Accordingly, such information will be used only for the purpose of corroborating other evidence."

"Only a single UN Report refers to the alleged attack in Malembe in January 2009, stating that [REDACTED]. By the same token, the only reference to the village of Busheke comes from a Human Rights Watch Report claiming fourteen civilians were killed, including twelve women and girls who were also raped. In both cases the Prosecution relied only on a single UN or Human Rights Watch Report and has not provided any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations. The sources of the information contained in both the UN and Human Rights Watch Report are anonymous..."

"The Chamber further notes that the only pieces of evidence tendered by the Prosecution to support its allegations that war crimes were committed by the FDLR in Kipopo are reports from media sources and Human Rights Watch, according to which FDLR combatants attacked Kipopo at night, killing seventeen civilians, including eight children. The Chamber notes that the only testimony that refers to civilians being attacked in Kipopo is the hearsay testimony of Witness 544. Accordingly, the Chamber finds that the evidence submitted in support of this charge is insufficient to establish to the required threshold that the war crimes of attacking civilians ..."

"Regarding the Human Rights Watch Report,... the Majority observes that, whilst detailing a

number of incidents and attacks allegedly committed by FDLR troops against the civilian population of the Kivus, it does not go so far as to suggest that such attacks were carried out in furtherance of a general FDLR order or policy to attack the local civilian population, or to create a humanitarian catastrophe in the terms outlined by the Prosecution."

29.4.6.5 The ICTY in the case of the ***Prosecutor v Milan Milutinovic & Others,*** [68] where the ICTY commented as follows regarding Human Rights' Watch reports:

> *"The Prosecution asserts that "[these reports should be admitted because the method of creation provides sufficient indicia of their reliability"... and places considerable emphasis on the care with which the organisations preparing the challenged reports undertook their tasks, and endeavoured to provide an objective assessment of the situation in Kosovo during the relevant period... With regard to the excerpts of the challenged reports that are based on interviews and statements of persons who were reporting alleged crimes during the indictment period, however, these organisations' careful*

[68] ***Prosecutor v Milan Milutinovic & Others***, Case No IT-05-87-T, dated 1 September 2006 in paras 21-22

methods can at best assure the accuracy of the process for recording the information contained in the eventual report, not the reliability of the material contents for the purposes of use in criminal proceedings... While both the challenged reports use extensive footnotes throughout these excerpts, they do not identify the persons interviewed, leaving the sources of this critical information largely anonymous... Moreover, Ms. Mitchell testified that she was in a supervisory role with regard to the collection and analysis of the information gathered from persons in Albania and Macedonia; she did not state that she ever took any of these statements herself. Although Mr. Abrahams did testify that he personally interviewed some of the declarants, it is not possible to determine, by reading the report, which portions of the tendered excerpts from Under Orders are based on interviews he himself conducted... Most of the tendered excerpts of the challenged reports set forth allegations of criminal conduct made by persons who claimed to be the victims of, or witnesses to, these crimes. Not having had the opportunity of hearing any of the persons upon whose statements these excerpts are based, the Chamber is not in a position to assess the reliability of the factual contentions contained therein."

> *"The introduction to the section of As Seen, As Told containing the bulk of the tendered excerpts itself concedes that certain allegations "are based on the statement of one person only", that other information provided by interviewees was "hearsay, rather than the statement of a direct victim or witness", and that there are certain "inconsistencies in the details given by different interviewees about particular incident."... These are the kinds of issues that go directly to the reliability of the assertions which these excerpts present, and which are best tested through the in-court examination of the declarants by the parties and the Chamber. In these circumstances, neither the report's acknowledgement of these problems,... nor the opportunity to cross-examine one of the authors and editors of the report, can adequately replace the opportunity to test the reliability of any of the persons making the statements. The Trial Chamber does not have before it sufficient material to satisfy it of the general reliability of the information on which this report is based."*

29.5 In the circumstances of the First Applicant's material, we submit that it is inherently unlikely that the contents of the reports would be admitted and to proceed to hand them in and thereby deny the accused the right to cross-examine

would render the trial unfair. In ***State v Molimi***, [69] the Court held that proceedings which accord little or no respect to the fair trial rights of the accused had the potential of undermining the fundamental adversarial nature of judicial proceedings and could threaten their legitimacy.

29.6 As Marion indicated, it would be necessary to trace the victims themselves and to conduct investigations based thereon. If however expert testimony is necessary, then we submit that this should be dealt with in the same manner as in ***Her Majesty The Queen v Desiré Munyaneza***, [70] where a Rwandan national was prosecuted in Canada for crimes against humanity and war crimes committed in Rwanda. The existence of the widespread or systematic attack was proved by calling an expert in history, who had extensive working experience with Rwanda at that time and was found by the Court to have done remarkable scientific work. The prosecution also called a General in the Canadian Army who was in charge of the UN Mission in Rwanda at the relevant time, as well as a medical expert who had first-hand experience of the Rwandan genocide.

