IN THE NORTHERN GAUTENG HIGH COURT
(PRETORIA)

Case No. 77150/09

In the matter between:

SOUTHERN AFRICA HUMAN RIGHTS LITIGATION CENTRE	**FIRST APPLICANT**
ZIMBABWE EXILES FORUM	**SECOND APPLICANT**

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**FIRST RESPONDENT**
HEAD: PRIORITY CRIMES LITIGATION UNIT	**SECOND RESPONDENT**
DIRECTOR-GENERAL OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**THIRD RESPONDENT**
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	**FOURTH RESPONDENT**

FIRST RESPONDENT'S PRACTICE NOTE

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1. THE NAMES AND TELEPHONE NUMBERS OF ALL COUNSEL IN THE MOTION

1.1 **Counsel for the Applicants:**

Wim Trengove SC - 082 337 0852

Gilbert Marcus SC – (011) 291 8600

Max du Plessis – (031) 260 2672

1.2 **Counsel for the First Respondent**:

RC Macadam – (012) 845 6431

SC Bukau – (012) 845 6476

1.3 **Counsel for the Third & Fourth Respondents**:

AC Ferreira SC – (012) 334 4036

I Ellis – (012) 334 4036

2. THE NATURE OF THE MOTION

2.1 A review in terms of Rule 53 and the Promotion of Administrative Justice Act ("*PAJA*") to set aside a decision not to institute an investigation taken by the Fourth Respondent and accepted by the First Respondent.

2.2 In the event of the review succeeding, a *mandamus* directing that the First, Second and Fourth Respondents reconsider the request for the initiation of an investigation.

2.3 A declaratory order to the effect that the delay in making the decision, referred to in para 2.1 *supra,* constituted a breach of Sections 179 and 237 of the Constitution.

2.4 Independently and/or as an alternative to PAJA, it is alleged that the failure to institute an investigation constituted a breach of the constitutional principle of legality.

2.5 The relief sought is opposed by the First Respondent.

3. INDICATION OF THE ISSUES TO BE DETERMINED

3.1 For the purposes of the review, it is necessary to determine:

3.1.1 Whether the First or Second Respondents had the power to initiate the investigation or whether this power resorted under the Fourth Respondent.

3.1.2 Whether the First Respondent was in law correct in referring the request for the investigation to the Fourth Respondent.

3.1.3 Whether the Fourth Respondent was correct in deciding not to initiate the investigation and whether the First Respondent acted correctly in accepting his decision. This issue in turn requires a determination on the following issues:

3.1.3.1 Whether the material compiled by the First Applicant constituted a Court-directed investigation.

3.1.3.2 Whether the First and Fourth Respondents were correct in concluding that the necessary evidence had to be obtained via mutual legal assistance instruments

and that the Government of Zimbabwe would not render the necessary assistance.

3.1.3.3 Whether the First and Fourth Respondents were correct in concluding that the First Applicant could not gather evidence on their behalf.

3.1.3.4 Whether the Fourth Respondent was correct in taking into consideration the impact which the requested investigation would have on negotiations in Zimbabwe, the functioning of the SADC policing structure and ongoing cooperation with the Zimbabwean Police (The First Respondent has abandoned reliance on the issue of negotiations.)

3.2 As far as the *mandamus* is concerned, it is the First Respondent's submission that this would only require determination in the event of the review succeeding. In this eventuality the *mandamus* raises the following issues:

3.2.1 Whether the Rome Statute of the International Criminal Court and the Implementation of the Rome Statute of the International Criminal Court Act, No 27 of 2002 ("*the domestic Rome Statute*") place an obligation upon the First and Fourth

Respondents to initiate an investigation of the nature requested by the Applicants.

3.2.2 Whether the presence of the accused is a prerequisite for the initiation of an investigation in terms of Section 4(3)(c) of the domestic Rome Statute.

3.2.3 Whether ordering a reconsideration would not constitute a *brutum fulmen.*

3.3 As far as the issue of unreasonable delay is concerned, the First Respondent's submission is that the First Applicant did not suffer any prejudice as a result of the delay and that consequently the decision not to initiate an investigation should not be set aside on this ground.

3.4 As far as the issue of the constitutional principle of legality is concerned, the First Respondent's submission is that this matter raises precisely the same issues as will have to be determined for the purposes of the review.

3.5 The First Respondent seeks an order of costs including the costs of two counsel in the event of the Court dismissing the application.

3.6 The Fourth Respondent has raised as a point *in limine* the *locus standi* of the Applicants to bring this application. The First Respondent's submission

is that in the event of the point *in limine* succeeding, it would be unnecessary for the Court to entertain the merits of the application.

3.7 The Third Respondent was cited solely because the Applicants alleged that he failed to submit a decision of the First Respondent to the International Criminal Court.

3.8 The Second Respondent has filed a Notice to Abide.

4. THE RELIEF SOUGHT AT THE HEARING BY THE FIRST RESPONDENT

The First Respondent seeks the dismissal of the Applicants' application in its entirety and an order of costs against the Applicants in respect of the costs of two counsel.

5. DURATION OF THE MOTION

As per the directive of the Deputy Judge President of 27 October 2011 (copy annexed hereto), the matter has been set down for five days from 26 to 30 March 2012 as a special motion.

6. INDICATION OF URGENCY OF MATTER

As per the Deputy Judge President's directives, the matter is not urgent.

7. WHETHER OR NOT THE PAPERS NEED TO BE READ AND IF SO, WHICH PORTIONS THEREOF

7.1 The First Respondent submits that the following portions of the record should be read:

7.1.1 The Notice of Motion and Amended Notice of Motion.

7.1.2 The Founding, Supplementary and Replying Affidavits of the Applicants.

7.1.3 The portions of the First Applicant's Memorandum and Summary of Evidence referred to in the Answering Affidavits of the First Respondent and the First Respondent's Heads of Argument.

7.1.4 The Answering Affidavits of Adv MJ Mpshe SC, Adv Simelane and the Supporting Affidavit of Ndaba John Makhubele, filed on behalf of the First Respondent (including the annexures attached thereto).

7.1.5 The portions of the First Respondent's record referred to in the Answering Affidavits of Adv Mpshe SC and Adv Simelane and the First Respondent's Heads of Argument.

7.1.6 The Answering Affidavit of the Fourth Respondent, the Supporting Affidavit of Clifford Reginald Christopher Marion, the Supporting and Confirmatory Affidavit of Philippus Christoffel Jacobs, the Supporting Affidavit of Anwa Dramat and the Affidavit of Louis Johannes Bester filed on behalf of the Fourth Respondent.

7.1.7 The witness statements and press statements referred to in the Affidavit of CRC Marion and the three Amnesty International/Human Rights' Watch reports, filed in the First Respondent's record.

RC MACADAM

SC BUKAU

COUNSEL FOR THE FIRST RESPONDENT

Office of the National Director of Public Prosecutions
Pretoria
8 February 2012

OFFICE OF THE DEPUTY JUDGE PRESIDENT
NORTH GAUTENG HIGH COURT

North Gauteng High Court Building, Cnr. Vermeulen & Paul Kruger Str, Room 7.15, Seventh Floor
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27 October 2011

TO: Lawyers for Human Rights
Fax. No. : 012 320 2949 / 012 320 7681
Your Ref..: ad;5/00/DCOTE
Our Ref. : 77150/09/djp/27.10.2011

Sir

RE: ALLOCATION OF A THIRD MOTION COURT: South Africa Litigation Centre and Another vs National Director of Public Prosecutions and Others: CASE NO.: 77150/2009

Your letter dated 26 October 2011 refers.

You may set this matter down for **26, 27, 28, 29 and 30 March 2012** as a special motion. Attach a copy of this letter to your notice of set down and serve immediately.

