should not abrogate its duties on the basis of speculative reactions of other Ministries in deciding how to proceed. The SAPS are enjoined to carry out their functions within the parameters of the law, the

considerations alluded to are not relevant and do not justify the Fourth Respondent's refusal to initiate an investigation.

AD PARAGRAPH 74

248. I have already dealt with issue of *locus standi* elsewhere in this affidavit.

AD PARAGRAPH 75

249. While I deny that the Applicants' legal arguments are not correct I note the remainder of this paragraph.

AD PARAGRAPHS 76.1 TO 76.3

250. The contents of these paragraphs are denied. Ample evidence has been presented to this effect and it is difficult to know what the Fourth Respondent means when he says that the evidence given about the state of crisis in Zimbabwe should be viewed against the facts he mentions.

251. I have already dealt with the establishment of the ZHRC and maintain that its establishment is not germane to this application, save to confirm my view that the Fourth Respondent has failed to properly consider the Applicants' request.

AD PARAGRAPH 77

252. The content of this paragraph is noted.

AD PARAGRAPHS 78 AND 79

253. The issue of *locus standi* has been dealt with elsewhere in this affidavit.

AD PARAGRAPHS 80 AND 82

254. The content of this paragraph is noted.

AD PARAGRAPH 82

255. In paragraph 17 of my founding affidavit I did not submit that the "*alleged perpetrators fled Zimbabwe and are presently residing in South Africa*". I refute the assertion that "*with the advent of the new Human Rights Commission in Zimbabwe all the Applicants' fears will be allayed by the implementation thereof*". I again stress that the ZHRC has been precluded from investigating and acting on matters that occurred prior to December 2008.

AD PARAGRAPH 83

256. The content of this paragraph is denied. I have already dealt with the applicability of PAJA and the *locus standi* of the Applicants elsewhere in this affidavit.

AD PARAGRAPHS 84 TO 92

257. To the extent that these paragraphs are inconsistent with what I have said previously herein or in the founding papers, I deny them.

AD PARAGRAPHS 93 AND 94

258. I deny the contents of this paragraph. I refer to the portion of this affidavit dealing with submissions made by Colonel Bester and Brigadier Marion in their supporting affidavits and the applicability of PAJA to the impugned decisions.

AD PARAGRAPH 95

259. In response to the submissions made in this paragraph I reiterate my submissions regarding the applicability of the principle of anticipated presence. I accordingly deny the contents hereof and further legal argument will be addressed in respect thereof at the hearing.

AD PARAGRAPH 99

260. I reiterate that the First Applicant is not a deep-pocketed and specially-trained investigative unit. There should thus be no surprise that it took a number of months to painstakingly and carefully gather the evidence that it did in the Torture Docket. In addition thereto, it took the step of seeking independent legal advice on the best means by which to lodge its request. What is more, unlike the First Respondent, the First Applicant is not held to the constitutional standard of ensuring prompt and effective compliance with obligations.

AD PARAGRAPHS 100 TO 154

261. The contents hereof are largely a repeat of submissions made elsewhere in the Fourth Respondent's answering affidavit and have been dealt with. I deny them to the extent inconsistent with what I said herein or in the founding papers.

CONCLUSION

262. For these reasons the Applicants persist in seeking the relief sought in the amended notice of motion.

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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 ……. 2011, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

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COMMISSIONER OF OATHS