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[69] *Supra*
[70] ***Her Majesty The Queen v Desiré Munyaneza***, 2009 QCCS 2201

30. The First Applicant sought not only the arrest and prosecution of the alleged torturers, but two Cabinet Ministers and four Directors General, whom it alleged were guilty by virtue of command responsibility. As pointed out by Marion, the only "evidence" implicating these persons, was a one-page document, entitled "*Believed de facto Chain of Command and Rank for Perpetrators*". We reserve the right to introduce this document during the course of oral argument if the Applicants submit that this constitutes sufficient proof of the guilt of these persons. Marion has already outlined what would be necessary to prove the elements of command responsibility for a superior who is not a military commander as set out in Article 25(b) of the international Rome Statute. We again refer to ***The Prosecutor v Callixte Mbarushimana***, [71] where the ICC refused to confirm charges because of the inadequacy of the evidence as to whether the accused or even the political leadership were aware of the crimes committed on the ground. In this regard, reliance was placed on evidence that not all the crimes which were committed against civilians were reported to the leadership and whether, if reporting took place, such reporting reached the accused. In the other Pre-Trial judgment, [72] dealing with the same accused, the ICC found that there was insufficient evidence to establish reasonable

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[71] *Supra* at para 313

[72] ***The Prosecutor v Callixte Mbarushimana***, Case No ICC-01/04-01/10, dated 28 September 2010 at para 36

grounds to believe that the accused had the power by not performing his tasks to frustrate the commission of the crimes.

We further point out that the issues which were identified for investigation by Marion correspond closely to the facts which are relevant to establishing the knowledge requirement as set out in the chapter, **Superior (or Command) Responsibility**, contained in the Genocide Encyclopaedia. We point out that key criteria for proof of command responsibility entail knowledge of the commission of the crimes or consciously disregarding information regarding the commission. We therefore emphasise the fact that it would appear that the witness statements were never referred to the Ministers and Directors General implicated, but, on the contrary, directly to the Second Respondent. In the circumstances we submit that these persons can hardly be accused of failing to have the allegations investigated.

31. The Applicants have however made the sufficiency of the material a major issue in this application. In assessing the weight to be attached to their submissions, we submit that the Court should rely strongly on the Applicants' submission unequivocally stated in their Replying Affidavit: [73]

> *"The Applicants have never suggested that they are professional investigators of international crimes against*

[73] Applicants' Replying Affidavit ("RA") CB 5 Vol 16 para 177 p 1616

humanity or police officers. This is clearly a function of the police and prosecution team ..."

32. This corroborates the averments of the Respondents to the effect that the Applicants lack the necessary professionalism to express opinions as to the sufficiency of evidence and we submit that this determines the weight which should be attached to their submissions. Their conduct is consistent with this lack of expertise:

32.1 Although the First Applicant decided to engage the services of three counsel, it did not do what one would think would be elementary, namely to read the statements and determine whether or not they were adequate to justify the arrest and prosecution of the implicated parties. On the contrary, not only was the Memorandum compiled the basis of "assumed facts", [74] but counsel was instructed that the statements constituted *prima facie* evidence of the proof of the commission of the crimes. [75] The inappropriateness of these instructions given to counsel is demonstrated in the affidavits of Bester and Marion.

32.2 The matter however does not rest there, since in the Supplementary Affidavit it was repeatedly stated that the torture docket constituted a prosecutable case, requiring no

[74] Memorandum in para 2 CB 1 Vol 1 p 82
[75] Memorandum in paras 23 and 26 CB 1 Vol 1 pp 94 - 95

further investigations, which fact had never been disputed by the Respondents. [76] Adv Mpshe SC, in fact, pointed out that the Applicants withheld including in this application his letter dated 12 May 2009, [77] where he pointed out that the material *"simply contained allegations which would require extensive investigations"*. We point out that in his letter of 10 December 2008, he also informed the First Applicant that: *"I am of the view that the allegations must be investigated by the South African Police Service."* [78] We submit, in the light of these two documents, it is reprehensible in the extreme to allege that the adequacy of the evidence had never been disputed.

32.3 Insofar as the allegation that a prosecutable case had been presented is concerned, we submit that this is inconsistent with the relief sought, namely the initiation of an investigation. What should have been done was to request the First Respondent to institute the prosecution.

32.4 This claim is also directly in conflict with the request made by the First Applicant's counsel, [79] requesting the NPA to initiate an investigation in order to confirm the evidence

[76] Applicants' Supplementary Affidavit ("SA") CB 3 paras 24, 25.1, 25.3, 30.7, 30.9, 33 pp 545, 546, 551, 552, 553
[77] First Respondent's Record CB 3 Vol 8 pp 889 - 890
[78] First Respondent's Record CB 3 Vol 8 p 873
[79] Memorandum in para 85 CB 1 Vol 1 p 122

contained in the dossier (Our emphasis). We point out that in the Memorandum, [80] counsel indicated that a prosecution could only be instituted, provided that there is sufficient evidence (Our emphasis).

32.5 Proof of the inappropriateness of the claim that the material constituted a prosecutable case lies again in the affidavits of Marion and Bester which, we repeat, have never been properly or at all challenged.