Kindly ensure that the court file is properly indexed and paginated by **no later than 30 January 2012.** The applicant must file heads of argument **no later than 6 February 2012** and the respondent **no later than 13 February 2012.** These dates must be strictly adhered to, failing which the matter may not proceed on the date allocated. All heads of argument must be filed at the Deputy Judge President's office.

The applicant must ensure that the court file is delivered to the Deputy Judge President's office by close of business (4pm) **on 13 February 2012.**

The file with the heads of argument will be delivered to the chambers of the judge hearing the matter. It remains the duty of the legal representatives to ensure at least 10 days before the hearing of the matter that all documents reached the chambers of the judge hearing the matter.

Should it, for any reason, transpire that this matter will not proceed on the given date, you are directed to inform the Registrar's office as well as this office in writing immediately

Regards

W J van der Merwe
Deputy Judge President
North Gauteng High Court

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FIRST RESPONDENT'S HEADS OF ARGUMENT
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FIRST RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1. The Applicants have brought an application to review and set aside a decision not to institute a criminal investigation in terms of the Implementation of the Rome Statute of the Criminal Court Act, No 27 of 2002 ("the domestic Rome Statute") in response to such a request by the First Applicant. The

investigation related to alleged acts of torture committed as a crime against humanity in Zimbabwe on Zimbabwean citizens by members of the Zimbabwean Government in March 2007. The request was submitted to the Second Respondent on 14 March 2008. On 17 December 2008, the request was referred by the First Respondent to the Fourth Respondent. On 29 May 2009, the Fourth Respondent declined to initiate the investigation. On 19 June 2009, the First Applicant was informed of the decision by the First Respondent.

2. The Second Applicant never submitted a request for an investigation to either the First, Second or Fourth Respondents and, in fact, played no role in all the events relevant to the request from the time of its submission by the First Applicant until 19 June 2009.

3. The Notice of Motion was served on the Respondents on 15 December 2009 and the Applicants' Replying Affidavit was served on the attorney for the Respondents on 11 March 2011 (out of time).

4. The review application is brought under the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA"). An amended Notice of Motion was filed on 26 April 2010, seeking a declaratory order to the effect that the delay taken by the Respondents in reaching the decision constituted a breach of Sections 179 and 237 of the Constitution. In the event of a finding in favour of the Applicants, they seek a *mandamus* ordering the First, Second and Fourth Respondents to reconsider, within a reasonable period of time, the

original request for the initiation of an investigation. In para 101 of the Founding Affidavit, para 18 of the Supplementary Affidavit and para 62 of the Replying Affidavit it was alleged that there was a violation of the constitutional principle of legality which exists independently of, or as an alternative to PAJA. The Notice of Motion was not amended so as to reflect this ground.

5. The relief sought is opposed by both the First and Fourth Respondents. The Second Respondent has filed a notice to abide with the decision of this Court.

6. The Fourth Respondent has challenged, as a point *in limine,* the *locus standi* of the Applicants to bring this application. In the event of this Court finding in favour of the Fourth Respondent, it will be unnecessary for this Court to rule on the merits of the Applicants' application for a review and declaratory order. [1]

7. At the time when the impugned decision was made, Adv Mpshe SC was the Acting National Director of Public Prosecutions (the "ANDPP") and Commissioner Williams was the Acting National Commissioner of Police ("ANASCOM"). At the time of the bringing of this application, both ceased to hold public office. Consequently, Adv Mpshe SC's answering affidavit deals solely with issues relevant to the review. As far as the *mandamus* is concerned, an answering affidavit has been filed by Adv Simelane, who was appointed as the National Director of Public Prosecutions ("the NDPP"),

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[1] ***Democratic Alliance v The Acting National Director of Public Prosecutions and Others,*** unreported North Gauteng High Court judgment case number 19577/09 dated 22 February 2011, reported online at [2011] ZAGPPHC 57.

dealing primarily with issues relevant to the *mandamus*. It is not true that he has been suspended as alleged by the Applicants. [2] He is on special leave, pending the Constitutional Court, in terms of Section 167(5) of the Constitution, ruling on a finding as to the invalidity of his appointment. Since Adv Simelane was also the Director General of the Department of Justice & Constitutional Development (the "DG of DoJ&CD") and hence the Central Authority for mutual legal assistance, his affidavit deals with this issue insofar as it relates to the review. Due to an amendment of the National Prosecuting Authority Act, No 32 of 1998 ("the NPA Act"), he also deals with the current investigative powers of the NPA insofar as this is relevant to the review.

8. During the course of these Heads, frequent reference will be made to both national and international officials, structures, pieces of legislation, courts and tribunals. For the sake of conciseness, these titles have been abbreviated as per **Annexure "A"** to these Heads. Once the full title has been used for the first time, thereafter the abbreviations will be used.

9. We propose to deal with the following issues in the following sequence:

   9.1 The review

   9.2 The declaratory order relating to the delay in reaching the impugned decision

   9.3 The constitutional principle of legality

   9.4 Conclusion and order of costs

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[2] Statement of the Presidency, dated 28 December 2011

THE REVIEW

10. The review raises the following issues:

    10.1 Whether the First and / or Second Respondents could in law initiate the investigation as requested by the First Applicant

    10.2 Whether the referral of the request by the First Respondent to the Fourth Respondent constituted an abdication of duty by the First Respondent

    10.3 Whether the Fourth Respondent was correct in declining to initiate the investigation

11. As indicated by Adv Mpshe SC, [3] the review is opposed on the following grounds:

    11.1 The impugned decision does not constitute administrative action as defined in PAJA, because the Applicants have not established that the decision had a direct, external, legal effect which adversely affected their rights.

    11.2 Alternatively, if it is found that the decision is reviewable in terms of PAJA, then the grounds for setting aside the decision, advanced by the Applicants and contained in Section 6 of PAJA have not been

[3] Adv Mpshe's Answering Affidavit ("AA") para 37 CB 4 Vol 13 pp 1322 - 1324

established and that there is no other legal basis upon which the decision could be reviewed.

We submit that it is most appropriate to deal first with the issues set out in paras 10.1 to 10.3 and thereafter to deal with the applicability of PAJA.

The initiation of the investigation and the referral to SAPS

12. We make the following submissions with respect to the first and second issues referred to in para 10 *supra* because they are inter-connected:

12.1 This issue is dealt with extensively by Adv Mpshe SC. [4]

12.2 We merely highlight the salient features thereof, namely:

12.2.1 Neither the NPA Act, Section 179 of the Constitution, nor the Prosecution Policy (required in terms of Sections 179(5)(a) and (b) of the Constitution) authorize the Second Respondent to initiate investigations or for the NDPP himself to do so in respect of crimes falling within the mandate of the Priority Crimes Litigation Unit ("PCLU"), headed by the Second Respondent. In March 2008, the limited investigative power conferred upon the NPA by virtue of the National Prosecuting Authority Amendment

[4] Adv Mpshe's "AA" in paras 9 to 14 CB 4 Vol 13 pp 1302 - 1306

Act, No 61 of 2000, was located solely in the investigating directorates referred to in Section 7 of the NPA Act. The Second Respondent was not appointed as an investigating director in terms of Section 7 and could consequently not exercise those powers. In fact, the only investigating directorate in existence in March 2008 was the Directorate of Special Operations ("DSO" or "Scorpions"). It is common cause that the First Applicant made no request for the initiation of an investigation to the DSO. The Applicants only now claim that the matter should have been referred to the DSO. It is a matter of fact that already as at 8 May 2008, a Draft Bill had been published for its dissolution. [5] It would be illogical to refer a complex investigation to a structure that was in the process of disbanding.