32.6 Paradoxically, this claim is also refuted by the very affidavits authored by the self same Applicants. In the same breath as making these claims in the Supplementary Affidavit, the following is also stated: [81]

> *"... They expected nothing more (and nothing less) than the proper use of conventional investigative methods and cooperation mechanisms and the investigation and prosecution of the individuals concerned with due regard for the Government's obligations under the ICC Act."*

We merely refer to the Replying Affidavit [82] where the Applicants deny stating that a prosecution was inevitable and that all they did was seek to provide assistance to the NPA in the form of evidence. They allege that the information (i.e. the material) was provided as a basis for

[80] Memorandum in para 51 CB 1 Vol 1 p 107
[81] SA at para 52 CB 3 p 559
[82] RA at para 84 CB 5 Vol 16 p 1586

the Respondents to perform their own investigation. [83] We also refer to where it is stated that the evidence (i.e. the material) was to form a basis to initiate an investigation. [84]

32.7 The Applicants also, in the Founding – and Supplementary Affidavits, make claims that the statements (i.e. the material) are *"corroborative, detailed, and substantial"*. [85] Yet again we are constrained to refer to the affidavits of Bester and Marion where these averments are conclusively refuted. As far as the reference to corroborative is made, we do no more than refer to the fact that the majority of the statements bear signs of copying and pasting.

32.8 Finally, in the Replying Affidavit, the Applicants allege that asking Marion to establish whether the First Applicant's material constituted a Court-directed investigation was the wrong question. [86] We submit for the following reasons that it is outrageous to suggest this:

32.8.1 The First Applicant sought ultimately the arrest and prosecution of the implicated parties, including at least six Ministers or Directors General.

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[83] RA at para 103 CB 5 Vol 16 p 1592
[84] RA at para 187 CB 5 Vol 16 p 1618
[85] SA at para 30.6 CB 3 p 551
[86] RA at para 30 CB 5 Vol 16 pp 1570 - 1571

32.8.2 The First Applicant's counsel conceded in the Memorandum that a prosecution should only be considered on the basis of sufficient evidence and that the information supplied should be corroborated. They however did not peruse the material in order to establish whether it was sufficient to institute a prosecution or not.

32.8.3 In the Founding Affidavit the Applicants, on several occasions, alleged that the adequacy of the material had never been questioned by the Respondents and furthermore, that it presented "*substantial and compelling evidence*". [87] As already indicated supra, in the Supplementary Affidavit these allegations are elevated to the claim that the material constituted a prosecutable case in its own right.

33. We submit that in the light of the above, the Fourth Respondent was correct in deciding that the first step for making a decision whether to initiate an investigation or not, was to assess the sufficiency of the material gathered by the First Applicant and that his further assessment

[87] FA at para 47 and 96.9 CB 1 Vol 1 pp 25 and 45

that it fell short of a Court-related investigation, was also correct. It needs to be emphasised that the Fourth Respondent did not place a burden on the First Applicant to produce a fully investigated docket. The adequacy or otherwise of the material is however highly relevant to the determination of what investigations would be necessary and whether the necessary evidence could be obtained.

The channels for obtaining evidence from Zimbabwe

34. The affidavits of Bester and Marion establish that all the investigations would have to be conducted in Zimbabwe. The Fourth Respondent concluded that the necessary evidence could not be obtained through legitimate channels, which required the consent and cooperation of the Government of Zimbabwe. The claim in the Applicants' Heads to the effect that the issue of mutual legal assistance was an afterthought is completely without merit.

35. We submit that the correctness of this assessment is based on the doctrine of sovereignty; hence necessitating the use of mutual legal assistance mechanisms.

36. We refer in this regard to Bassiouni: [88]

> *"It is an undisputed principle of international law that no state shall be allowed to exercise sovereign functions in the territory of*

[88] M Cherif Bassiouni "***A Treatise on International Criminal Law***", Vol 2, Jurisdiction and Cooperation at page 189

> *another state. Any sovereign act performed in the territory of a foreign state constitutes a violation of the sovereignty of that state. A state may act in the territory of another state only where the latter agrees, either in general by statute or treaty or by a specific declaration in an individual case. Such sovereign acts include all measures taken in the course of criminal proceedings, from the first police investigations down to the enforcement of criminal judgments. Where evidence required in criminal proceedings is available in a foreign country, it cannot, in principle, be obtained unless the foreign state cooperates ..."*

37. We refer also to where the learned author states: [89]

> *"At the present time, international police cooperation is based on traditional principles and relies on traditional ideas of cooperation between states. The concept of national sovereignty is, in fact, the cornerstone of international relations. It is the basis of the relationships between states; it is also the basis of the relationships between the law and international crime. It is common knowledge that at the present time the powers of Law and Police extend only to the borders of a country and that it is only possible to prosecute offenders at the international level if the states concerned have a reciprocal agreement."*
>
> *"This fundamental principle – the respect of national sovereignty – has a determining influence on police cooperation regarding international crimes. The very words used are significant; since we speak of "cooperation," we can only mean that equal effort is made in the common cause by all concerned. Since police cooperation respects national sovereignty, it will, by definition, be concentrated on ordinary law crimes or, in other words, those acts universally considered as offenses."*
>
> *"... All these possible interpretations of common crimes reveal the true importance of the principle of respecting national sovereignty. Each state has the absolute right and complete freedom to decide whether or not to cooperate."*
>
> *"It must be emphasized that everything depends on the will to cooperate at the international level – this is essential. Nothing and no one can bring about cooperation by force."*