12.2.2 As is unequivocally stated in the Prosecution Policy: [6]

> *"The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The Prosecuting Authority is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance."*

In the light thereof, Section 24(1)(c) of the NPA Act confers on the Directors of Public Prosecutions the power "*to supervise, direct and coordinate specific investigations*".

[5] Government Gazette No 31037 of 8 May 2008

[6] Annexure "MJM1" to Adv Mpshe SC's "AA" in CB 4 Vol 13 pp 1370 - 1382

(We emphasise not to initiate them.) The lack of a legal basis to initiate investigations is confirmed in Section 24(7), which provides that when a Director is considering the institution of a prosecution and is of the opinion that a matter connected therewith requires further investigation, he/she must request the Provincial Commissioner of police for assistance in the investigation of that matter. The Provincial Commissioner is required so far as practical (our emphasis) to comply with the request.

12.2.3 The Presidential Proclamation, mandating the Second Respondent to, *inter alia* manage and direct investigations and prosecutions, must be interpreted in terms of the above legislation. Yet again, we emphasise that the proclamation does not empower him to initiate investigations.

12.3 A decision by a member of the NPA to initiate a criminal investigation in the absence of a legal provision authorizing such initiation, would render that investigation null and void. We refer in this regard to ***Powell NO and Others v Van der Merwe NO and Others,*** [7] where the Court set aside the decision by an Investigating Director to initiate

[7] ***Powell NO and Others v Van der Merwe NO and Others*** 2005 (1) SACR 317 (SCA) in paras 22-23

an investigation because he lacked the necessary statutory authority to do so.

> *"[23] It is true that the statute empowers the investigating director to range broadly in carrying out duties. Given the problems of corruption, fraud, theft and other serious economic offences that beset our country, this is both necessary and right... But the statute did not give him unlimited power, nor power to range beyond its boundaries. Nor does it mean that confining him to the lawful ambit of his powers was pointless or formalistic. Clarity and precision are the allies of order in law. Imprecision and vagueness all too often are its enemies."*
>
> *"[22] The principle of legality required him to confine himself in the exercise of those powers to what the statute permitted, and in specifying 'alleged irregularities' he went beyond that. To insist that he should not have done so is not technical or formal. It is a requirement of constitutional substance, relating to the ambit of the investigating director's powers and the pre-conditions for their lawful exercise."*

12.4 There is a very valid reason why the NPA should not initiate investigations and one has to go no further than Section 205(3) of the Constitution which provides the answer. This provision defines, *inter alia,* the objects of the police service as being to investigate crime and to uphold and enforce the law. The NPA, in initiating investigations without any legal basis, would be usurping the constitutional mandate of SAPS.

12.5 We refer to Du Toit et al,[8] where the different roles of SAPS and the NPA are discussed:

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[8] Du Toit & Others ***Commentary on the Criminal Procedure*** at 1-4L to 1-4M

> *" ... The National Police Force is an independent Government Department."*
>
> *"... the police do in practice exercise a discretion of their own and often refrain from bringing trivial matters and allegations, which are not adequately supported by evidence, to the attention of the public prosecutor."*
>
> *"The initial investigation is conducted by the police."*
>
> *"The prosecutor, in the exercise of his discretion to prosecute, examines witness statements ... contained in the docket. At this stage the prosecutor may also direct and control the investigation by giving specific instructions to the investigations officer ... But he himself does not, in principle, actively participate in any investigative work. The prosecutor should avoid a situation where he becomes a potential state witness."*

12.6 Adv Mpshe SC therefore acted perfectly legally and correctly in referring the request for the initiation of an investigation to the Fourth Respondent. (The delay in so doing is dealt with under the issue of a declaratory order.)

12.7 As has been explained by Adv Simelane in his Answering Affidavit [9] and Lieutenant General Dramat in his Supporting Affidavit [10], the issue of the PCLU or the NDPP initiating the investigation is now of purely academic interest and therefore cannot be legitimately reviewed. This is because by virtue of the South African Police Service Amendment Act, No 57 of 2008, and the National Prosecuting Authority Amendment Act, No 56 of 2008, the DSO was dissolved and a SAPS structure, namely the Directorate for Priority Crime Investigation ("DPCI") was established to investigate priority crimes. The DPCI came into effect on 6 July 2009. (Five months before the Applicants

[9] Adv Simelane "AA" CB 4 Vol 14 paras 21 – 24 at pp 1449 - 1451
[10] Gen Dramat "Sup A" CB 4 Vol 12 at pp 1201 - 1206

launched this application and after the decision not to institute an investigation had been taken.) The Applicants are therefore clearly wrong when they allege that the DPCI came into existence in January 2009 and that the authorities should have used the DPCI provisions in order to evaluate the request for an investigation.

12.8 As is explained by Adv Simelane, [11] none of the investigating directorates referred to in Section 7 of the amended NPA Act are in existence and consequently there is no legal provision to enable the NPA to initiate investigations.

12.9 As emerges from Schedule 1 of the amended SAPS Act, the offences created in terms of the domestic Rome Statute fall within the mandate of the DPCI. Section 17D(3) of the amended Act completely takes away the power of the NPA to initiate investigations in respect of the DPCI offences. This is because the section requires the Head: DPCI, if he suspects that such an offence has been committed, to request the NDPP to designate a Director of Public Prosecutions to exercise the powers set out in Section 28. It is therefore a matter of elementary logic that it would be for the Applicants to submit requests for investigations directly to the Head: DPCI and not to the NPA. When regard is had to the powers described in Section 28, it is clear that these could not be exercised in respect of an investigation relating to events and persons located outside the borders of the Republic.

[11] Adv Simelane's "AA" para 21 CB 4 Vol 14 at pp 1449 - 1450

Consequently, Section 17F(4) requires that the NDPP must ensure that a dedicated component of prosecutors is available to "*assist and cooperate with members of the directorate in conducting its investigations.*" Obviously, this assistance is in respect of investigations initiated by the DPCI. In this regard the position in the NPA Act, prior to amendment, that prosecutors manage and direct specific investigations remains unaltered. Since the Presidential Proclamation establishing the PCLU has not been recalled, the PCLU must as from 6 July 2009 be considered to be the dedicated component of prosecutors in respect of domestic Rome Statute offences.

12.10 Notwithstanding the above clear and unambiguous legislation and the *dicta* in ***Powell***'s case, [12] the Applicants still maintain that it is the responsibility of the NDPP and/or the Second Respondent to initiate the investigation. We submit that their submissions in this regard are without substance and are bad in law. Basically they rely on four grounds, which we refute as follows:

12.10.1 In the Memorandum of counsel which accompanied the request for investigation and in the Founding Affidavit, reliance is placed on the Presidential Proclamation creating the PCLU, as well as the NPA Policy, NPA Act and the UN Guidelines on the Role of Prosecutors. We submit that a

[12] ***Powell NO and Others v Van der Merwe NO and Others*** *supra*

simple reading of these documents supports no such conclusion. Specifically with the UN Guidelines, the right to investigate offences by prosecutors is only where authorized by law and consistent with local practice. As Adv Simelane has explained, [13] South Africa does not have an inquisitorial system in terms of which prosecutors perform investigative powers. Reliance is also placed on the fact that it is alleged that the PCLU has a dedicated body of investigators. Both Advocates Mpshe SC and Simelane have confirmed that at no stage did the PCLU ever have any investigators. In addition, Senior Superintendent Bester in his Affidavit confirmed that at the time when the First Applicant made its request, the investigation of offences under the domestic Rome Statute formed part of a SAPS structure, namely the Crimes Against the State Unit, falling under the Detective Service of SAPS. This is further proof that at the time when the request was made, the initiation of the investigation was a SAPS responsibility and more specifically that of the Detective Service.

12.10.2 In the Supplementary Affidavit, the Applicants argue that the power to initiate an investigation rests with the NDPP by virtue of the powers conferred upon him in terms of

[13] Adv Simelane's "AA" CB 4 Vol 14 p 1492

Section 5 of the domestic Rome Statute. Section 5(1) provides that a prosecution may not be instituted without the consent of the NDPP. Section 5(5) requires that a decision not to prosecute be taken by the NDPP. Section 5(3) states that when making a decision whether to prosecute, the NDPP must recognize the principle of complementarity. A simple reading of these sections establishes that they have nothing to do with making a decision to initiate an investigation, but only with a decision whether or not to prosecute. Section 16 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No 33 of 2004, also requires the consent of the NDPP to the institution of prosecutions in respect of that Act. In ***S v Bogaards*** [14] the Court held that the purpose of the section was to ensure that the decision to prosecute a person on a serious charge be taken "*by the highest official after properly considering all the relevant facts and implications of such a prosecution.*" The Court went on to hold further that "*if the NDPP can be expected to make a decision to issue the certificate, prior to the proper investigation of the case, that might undermine the objective of the section.*"

[14] ***S v Bogaards*** (864/10) [2011] ZASCA 196 (21 November 2011) at paras 47 and 52

This is in line with the decision of the House of Lords in ***R v Director of Public Prosecutions, ex parte Kebeline and others; R v Director of Public Prosecutions, ex parte Rechachi.*** [15] The UK counter-terrorism legislation has an identical provision and its existence was motivated as follows:

> *"The purpose of requiring the DPP's consent to prosecutions ... is, to ensure that the decision to prosecute is taken at a very senior level in the Crown Prosecution Service (the CPS), following a careful consideration of all relevant matters including the public interest, and to protect defendants from the risk of oppressive prosecutions."*

Since it cannot seriously be contended that the offences created under the domestic Rome Statute are less serious than terrorist related offences, the *dicta* referred to above are applicable to Section 5 of the Rome Statute. These powers are therefore to be exercised after the proper investigation of the charges and are not be used as the legal basis to initiate an investigation. It is in fact startling that the Applicants advance this argument in the Supplementary Affidavit in the light of the Memorandum compiled by the First Applicant's counsel, which accompanied the request for the initiation of an investigation. In the Memorandum, [16] the Applicants' counsel unequivocally stated that the initiation of

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[15] ***R v Director of Public Prosecutions, ex parte Kebeline and others; R v Director of Public Prosecutions, ex parte Rechachi*** [1999] 4 All ER 801 at 828

[16] Applicants' Memorandum ('Memorandum') in para 76 CB 1 Vol 1 p 118

an investigation and the issue of a warrant of arrest were not subject to the consent of the NDPP, which is again the position in their Heads. It is trite that a simple reading of the domestic Rome Statute reveals that it in fact contains no provision which could be cited as authority for either the NDPP or any other member of the NPA to initiate an investigation.

12.10.3 In the Replying Affidavit and their Heads, the Applicants seek to rely on the Second Respondent. In this regard it is alleged that the Second Respondent expressed a view *"that the PCLU was seriously considering launching an investigation."* It is also alleged that the Second Respondent was *"clearly attempting to fulfil his mandate to direct and manage investigations"*. Finally it was contended that Adv Mpshe's view that the NPA had no authority in law to initiate investigations contradicted the view expressed by the Second Respondent. We submit that a simple perusal of all the documentation relating to the Second Respondent, contained in the First Respondent's record, establishes a different position. We merely highlight the following:

12.10.3.1 Nowhere in the record is there an indication that the Second Respondent either initiated an

investigation or took any steps in this regard. Certainly:

- He did not approach a Magistrate to apply for warrants of arrest upon receipt of the First Applicant's material

- He did not submit a request for mutual legal assistance to the Zimbabwean Government

- He did not have any engagements with SAPS

- He did not interview any of the witnesses in South Africa

12.10.3.2 In his letter to the Prosecutor of the International Criminal Court, dated 22 April 2008, he merely sought advice on legal issues so as to advise the NDPP on making a decision whether to prosecute. [17]

12.10.3.3 In his letter, dated 1 July 2008, addressed to his immediate superior, the Second Respondent

[17] CB 3 Vol 8 pp 830 - 832

recommended that an investigation be instituted but stated twice that it was for the NDPP to make the decision to institute the investigation. As we have demonstrated *supra*, this view is incorrect and, in fact, the statute does not give the NDPP the power to initiate investigations. [18]

12.10.3.4 In his letter dated 8 December 2008, to an office bearer of the First Applicant, he specifically distanced himself from the decision which had to be made on the matter. [19]

12.10.3.5 The letter of 15 December 2008, claiming that *"the PCLU is seriously considering launching an investigation"*, was authored not by the Second Respondent, but by an office bearer of the First Applicant. [20] No Confirmatory Affidavit has been filed by the Applicants from this person.

If regard is had to the Supporting – and Confirmatory Affidavit of Major General Jacobs, [21] he collected the First Applicant's material from the office of the Second Respondent. Nowhere in his affidavit does he

[18] CB 3 Vol 8 pp 852 - 854
[19] CB 3 Vol 8 p 863
[20] First Respondent's Record CB 3 Vol 8 pp 869 - 870
[21] CB 4 Vol 12 pp 1284 - 1297

state that the Second Respondent performed any acts which could be construed as managing or directing the investigation. This was consistent with the fact that the First Respondent's record is devoid of any written communications by the Second Respondent after the handover of the material to SAPS. In fact, Jacobs requested Senior Superintendent Bester to read the material in order to evaluate whether further investigations were necessary.

In terms of the Presidential Proclamation, the Second Respondent performed his powers under the direction of the National Director. We submit that it would be inappropriate for both Advocates Mpshe SC and Simelane to place reliance on the opinions of the Second Respondent where he is clearly wrong. The reasons why Adv Mpshe SC disregarded his views is set out at length in his Answering Affidavit. [22] The First Respondent's record clearly reflects:

- That he did not furnish the opinion dealing with the issues identified by Adv Mpshe SC in para 4.8

[22] Adv Mpshe's "AA" CB 4 Vol 13 para 30 p 1315

of his memorandum to the Minister. [23] On the contrary, he merely compiled 2¼ pages of notes on other issues. [24]

- In a three-page document to the Prosecutor of the ICC, he sought advice regarding making a decision to prosecute whereas the request was only for the initiation of an investigation. [25]

- He obtained an opinion from counsel for the First Applicant dealing with the issue of the gravity test applied by the ICC. [26]

- He thereafter submitted a 2½-page document, confirming that he had never approached SAPS and incorrectly advising Adv Mpshe SC that in terms of the domestic Rome Statute, the NDPP had to make the decision whether or not to initiate an investigation. [27]

Adv Simelane has also confirmed [28] that the Second Respondent requested him to deal with the *mandamus* himself and consequently he was entitled to make

[23] CB 3 Vol 8 pp 816 - 817
[24] CB 3 Vol 8 pp 827 - 829
[25] CB 3 Vol 8 pp 830 - 832
[26] CB 3 Vol 8 pp 834 - 851
[27] CB 3 Vol 8 pp 852 - 854
[28] Adv Simelane's "AA" CB 4 Vol 14 para 23 pp 1450 - 1451

submissions on this matter on behalf of the Second Respondent, who in any event works under his direction.

12.10.4 In the Replying Affidavit the Applicants seek to rely on the provisions of Section 17 of the amended SAPS Act which we have already dealt with. Insofar as a review of the decision to refer the request to SAPS is concerned, this reliance is misplaced because at the relevant time this legislation was not in existence. Secondly, as we have already demonstrated, if it was applicable, it does not authorize the NPA to initiate investigations. Finally, reliance is also placed on Section 179 of the Constitution. In this regard, we do no more than refer to the wording of this section, which has nothing to do with initiating investigations, but only with prosecution-related issues.