38. We submit that these principles are classically illustrated in ***R v Hape***. [90]

We submit that considerable weight should be attached to the *dicta* in this

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[89] M Cherif Bassiouni "***A Treatise on International Criminal Law***" Vol 1 pp 682-683 and 686
[90] ***R v Hape***, 2007 SCC 26; [2007] 2 SCR 292

judgment, because in ***S v Kaunda*** [91] the Constitutional Court found that the *dicta* in ***R v Cook***, [92] relating to the doctrine of sovereignty, applied in South African Law. In ***Hape***, the Canadian Court further interpreted the ***Cook*** judgment. In ***Hape***, the Court described the relationship between Canadian domestic law and international law, as well as the principles pertaining to territorial sovereignty, non-intervention and extraterritorial assertions of jurisdiction: [93]

> *"Sovereign equality remains a cornerstone of the international legal system. Its foundational principles — including non-intervention and respect for the territorial sovereignty of foreign states — cannot be regarded as anything less than firmly established rules of customary international law ..."*
>
> *"Related to the principle of sovereign equality is the concept of comity of nations. Comity refers to informal acts performed and rules observed by states in their mutual relations out of politeness, convenience and goodwill, rather than strict legal obligation ..."*
>
> *"The principle of comity reinforces sovereign equality and contributes to the functioning of the international legal system."*
>
> *" ... the principle of comity encourages states to co-operate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders."*

The Court proceeded to, at considerable length and with reference to leading international authority, distinguish between the right of a State to pass laws, criminalising activities committed outside its territory (prescriptive or adjudicative jurisdiction) and the right of the State to enforce such laws

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[91] *Supra* at paras 41-42
[92] ***R v Cook***, 1998 CanLII 802 (SCC); [1998] 2 SCR 597
[93] ***R v Hape***, 2007 SCC 26; [2007] 2 SCR 292 in paras 46-47, 50 and 52

(enforcement jurisdiction). The Applicants, in their Heads, have only dealt with the former and completely ignored the latter. Although recognising universal crimes as being an exercise of adjudicative jurisdiction, the Court nevertheless held that enforcement jurisdiction applied: [94]

> *"Some examples can be found in criminal legislation, including the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, which addresses crimes of universal jurisdiction. Section 6(1) of that statute provides that every person who commits genocide, a crime against humanity or a war crime outside Canada is guilty of an indictable offence. Pursuant to s. 8, such a person may be prosecuted in Canada: (a) if at the time of the offence the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, after the time of the offence was committed, the person is present in Canada. These provisions exemplify valid extraterritorial prescriptive jurisdiction, and any trial for such offences would constitute a legitimate exercise of extraterritorial adjudicative jurisdiction. But, importantly, they do not authorize Canada to enforce the prohibitions in a foreign state's territory by arresting the offenders there."*
>
> *"In an investigation that takes place under foreign sovereignty, it is the foreign government that has a legal authority over the mechanics of the investigation."*
>
> *"A criminal investigation in the territory of another state cannot be a matter within the authority of Parliament or the provincial legislatures, because they have no jurisdiction to authorize enforcement abroad."*

39. We submit that the decision in ***Zingre v The Queen et al***, [95] also classically emphasises the role of sovereignty in mutual legal assistance requests:

> *"Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed ... or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction."*

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[94] ***R v Hape***, 2007 SCC 26; [2007] 2 SCR 292 in paras 66, 92 and 94
[95] ***Zingre v The Queen et al*** [1981] 2 SCR 392 at p401

> *"The interests of sovereignty have come into conflict with the principle of judicial comity in a number of situations."*

40. We also refer to ***R v Terry***: [96]

> *"XVIII. The practice of cooperation between police of different countries does not make the law of one country applicable in the other country. Bilateral mutual legal assistance treaties negotiated under the authority of the Mutual Legal Assistance in Criminal Matters Act, R.S.C., 1985, c. 30 (4th Supp.), stipulate that the actions requested of the assisting state shall be undertaken in accordance with its own laws, not those of the requesting state."*
>
> *"XIX. Still less can the Charter govern the conduct of foreign police cooperating with Canadian police on an informal basis. The personal decision of a foreign officer or agency to assist the Canadian police cannot dilute the exclusivity of the foreign state's sovereignty within its territory, where its law alone governs the process of enforcement. The gathering of evidence by these foreign officers or agency is subject to the rules of that country and none other."*

41. We have indicated that **Hape** found that enforcement jurisdiction applied even in respect of crimes against humanity. We refer to ***Amnesty International Canada v Canada (Chief of the Defence Staff)***, [97] where the Court found that **Hape** did not create a fundamental human rights exception to the general rule against territoriality. See also ***Canadian Security Intelligence Service Act (Re)***, [98] relating to warrant powers to perform investigative activities in countries other than Canada. Confirming the decision in **Hape**, the Court found that Canadian law could not apply to such investigative activities in another State's territory without that State's consent.

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[96] ***R v Terry***, [1996] 2 SCR 207
[97] ***Amnesty International Canada v Canada (Chief of the Defence Staff)***, 2008 FCA 401; [2009] 4 FCR 149
[98] ***Canadian Security Intelligence Service Act (Re)***, 2008 FC 301 (CanLII)

42. Consistently with this jurisprudence the Canadian Government has decided that, when considering instituting investigations in terms of its Crimes Against Humanity and War Crimes Act in respect of offences committed outside Canada, the first consideration is to seek cooperation with the country where the evidence is located. We refer to the article published by Joseph Rikhof, a senior counsel and manager of law in the Crimes Against Humanity and War Crimes Section of the Department of Justice, attached as "MS5" to Adv Simelane's affidavit, [99] as well as the official documentation released by the Canadian Department of Justice, attached as "MS3" to the same affidavit. We also refer to the ***Zhang*** judgment, [100] where the decision of the Attorney General not to consent to a private prosecution was confirmed inter alia because:

> *"Much of the evidence is not available to Canadian authorities for investigations, assessment, or trial."*

43. We submit that these principles have been recognised in the judgments of international tribunals mandated to try universal crimes. In this regard we refer to the ***Prosecutor v Tihomir Blaskic*** [101] where the Appeals Chamber of the ICTY held that:

> *"The international community primarily consists of sovereign States, each jealous of its own sovereign attributes and prerogatives, each insisting on its right to equality and demanding full respect, by all other States, for its domestic jurisdiction. Any international body must therefore take into account this basic structure of the international community."*

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[99] Simelane's "AA" CB 4 Vol 15 pp 1528 - 1533
[100] *Supra* in para 8
[101] ***Prosecutor v Tihomir Blaskic***, ICTY Appeals Chamber judgment dated 29 October 1997 in par 40

In this regard, the Appeals Chamber found that the ICTY, at international law, could not address binding orders to State officials to render assistance. The only remedy in the event of a State refusing to cooperate with the ICTY was the right to report the non-compliance to the Security Council of the United Nations for it to determine what action, if any, should be taken against the State.

The ICTY went on to define State-to-State cooperation in the following terms: [102]

> *"These treaties are, of course, between equal sovereign States. Everything is therefore placed on a 'horizontal' plane and each State is concerned with its sovereign attributes when it comes to the fulfilment of prosecutorial or judicial functions. It follows that any manifestation of investigative or judicial activity (the taking of evidence, the seizure of documents, the questioning of witnesses, etc) requested by one of the contracting States is to be exercised exclusively by the relevant authorities of the requested State."*

44. **Cassese** [103] points out that one of the pitfalls with the universality principle is:

> *"In essence, the search for and collection of evidence may prove extremely difficult, for most of the evidence may be found in the State where the crimes were committed, and the national authorities may not be forthcoming and co-operative, especially if the crimes were committed on behalf of or at the behest of those authorities."*

At page 356:

> *" ... as a rule the collection of evidence, search, and other investigatory actions requested by a State may not be undertaken by the authorities of that State, but only by those of the requested State, through the system of 'letters rogatory'; normally a foreign country may not enter into direct contact with individuals subject to the sovereignty of the requested State ... It* [referring to the

[102] *Supra* in para 54
[103] *Supra* at p 291

> international Court model] *departs from the traditional setting of State-to-State judicial co-operation, where by definition all co-operating States are on an equal footing."*

At page 442:

> *"As long as States refuse outright to assist those courts in collecting evidence or arresting the indictees, or do not provide sufficient assistance, international criminal justice can hardly fulfill its role..."*

45. The doctrine of sovereignty is recognised in the international Rome Statute in that, although in the preamble State Parties are required to exercise criminal jurisdiction over those responsible for international crimes, the preamble also *"emphasises ... that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State."* The effective prosecution of crimes is achieved by national measures and enhanced international cooperation. In his article Hakan Friman, [104] a Judge and legal expert in the Swedish Ministry of Justice, indicated that this provision was inserted in the preamble specifically to allay fears that the other provisions would be relied on by States to justify interventions in other States. We also point out that the non-intervention provision is derived directly from the "1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (GAR 2625)" which recognises the sovereignty of all States. It is not without significance that since the inception of the Rome Statute, no national jurisdiction has successfully prosecuted members of another sitting Government. Even the ICC has failed to have its arrest warrant for

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[104] Hakan Friman *"The International Criminal Court: Negotiations and Key Issues"* ***African Security Review*** Vol 8 No 6 of 1999

the President of Sudan executed. It is not surprising that in their Heads, the Applicants are silent on these crucial issues.

46. In the ***Kaunda*** matter [105] the Court recognised sovereignty as a general rule of international law even though in that matter the Court was seized with an application relating to South African citizens who were being tortured abroad and facing possible execution.

47. The domestic Rome Statute was enacted in order to ensure the effective implementation of the international statute. The preamble of the international statute is therefore binding upon the Republic. As indicated *supra*, Section 2 of the domestic Act makes customary international law, the international statute and comparable foreign law applicable to the application of the Act. The authorities referred to above relating to sovereignty, comity and enforcement jurisdiction are therefore applicable to the domestic Act. We refer to Section 4(2) of the Act where certain customary – and conventional international law provisions are excluded but point out that these principles are not.