Consequently, we submit that it has not been proved that the First Respondent was wrong in concluding that neither he nor the Second Respondent had the legal power to initiate the investigation and that that decision had to be taken by the Fourth Respondent.

The decision not to initiate an investigation

13. This decision was taken by the Fourth Respondent but accepted by Adv Mpshe SC. We submit that this is entirely consistent with Section 24(7) of the NPA Act. Both the Memorandum of counsel and the Summary of Evidence which accompanied the request for an investigation made it clear that the purpose for such request was for the prosecution of the persons implicated in the material. Section 24(7) of the NPA Act required that the First Respondent refer the issue of initiating the investigation to SAPS. This was however a case where SAPS could not conduct an investigation and consequently guidance by the NPA in the conduct thereof did not arise. Section 24(7) does not require SAPS to conduct all investigations at the request of the NPA, but only those which are practical.

14. The reasons for not initiating an investigation are set out in Commissioner Williams' letter to Adv Mpshe SC, dated 29 May 2009. [29] Consequently the claim in the Applicants' Heads that the reasons are an *ex post facto* construction has to be rejected. We highlight the grounds because it will be necessary to, at some considerable length, deal with the correctness thereof:

    14.1 Although the First Applicant's argument on anticipated presence was not accepted by SAPS, the request was not declined on that

[29] First Respondent's Record CB 3 Vol 8 pp 892 - 894

basis. We submit however that should the Court consider ordering a reconsideration, it will be highly relevant at that stage.

14.2 The information comprising the First Applicant's material was insufficient to constitute evidence and was regarded as allegations.

14.3 In order to conduct a thorough Court-directed investigation, evidence would have to be obtained from Zimbabwe which could not be done utilizing existing legitimate channels. These channels required the assistance of the Zimbabwean authorities.

14.4 The offer of the First Applicant to make witnesses available and to assist in obtaining evidence could not be accepted. SAPS would have no control over the persons performing these functions and SAPS would run the risk of being accused of espionage if it did so. In addition, it was noted that the First Applicant had published an article in the Mail & Guardian, placing the request for an investigation in the public domain. It was feared that any investigation would result in further public disclosures, compromising such investigation.

14.5 Finally, the undertaking of the investigation would negatively impact on the Republic's diplomatic initiatives in Zimbabwe and also compromise the position of SAPS, which chairs the official SADC law enforcement agency (SARPCCO). The Zimbabwean Police would resist the investigation which would impact on ongoing and future criminal investigations in the direct interest of the Republic.

The sufficiency of the First Applicant's material

15. It is clear from both the Summary of Evidence and memorandum submitted by the First Applicant to the office of the Second Respondent that the purpose of requesting the initiation of an investigation was for a prosecution. In fact, in the Memorandum, [30] it was accepted that the apprehension and prosecution of the implicated parties was on the basis of evidence establishing that they were guilty of the crime against humanity of torture.

16. As a result of a number of conflicting statements made by the Applicants with regard to the sufficiency of the evidence we are constrained to deal with this issue at some considerable length.

17. Section 2 of the domestic Rome Statute provides that, in addition to the Constitution and South African law, three forms of international law are applicable to the interpretation of the Act. It is our submission that in all material aspects on the sufficiency of evidence necessary to prove a Rome Statute offence national and international law correspond.

18. We propose first to deal with international law:

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[30] Memorandum in para 3 CB 1 Vol 1 pp 82 - 83

18.1 Article 54(1)(a) of the international Rome Statute requires that the Prosecutor of the International Criminal Court, when conducting an investigation, *"must establish the truth, cover all facts and evidence and when so doing, investigate incriminating and exonerating circumstances equally."*

18.2 The ICC has in fact in certain cases declined to confirm charges due to the inadequacy of the evidence adduced to support them. In this regard, we refer to:

18.2.1 The judgment of the Pre-Trial Chamber 1 in the case of ***The Prosecutor v Bahar Idriss Abu Garda***, [31] where, *inter alia,* the following was said:

> *"The Chamber is therefore of the view that the evidence presented by the Prosecution in respect of Mr Abu Garda's participation in the First Meeting is weak and unreliable due to the many inconsistencies exposed above."*
>
> *"In this respect, the Chamber notes that such information, contained in a summary of the interview transcripts of a witness whose identity is unknown to the Defence, is not corroborated or supported by any other evidence, including the statements of those witnesses who allegedly participated in the attack."*
>
> *"For these reasons, the Chamber is not satisfied that there is sufficient evidence to establish substantial grounds to believe that*

[31] ***The Prosecutor v Bahar Idriss Abu Garda***, Case no ICC-02/05-02/09, dated 8 February 2010 at paras 173, 177-178 and 208

the Second Meeting took place as alleged by the Prosecution."

"Considered as a whole, the evidence of the Prosecution witnesses from AMIS regarding the purported existence of an armed group under the command and control of Mr Abu Garda in the area of Haskanita at or around the time of the attack on the MGS Haskanita is not sufficient to support the Prosecution's allegations."

18.2.2 The judgment of the Pre-Trial Chamber 1 in the case of ***The Prosecutor v Callixte Mbarushimana***, [32] is to similar effect:

"There is no provision in the statutory framework of the Court which expressly states that inconsistencies, ambiguities or contradictions in the evidence should be resolved in favour of the Prosecution."

"The Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of the evidence necessary to prove those charges to the requisite level in advance of the confirmation hearing."

"The duty of the Prosecution to provide sufficient factual details in the DCC is the corollary of the right of the suspect to be clearly informed of the charges against him, so that he is in a position to properly defend himself against these charges."

"Given (i) the paucity of the information provided in these UN reports, (ii) the identified inconsistencies between the information provided and the Prosecution's allegations, and (iii) the lack of any corroborating evidence, the Chamber is of the view that the evidence submitted by the Prosecution is not sufficient to establish

[32] ***The Prosecutor v Callixte Mbarushimana***, Case no ICC-01/04-01/10, dated 16 December 2011 in paras 45, 82, 112 and 120

> *substantial grounds to believe that the alleged attacks occurred in Ruvundi, Mutakato, or Kahole."*

18.2.3 The judgment of the Pre-Trial Chamber in the ***Situation in the Democratic Republic of Congo,*** [33] emphasised that the fundamental right of an accused to his liberty required of the Court not to take any decision limiting such right on the basis of applications where key factual allegations were fully unsupported.

18.2.4 In the judgment of the Trial Chamber Court in the case of ***The Prosecutor v Thomas Lubanga Dyilo,*** [34] the ICC found that the right to a fair trial was a fundamental one and included the entitlement to disclosure of exculpatory evidence. The Court remarked:

> *"Cases where evidence has been hidden from the trial court have left bitter memories in the history of justice."*

In essence, the Applicants seek the arrest and prosecution of a number of persons, purely on the basis of a handful of witnesses selected by

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[33] ***Situation in the Democratic Republic of Congo,*** Case No ICC-01/04-01/07, dated 10 February 2006 in para 11

[34] ***The Prosecutor v Thomas Lubanga Dyilo,*** Case No ICC-01/04-01/06, dated 13 June 2008 in para 84

the First Applicant and denying SAPS the opportunity to do a full investigation which would include establishing the existence or otherwise of exculpatory evidence.

18.2.5 In the judgment of the Trial Chamber in the matter of ***The Prosecutor v Thomas Lubanga Dyilo,*** [35] the ICC found that the consequences of the non-disclosure of exculpatory evidence would constitute a violation of the rights of the accused in bringing him to justice and could justify the staying of the proceedings. In this regard, it was held that this would not be dependent on the Prosecutor having acted *mala fides,* but merely that the non-disclosure had taken place.