48. As pointed out by Adv Simelane, [106] the absence of enforcement jurisdiction has led to South Africa having to enact mutual legal assistance mechanisms in order to attempt to obtain evidence located outside the country.

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[105] *Supra*
[106] Adv Simelane's "AA" CB 4 Vol 14 para 29 pp 1444 - 1455

49. In ***Thatcher v Minister of Justice and Constitutional Development and Others*** [107] the Court recognised the principles of sovereignty, comity and enforcement jurisdiction:

> *"Both countries are sovereign states with exclusive competence within their own territory but, as we have seen, have for some time been involved in building up a constructive relationship based on mutual co-operation in a variety of spheres. The principle of reciprocity is fundamental to this form of co-operation. Although neither of the States is under any obligation to recognise the domestic law or extra-territorial jurisdiction exercised by the other, considerations of comity, convenience and justice, which have no geographical limitations, require that such recognition be given."*

50. We submit that the First Applicant's request for the initiation of an investigation required consideration of two issues, namely the presence of the implicated parties in the country and evidence that they had committed a Rome Statute offence. In **Powell** [108] the Court held that an investigation could only be instituted upon a reasonable suspicion that a crime had been committed. The Court endorsed Lord Devlin's meaning of suspicion:

> *"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. ... When such proof has been obtained, the police case is complete; it is ready for trial and passes on to its next stage."*

51. We accept that the NGO reports relating to the situation in Zimbabwe in March 2007 and certain of the witness statements obtained by the First Applicant create a reasonable suspicion that crimes against humanity

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[107] ***Thatcher v Minister of Justice and Constitutional Development and Others*** 2005 (1) SACR 238 (C) in para 52
[108] *Supra* in paras 36-37

were committed in Zimbabwe during that period. The issue is however whether the necessary evidence to prove these crimes could be obtained from Zimbabwe. We submit that in the light of the authorities we have referred to *supra*, such evidence would have to be obtained via mutual legal assistance mechanisms, which would require the consent of the Zimbabwean Government.

52. In the affidavits filed by the Respondents the following mutual legal assistance mechanisms have been identified as being potentially applicable:

52.1 The SADC "Agreement in Respect of Co-Operation and Mutual Assistance in the Field of Crime Combating" (introduced by the Fourth Respondent. For the sake of conciseness, we refer to it as "the SADC policing agreement"). We highlight the following salient features thereof:

52.1.1 The preamble recognises the supremacy of the principle of non-interference in the internal affairs of States

52.1.2 The police service of the hosting country is responsible for the gathering of all the relevant evidence, which would include tracing and questioning witnesses and seizing exhibits

52.1.3 The police service requiring the assistance must obtain approval via the Central Office, which requires the consent of the hosting service

52.1.4 The visiting police officials must at all times be accompanied by members of the hosting police service and all actions must be undertaken by the hosting police officials

We submit that the principles of this agreement are specifically in line with the Canadian judgments which we have referred to above. Although the agreement permits the seizing of exhibits, we refer to ***Beheersmaatschappij Helling I NV and Others v Magistrate,*** [109] where the Court held that intrusive measures such as searches could not be conducted purely on the basis of police-to-police liaison but required formal approval in terms of mutual legal assistance legislation. We refer also to ***Reuters Group PLC and Others v Viljoen NO and Others.*** [110] We therefore submit that, insofar as the further investigations required inter alia the searches of Zimbabwean Government buildings, the agreement would have to be preceded by a formal request for mutual legal assistance. This leads us to the mutual legal instruments which were identified.

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[109] ***Beheersmaatschappij Helling I NV and Others v Magistrate, Cape Town and Others*** 2007 (1) SACR 99 (C)

[110] ***Reuters Group PLC and Others v Viljoen NO and Others*** 2001 (2) SACR 519 (C)

52.2 The "Protocol on Mutual Legal Assistance in Criminal Matters" (For the sake of conciseness, referred to as "the SADC Protocol"), attached as "MJM3" to Adv Mpshe SC's affidavit. The Applicants say that this Protocol is applicable, although in their Heads they appear to abandon reliance thereon. We refer to the fact that in Article 2.3 of the Protocol, the scope of its application is defined as relating to *"offences concerning transnational organized crime, corruption, taxation, custom duties and foreign exchange control."* In the light thereof, we submit that Adv Mpshe SC is correct in concluding that Rome Statute offences are excluded and that consequently this Protocol could not be invoked in respect of the First Applicant's investigation. Adv Mpshe SC indicated that his experience in engaging with his counterparts from many African States indicated that cooperation would be provided in transnational matters, but not ones which infringed on sovereignty. Consistent therewith Article 6 gives the Requested State the right to refuse the request, *inter alia*, on the ground that it would impair its sovereignty. Adv Simelane [111] confirmed that, in his experience as the Central Authority of South Africa, Requested States would not comply with requests for assistance which were not in their national interest.