18.2.6 We submit that a perusal of judgments of the International Criminal Tribunal for the former Yugoslavia also reveals that sufficiency of evidence is necessary for the institution of charges. We merely in this regard refer to the

[35] ***The Prosecutor v Thomas Lubanga Dyilo*** *supra* in para 90

Trial Chamber judgment in the ***Prosecutor v Stanislav Galic***: [36]

> *"The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond a reasonable doubt by a reasonable trier of fact is the key concept ... however, where the evidence is so manifestly unreliable or incredible that no reasonable tribunal of fact could credit it, the evidence should be dismissed."*
>
> *"... Thus, the Trial Chamber considers that the totality of the evidence submitted in relation to Scheduled Sniping Incident No 7 does not provide a sufficient basis upon which a reasonable trier of fact could be satisfied beyond a reasonable doubt that someone under the command and control of the Accused shot Mrs Dizdarevic. There is therefore no case for the Accused to answer in relation to Scheduled Sniping Incident No 7."*
>
> *"... the Trial Chamber considers that the totality of the evidence relating to Scheduled Sniping Incident No 19 does not provide a sufficient basis upon which a reasonable tribunal of fact could be satisfied beyond a reasonable doubt that the troops under the command of the Accused shot Mrs Husovic. There is therefore no case for the Accused to answer in relation to Scheduled Sniping Incident No 19."*

18.2.7 In the "***Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the***

[36] ***Prosecutor v Stanislav Galic***, Case no IT-98-29-T, dated 3 October 2002 in paras 9, 11, 21 and 27

Federal Republic of Yugoslavia" [37] it was stated that:

> *"... the Prosecutor will also take into account a number of factors concerning the prospects of obtaining evidence sufficient to prove that the crime has been committed by an individual who merits prosecution in the international forum."*

18.2.8 We have not referred to judgments from the International Criminal Tribunal for Rwanda but we submit that a perusal thereof will also emphasise the necessity for sufficiency of evidence. If necessary, we will refer to the relevant judgments during the course of oral argument.

18.2.9 As Adv Simelane has explained, [38] Section 4(3)(c) of the domestic Rome Statute is based on the original provisions of the forerunner to the Canadian Crimes against Humanity and War Crimes Act. We therefore submit that Canadian authority will be highly persuasive when dealing with an interpretation of the domestic Rome Statute. In ***Zhang v***

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[37] "***Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia***" in para 5

[38] Adv Simelane's "AA" CB 4 Vol 14 para 31 p 1456

Canada (Attorney General), [39] the Federal Court of appeal held in that:

> *"It would not be appropriate, in the public interest, to allow charges to be laid and thereby identify and accuse persons of very serious offences, without a full police investigation"* (our emphasis).

See ***R v Finta*** [40] where the Court, with reference to war crimes and crimes against humanity, held:

> *"It is essential in a case where the events took place 45 years ago that all material evidence be put before the jury. With the passage of time it becomes increasingly difficult to get at the truth of events: witnesses die or cannot be located, memories fade, and evidence can be so easily forever lost. It is then essential that in such a case all available accounts are placed before the court".*

18.2.10 Cassese, an international jurist with impeccable credentials, remarked: [41]

> *"It would be judicious for prosecutors, investigating judges, and courts to invoke this broad notion of universal jurisdiction with great caution, and only if they are fully satisfied that compelling evidence is available against the accused. Generally speaking it would seem harmful or at least illusory to transform national judges into some sort of 'knights errant of human nature', in the words attributed to Beccaria,*

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[39] ***Zhang v Canada (Attorney General)***, 2007 FCA 201 (CanLII), in para 8
[40] ***R v Finta*** [1994] 1 S.C.R. 701
[41] Cassese "***International Criminal Law***", 2003 at p 253

> *charged with righting the most serious wrongs throughout the world."*

19. There have been no prosecutions in South Africa in terms of the domestic Rome Statute. We submit however that the issue of sufficiency of evidence has been dealt with extensively by the Courts and in this regard we only refer to judgments in matters where the offences could be classified as Rome Statute offences because of the severity thereof and the circumstances under which they were committed.

19.1 In ***S v Basson*** 2005 (1) SA 171 (CC) [42] (in a matter where the Court found that certain of the charges fell within the definition of a war crime as contemplated by the Geneva Conventions), the following was said:

> *"In conclusion, it should be emphasised that none of the above should be taken as suggesting that because war crimes might be involved, the rights to a fair trial of the respondent as constitutionally protected are in any way attenuated. When allegations of such serious nature are at issue, and where the exemplary value of constitutionalism as against lawlessness is the very issue at stake, it is particularly important that the judicial and prosecutorial functions be undertaken with rigorous and principled respect for basic constitutional rights. The effective prosecution of war crimes and the rights of the accused to a fair trial are not antagonistic concepts. On the contrary, both stem from the same constitutional and humanitarian foundation, namely the need to uphold the rule of law and the basic principles of human dignity, equality and freedom."*

[42] ***S v Basson*** 2005 (1) SA 171 (CC) in para 129

19.2 In ***S v Msimango and Others*** (A case dealing with the murder of a mayor during the course of political violence), [43] the Court held:

> *"... It is not unusual in modern times, in this country and others, for people high up to be implicated in crimes. When that is done every effort ought to be made to ensure that the allegations are not wild and fantastical before they are led as evidence in a court."*

In the same matter, the Court quoted with approval the provisions of the NPA's Code of Conduct requiring that prosecutors should ensure that matters are properly investigated whether such investigations were to the advantage or disadvantage of the accused. [44]

19.3 In ***S v Peter Msane & 19 Others*** (This was a case where the former Minister of Defence and a large number of former Generals were charged with the establishment of an offensive unit in order to murder members of the Liberation Movements), [45] the following was said:

> *"I regard it as a pity that BA Khumalo was not asked to do at least a photo identification ... The reason for not having done so seems to us to be short sighted and lacking in proper thought ..."*

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[43] ***S v Msimango and Others***, decided in the Durban and Coast Local Division on 31 July 2001 (Case No CC45/01) at p 12

[44] ***S v Msimango and Others***, decided in the Durban and Coast Local Division on 31 July 2001 (Case No CC45/01) at p 12-13

[45] ***S v Peter Msane & 19 Others***, heard in the Durban and Coast Local Division (Case No CC1.96) on 4 March 1996 at pp 4387 - 4389

> *"In this case there is, as far as we can see, no objective evidence or acceptable evidence which tends to implicate the first six accused in this event apart from these three witnesses."*
>
> *"Colonel van den Berg who, on the evidence before us, could have corroborated Opperman as to the acquisition of the firearms from Ferntree was not called. He could also have assisted in the interpretation of some potentially very incriminating documents of which he was the author. He was available and he was not called ... There is authority that under the correct circumstances inferences may be drawn against the State for failure to call available witnesses."*

19.4 In ***S v T***, [46] the Court remarked that:

> *"It is a matter of grave concern to note the increased prevalence of offences of a sexual nature. It is by no means surprising therefore, to hear, literally on a daily basis, strident calls from the public at large for offenders to be visited with the harshest penalties possible."*
>
> *"Against this background it is incumbent on the police and the prosecution to ensure that these offences are diligently and thoroughly investigated and all the relevant evidence presented to the court so that justice may prevail. This has certainly not been the case here as a reading of the record reveals. The circumstances surrounding the commission of these offences were patently poorly investigated by the police. There is no indication that anyone inspected the house, and in particular the toilet, where the rapes allegedly occurred so that the court could be provided with descriptions and even photographs of these structures. It appears further that certain witnesses, who could have provided valuable information, were never interviewed with a view to establishing whether their evidence was essential or not in the prosecution of these crimes."*

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[46] ***S v T*** 2000 (2) SACR 658 (Ck) in paras 12-14

> *"A similar lack of diligence is apparent on the part of the prosecutor. His failure to establish that the police had conducted the necessary investigations ..."*

19.5 See also ***S v Van der Westhuizen***, [47] quoting the Supreme Court of Canada in ***Boucher v The Queen***, where the Court held that:

> *" ... it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented."*

19.6 See also ***Zuma and Others v National Director of Public Prosecutions***, [48] where the Court held that an investigation required the gathering of evidence:

> *"A criminal investigation, in ordinary language, is conducted not only to inform the investigator whether an offence was committed, but also to gather evidence that will prove its commission in due course."*

19.7 Para 4(a) of the Prosecution Policy of the NPA, appended to Adv Mpshe SC and Adv Simelane's affidavits, is unequivocally to the effect that prosecutors must satisfy themselves as to whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution and, in the case of doubt, to request further investigations.

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[47] ***S v Van der Westhuizen*** 2011 (2) SACR 26 (SCA) in para 10

[48] ***Zuma and Others v National Director of Public Prosecutions*** 2008 (1) SACR 298 (SCA) in para 14

20. The sufficiency of the material collected by the First Applicant was evaluated firstly by Senior Superintendent Bester, the Commander of the Unit responsible for investigating Rome Statute offences when the request was made and thereafter by Brigadier Marion, a very senior police officer with extensive experience with the investigation of violent, political crimes and crimes committed by the police. Bester concluded that the material was insufficient to sustain any form of prosecution and would have to be reinvestigated in its entirety. The contents of Bester's affidavit have never been challenged by the Applicants and therefore they are deemed to have admitted the contents. Marion concluded in respect of the evidence implicating the persons, who had allegedly physically participated in the torture, that this was inadequate for a Court-directed investigation and that the allegations of torture would have to be investigated *de novo.* [49] In respect of the persons implicated as having been guilty by way of command responsibility as contemplated in the international Rome Statute, he concluded that there was no evidence of any nature whatsoever implicating these persons. [50] Although, in the Replying Affidavit, it is stated in relation to Marion's affidavit that it is not admitted that further investigations are necessary, it is submitted that a perusal of the Replying Affidavit demonstrates that no detailed and proper response has been provided as to Marion's identification of all

[49] Marion's "Sup A" CB 4 Vol 12 para 14 pp 1251 - 1254
[50] Marion's "Sup A" CB 4 Vol 12 paras 25 - 26 pp 1266 - 1269

the relevant deficiencies. Consequently we submit that the Applicants should be deemed to have admitted his findings. Despite relying extensively on Marion's Affidavit in their Replying Affidavit, the Applicants seek to now argue that it is inadmissible. It is trite that in a review a party may elaborate upon the original grounds for reaching the decision but may not rely on new grounds. [51] The inadequacy of the First Applicant's material was the first ground relied on by Commissioner Williams and was supported by the Affidavit of Bester. Marion's Affidavit merely confirms the correctness of this ground and Bester's assessment and we submit, is admissible on this basis. The Applicants in their Heads have failed to draw a distinction between grounds relevant to a review and those relevant to their secondary relief, namely a *mandamus*. It is trite that when consideration is given to the latter issue, the Court is entitled to take into account all factors (whether or not they were considered at the time of the review) which would mitigate against ordering a reconsideration. It goes without saying that a Court will not order a reconsideration if this would constitute a *brutum fulmen*. In this regard, Marion gives evidence highly relevant to the reconsideration, namely the absence of the majority of the implicated parties in the country. In addition, in the Supplementary Affidavit the Applicants made extensive allegations to the effect that the First Applicant's material constituted a prosecutable case requiring no further investigation. It was perfectly

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[51] ***Nieuwoudt v Chairman, Sub-Committee on Amnesty for the TRC* 2002 (1) SACR 299 (C)**

legitimate therefore for the Fourth Respondent to instruct Marion to assess the material in the light of this new allegation. This we submit is a further ground for the admissibility of his Affidavit. In any event, we submit that any person with a knowledge of sufficiency of evidence could simply read the statements and other documents collected by the First Applicant and assess their adequacy or otherwise. We will therefore if necessary deliver full argument on the nature of the material.

21. Criticisms which would be applicable in respect of any charge sought to be investigated, included:

21.1 The spelling of the names of the alleged torturers differed from witness to witness necessitating that the identities be properly established independently of them.

21.2 The descriptions of the acts of alleged torture, given by the witnesses, were inadequate.

21.3 The medical reports produced to corroborate the allegations of torture were in many instances illegible, too scanty to constitute corroboration and compiled long after the dates of the examinations. No medical reports had been submitted in respect of a number of witnesses.

21.4 At least 17 statements were the product of a practice referred to as "*copying and pasting*", casting doubt as to whether the averments originated from the witness or the statement taker.

21.5 A number of these statements had neither been signed nor commissioned and in respect of other statements, they had not been properly commissioned. We refer to Section 43(1)(c) of the CPA, which requires that a Magistrate may only issue a warrant on the basis of a written application to the effect that the person has been implicated on the basis of "*information taken upon oath*".

21.6 The Applicants insisted on a redacted record being filed ostensibly to protect the identities of the witnesses. We however reserve the right in oral argument to refer to specific statements if our submissions as to the inadequacy of the material are disputed.

22. Marion identified an extensive number of further investigations which would be necessary, all of which would have to be conducted in Zimbabwe.

23. The Applicants however do not seek an investigation into any ordinary crime, but torture as a crime against humanity. Marion identified a number of additional investigations which would be necessary to prove this specific crime and identified further shortcomings in the witnesses' statements relating to this offence. [52]

24. Special elements have to be proven in respect of a crime against humanity. In the case of ***The Prosecutor v Katanga and Ano***, [53] the ICC gave the following definition of a "*widespread and systematic attack*":

> *"... the term "widespread" has also been explained as encompassing an attack carried out over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians..."*
>
> *"Accordingly, in the context of a widespread attack, the requirement of an organisational policy pursuant to article 7(2) (a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population..."*
>
> *"The term "systematic" has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts... or as "patterns of crimes" such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis."*

25. Cassese, [54] quoting ICTY jurisprudence, pointed out that the *mens rea* of the perpetrator required proof that he was cognizant of the link

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[52] Marion's "Sup A" CB 4 Vol 12 paras 16 – 18 pp 1256 - 1261

[53] ***The Prosecutor v Katanga and Ano***, Case no ICC-01/04-01/07 on 30 September 2008 in paras 395-397

[54] Cassese *supra* at pp 81-82

between his misconduct and the relevant widespread or systematic attack and, at least on the basis of *dolus eventualis,* appreciated that his conduct contributed to the attack. See also ***Mugesera v Canada (Minister of Citizenship and Immigration),*** [55] where the Supreme Court of Canada defined the criminal act and guilty mind necessary for a crime against humanity in detail.

26. In order to satisfy the above requirements, the First Applicant submitted that "*the acts of torture had been committed pursuant to a policy conceived by and promulgated through the Zanu-PF and aimed at opposition party members or persons suspected of being opposed to the ruling regime.*" [56]

27. We highlight the following deficiencies in the First Applicant's material relating to these issues identified by Marion. Again, these all or issues that may be deduced from a mere reading of the statements themselves:

27.1 Of the 26 statements taken (relating to the alleged torturers) 14 of the witnesses did not allege that they were members of the political opposition, nor that the torture was perpetrated for political reasons. In the Summary of Evidence and Founding Affidavit, the First Applicant alleged

[55] ***Mugesera v Canada (Minister of Citizenship and Immigration),*** [2005] 2 S.C.R. 100, 2005 SCC 40 in para 141-179
[56] Memorandum in para 21 CB 1 Vol 1 pp 93-94

that it had deliberately decided to invoke the domestic Rome Statute in response to the situation in Zimbabwe. It would be very difficult under those circumstances to justify why elementary elements of the crime were not canvassed with more than half of the witnesses concerned.

27.2 Several of the witnesses who admitted to be members of the political opposition did not provide information which would be necessary for proving the elements of the crime.

27.3 A number of statements were taken from members of the political opposition shortly before the election in Zimbabwe, opening the door for the veracity of these allegations to be challenged.

27.4 A possibility existed that the persons were tortured not for the purposes of furthering a widespread or systematic attack on the civil population but simply because they were suspected of complicity in crimes which were under investigation. While using torture for this purpose would be reprehensible in the extreme, it would not establish the elements necessary for a crime against humanity. See the ICTY judgment in the ***Prosecutor v Kunarac & Others,***

[57] where the Court found that the acts of the accused furthered the attack when they knew of the existence thereof and contributed towards it. The domestic Rome Statute does not permit, in the alternative, that accused be convicted on charges of assault, etc.

28. The adequacy of the reports from non-Governmental organizations produced by the First Applicant was also criticized. [58]

29. We make the following submissions regarding the admissibility of these reports:

29.1 Only the following reports were submitted on 14 March 2008:[59]

29.1.1 "*Terror tactics in the run-up to parliamentary elections, June 2000*", published by Amnesty International

29.1.2 "*You Will Be Thoroughly Beaten*", published by Human Rights' Watch in November 2006

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[57] ***Prosecutor v Kunarac & Others***, Case No IT-96-23-T and IT-96-23/1-T, dated 22 February 2001, at paras 434 and 654

[58] Marion's "Sup A" CB 4 Vol 12 para 12 p 1261

[59] CB 3 Vol 7 pp 764 - 792

29.1.3 "*Bashing Dissent*", published by Human Rights' Watch in May 2007

29.2 As is clearly stated in the Founding Affidavit, the additional reports incorporated into the Notice of Motion were solely for the purpose of establishing the commission of further acts of violence, justifying the necessity for the application. They have no relevance therefore to the correctness of the decision based on the material which was placed before the First and Fourth Respondents at the relevant time.

29.3 The domestic Rome Statute came into effect on 16 August 2002 and Section 5(2) of the Act specifically prohibits the institution of prosecutions in respect of crimes committed before the commencement of the Act. It is upfront therefore submitted that the Amnesty International report is not particularly helpful.

29.4 We submit that applying South African law the only scope for the admissibility of these reports would be on the basis of either expert opinion evidence or hearsay evidence. We submit that the criteria for the admissibility under either ground are not established.

29.4.1 The requirements for the admissibility of expert evidence have been succinctly set out in ***S v Kleynhans***.[60] These are briefly:

> *"The expert witness must be called to give evidence on matters calling for specialized skill or knowledge. Evidence on opinion matters which do not call for expertise is excluded because it does not help the Court."*
>
> *"The witness must be a qualified expert."*
>
> *"The facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others."*
>
> *"Opinion evidence must not usurp the function of the Court. The witness is not permitted to give an opinion upon the legal or general merits of the case."*

29.4.2 The common denominator of the three reports is that persons attached to the organizations summarise interviews with victims, draw certain conclusions therefrom and make certain recommendations. We submit that a Trial Court is in as favourable a position as the authors of the reports to hear witnesses describe how they were the victims of violent attacks by members of the Zimbabwean Government and make a finding as to whether the elements of a crime against humanity have

[60] ***S v Kleynhans*** 2005 (2) SACR 582 (W) at 585

been established. On that basis alone, the reports would be inadmissible.

29.4.3 Even were expert testimony necessary on the issue, it has not been established that the authors of the reports have the necessary specialized skill or knowledge to make the opinions admissible. The authors of two of the three reports are not identified at all whereas in respect of the third report, the author is a researcher, whose qualifications are not revealed. In addition, the report was edited and reviewed by a number of other persons and in addition, production coordination was provided by other persons.

29.4.4 As indicated, the reports are based on hearsay accounts from alleged victims and consequently, have not been proved by admissible evidence. Obviously, the "expert" would have to testify unless his/her report was admitted by the defence.

29.4.5 The admission of hearsay evidence is regulated in terms of Section 3(1)(c) of the Law of Evidence Amendment Act, No 45 of 1988. A prerequisite for invoking this provision is that a reason must be provided as to why the author of the evidence has not himself/herself testified. Once this hurdle has been overcome, there are a number of other criteria which have to be satisfied and the admission of the hearsay must be in the interests of justice. In ***S v Molimi*** [61] the Court held that in determining whether the hearsay evidence should be admitted, the fair trial rights (set out in Section 35(3) of the Constitution) had to be properly respected. One of these rights is for the accused to have the opportunity to cross-examine the authors of statements. We consequently submit that where an accused has been charged with the most serious crimes known to mankind and is facing life imprisonment, the circumstances under which the Courts attached weight to NGO reports in ***Tantoush v Refugee Appeal Board and***

[61] ***S v Molimi*** 2008 (2) SACR 76 (CC)

Others [62] and ***Kaunda and Others v President of the Republic of South Africa and Others*** [63] would not apply.

29.4.6 We submit that the international tribunals dealing with Rome Statute offences have also adopted a cautious approach towards the admission of hearsay evidence. In this regard we refer to:

29.4.6.1 The judgment in the Appeals Chamber of the ICTY in the case of the ***Prosecutor v Zlatko Aleksovski,*** [64] where the Court held that if the hearsay evidence is admitted to prove the truth of its contents, the Court must be satisfied that it is reliable for that purpose. The probative value of a hearsay statement will depend on the context and character of the evidence. The absence of

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[62] ***Tantoush v Refugee Appeal Board and Others*** 2008 (1) SA 232 (T) para 120
[63] ***Kaunda and Others v President of the Republic of South Africa and Others*** 2005 (4) SA 235 (CC) [also reported at 2005 (1) SACR 111; 2004 (10) BCLR 1009] paras 116 - 125
[64] ***Prosecutor v Zlatko Aleksovski***, dated 16 February 1999

the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence.

29.4.6.2 The **Final Report to the Prosecutor** in the NATO Bombing campaign, [65] where the Committee did not accept Amnesty International and Human Rights' Watch reports to the effect that NATO had committed war crimes.

29.4.6.3 The case of ***The Prosecutor v Callixte Mbarushimana***, [66] where the Pre-Trial Chamber held that:

> "*The Chamber reaffirms previous findings that, although the use of anonymous witnesses' statements and summaries of anonymous witnesses'*

[65] See *supra* at para 90
[66] *Supra* in para 49

statements is permitted at the pre-trial stage, such evidence may be taken to have a lower probative value in order to counterbalance the disadvantage that it might cause to the Defence. Furthermore, anonymous hearsay contained in witness statements will be used only for the purposes of corroborating other evidence, while second degree and more remote anonymous hearsay contained in witness statements will be used with caution, even as a means of corroborating other evidence. Hearsay from a known source will be analysed on a case by case basis, "taking into account factors such as the consistency of the information itself and its consistency with the evidence as a whole, the reliability of the source and the possibility for the Defence to challenge the source".

29.4.6.4 ***The Prosecutor v Callixte Mbarushimana***: [67] where the ICC held:

"The evidentiary weight to be attached to the information contained in documents emanating from Human Rights Watch will be assessed on a case-by-case basis. As a general principle, the Chamber finds that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness and authenticity of such information.

[67] *Supra* in para 78, 117, 232 and 261