[111] Adv Simelane's "AA" in para 34 CB 4 Vol 14 pp 1461 - 1468

In his Supporting Affidavit, [112] the Deputy State Chief Law Adviser responsible for advising the Minister and Director General on all matters relating to mutual legal assistance has confirmed that the views expressed by Adv Mpshe SC and Adv Simelane correctly reflect the position of the Central Authority. Very significantly he points out that the SADC Protocol had not been ratified by Zimbabwe and on that basis, the Attorney General of Zimbabwe could decline to render any assistance made in terms of it. Finally, he indicated that in his view the Government of Zimbabwe would be unlikely to render assistance in respect of the First Applicant's matter. The contents of this affidavit have never been challenged by the Applicants and we submit that the affidavit should be deemed to have been admitted.

52.3 The "International Co-operation in Criminal Matters Act, No 75 of 1996" ("ICCMA"). We submit in the light of the international jurisprudence referred to above that, as a piece of South African legislation, this Act (insofar as it relates to requests for assistance by South Africa), will regulate the admissibility of any such evidence obtained in a South African court but that its provisions are not binding on any foreign State to whom a request for assistance is made. In the absence of a bilateral treaty with Zimbabwe, we submit that a request for mutual legal assistance,

[112] CB 4 Vol 15 pp 1549 - 1553

were the First Applicant's case to be investigated, would have to be brought under this Act. Section 2(2) provides that a Judge or Magistrate may issue a letter of request if there are reasonable grounds for believing that an offence has been committed in the Republic" (our emphasis). It is common cause that the alleged offences were not committed in the Republic, but in Zimbabwe. In order to invoke this Act, regard would then have to be paid to Section 4(3) of the domestic Rome Statute, which stipulates that a crime committed outside the Republic is deemed to have been committed in the territory of the Republic under certain stipulated circumstances. Relevant to the First Applicant's case is Section 4(3)(c) thereof, where the deeming provision is only triggered by the accused being present in the Republic after the crime. We submit therefore that no request for mutual legal assistance may be submitted prior to the presence of the accused in the country. In ***Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions***, [113] it was held that the Judge or Magistrate had to satisfy himself/herself that each of the jurisdictional requirements under Section 2(2) had been met as a prerequisite for issuing the letter of request.

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[113] ***Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions*** 2009 (1) SA 141 (CC) at para 39

52.4 Any request made in terms of Section 2(2) of ICCMA directed to Zimbabwe would be evaluated by the Zimbabwean Government in terms of its own legislation and not ICCMA. The relevant legislation is the "Criminal Matters (Mutual Assistance) Acts, Nos 13 of 1990, 12/97, 22/2001", attached to Adv Mpshe's affidavit as "MJM4". Adv Mpshe SC [114] explained that the Attorney General of Zimbabwe could, in terms of these Acts, decline the request on several grounds, *inter alia,* because Zimbabwe has not criminalised the Rome Statute offences and the offences were not committed outside Zimbabwe. We submit that a reading of these Acts confirms the correctness of Adv Mpshe SC's assessment.

53. It was the opinion of both Commissioner Williams and Adv Mpshe SC that the Zimbabwean Government would not execute any request for assistance. Their opinions were confirmed by both the former DG: DoJ&CD and the Deputy Chief State Law Adviser. In addition Adv Mpshe [115] confirmed a meeting with a Zimbabwean delegation, including the Attorney General, wherein he was informed that the political situation in Zimbabwe was an internal matter and, "*not the business*" of the South African Government. It goes without saying that the purpose of the request would be to justify the prosecution of six serving Zimbabwean Ministers and Directors General, as well as 12 members of a special unit, including its Commander, holding the rank of Assistant Commissioner. It

[114] Adv Mpshe's "AA" in para 128.5 CB 4 Vol 13 p 1356
[115] Adv Mpshe's "AA" in para 128.6 CB 4 Vol 13 pp 1356 - 1357

would appear to us that it would be a matter of common sense that the Government would not support such a prosecution. We however submit that the most compelling confirmation for such a view lies in the First Applicant's motivation for making its request to the Second Respondent and in the reports of human rights' organisations put up by it. The reports all paint a picture of a breakdown of law and order in Zimbabwe in that the Government is using its agents, and in particular its police force, to commit serious acts of violence on the political opposition so as to enable the Government to remain in power. The reports also allege that none of these acts of violence are investigated or prosecuted and, in fact, the perpetrators enjoy the protection of the Government. Consistent therewith, in the Summary of Evidence, compiled by the First Applicant, [116] it is alleged that there has been an *"almost total collapse of the rule of law ... together with a corresponding failure on the part of Zimbabwean authorities to introduce any ameliorating or reforming measures ..."* This in turn led to the First Applicant making its request to the Second Respondent and not to the Zimbabwean Government. In the Replying Affidavit it is contended that this situation still prevails. [117]

54. We submit that the Applicants' attempts to criticise the First and Fourth Respondents' conclusion that the necessary evidence could not be obtained through legitimate channels, further demonstrates the

[116] First Applicant's Summary of Evidence ('Summary of Evidence') in para 4 CB 1 Vol 2 p 134
[117] RA at para 123 CB 5 Vol 16 p 1598

Applicants' self-confessed lack of expertise in investigation and prosecution matters:

54.1 Although in the Memorandum counsel acknowledged the necessity of establishing the sufficiency of evidence, they did not deal with how this was to be done. The issue of mutual legal assistance is not dealt with at all in the document and on the contrary, the section entitled "*The Procedure for Initiating an Investigation*", [118] deals only with the issue of issuing warrants of arrest without the implicated parties being present in the Republic. The final page of the Memorandum [119] suggests that the First Applicant will gather any further evidence. In the Founding Affidavit it is alleged that there was an agreement in place between the First Applicant and the Second Respondent to the effect that neither the names of the witnesses nor the perpetrators would be revealed. Any legitimate request for mutual legal assistance would necessitate providing these details and full details regarding the alleged offences. The First Applicant gathering the evidence flies in the face of the instruments referred to above as well as relevant international law, which are all to the effect that the evidence must be gathered by the officials of the Requested State in accordance with that

[118] Memorandum at pp 38-40 CB 1 Vol 1 pp 117 - 119
[119] Memorandum at p 52 CB 1 Vol 1 p 131

country's laws. In the Supplementary Affidavit, the Applicants seek to deny that the First Applicant ever made this offer unsolicited. [120]

54.2 What is however startling is that in the Applicants' Supplementary Affidavit, [121] the claim is made that the Applicants all along required conventional investigative methods and cooperation mechanisms. In this regard a blistering attack is launched on the Respondents' failure to invoke ICCMA and the SADC Protocol. In this regard it is alleged [122] that the Respondents have insulted the Government of Zimbabwe by not doing so. Adv Mpshe SC's response was to state that if the Applicants believed that the Zimbabwean Government would cooperate with the prosecution of senior members of its own Government, then the Applicants should have taken the request for an investigation to the Zimbabwean Government. We submit that the following legal provisions and considerations support Adv Mpshe SC:

54.2.1 Although Zimbabwe has not criminalised the Rome Statute offences, assault and attempted murder are all common law crimes and the witness statements allege that these offences were committed. [123]

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[120] SA at para 38 CB 3 p 555
[121] SA at para 52 CB 3 p 559
[122] SA at para 30.4 CB 3 pp 550 - 551
[123] See "***A Guide to Zimbabwean Criminal Law***" by G Feltoe.

54.2.2 In the Memorandum, the First Applicant's counsel referred to the dissenting judgment in the International Court of Justice's case of ***Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)***. [124] In the judgment [125] the three learned Judges indicate that a State, contemplating bringing criminal charges based on universal jurisdiction, must first offer to the national State of the prospective accused the opportunity itself to act upon the charges concerned.

54.2.3 **Cassese** [126] also indicates the numerous advantages if the offence is tried by the country where the crime was committed. He also stresses [127] that the exercise of universal jurisdiction is based on the failure of the territorial State to institute proceedings.

54.2.4 In ***United States of America v Cotroni; United States of America v El Zein***, [128] the desirability of the

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[124] ***Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*** (hereinafter referred to as ***Congo v Belgium***), International Court of Justice's judgment dated 14 February 2002
[125] *Supra* in para 59
[126] *Supra* at pp278-279
[127] *Supra* at p287
[128] ***United States of America v Cotroni; United States of America v El Zein***, [1989] 1 SCR 1469

country where the crime was committed trying the matter was also emphasised.

54.2.5 In the light of Marion's affidavit, only a very small number of the implicated parties have visited the country individually. Were any prosecution to be instituted, we submit that in fact the first visitor would be arrested. In ***S v Mandela*** [129] the Court emphasised that it was undesirable to bring only one accused to trial in a common purpose offence.

55. In the Replying Affidavit, much is made about the failure of the Respondents not to at least submit a request to the Government of Zimbabwe. We submit that it is a matter of common sense that one does not embark on a course of action when upfront one is aware that a negative result will ensue. In any event, the making of the request would be in conflict with the First Applicant's request that the names of witnesses and implicated parties not be revealed.

56. In conclusion, we submit that the raising of mutual legal assistance is opportunistic and invented simply to avoid the difficulties posed to the case of the Applicants in the light of the reasons furnished by the First and Fourth Respondents.

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[129] ***S v Mandela*** 2001 (1) SACR 156 (C)

57. Not surprisingly, the Applicants [130] suggest that evidence might (our emphasis) be available from witnesses in South Africa, other (unidentified) countries and from the ICC. On their own version therefore, this is pure speculation. The Applicants sought very specific allegations to be investigated, focused on the arrest of persons at Harvest House on 28 March 2007. As Marion has explained, all the investigations relevant to those allegations would have to be conducted in Zimbabwe. We submit it would be absolutely absurd to ignore the primary source of evidence and instead to embark on a speculative fishing expedition elsewhere. Yet again, the availability of this evidence was never mentioned in the material submitted by the First Applicant nor has it ever been disclosed who the witnesses are and what the nature of the evidence is. Perhaps significantly, this line of argument appears to have been abandoned in their Heads.

58. In the Replying Affidavit it is claimed that the witnesses are available to come to South Africa to speak to an investigator. [131] It is also alleged that this should be the first step in the investigation. Yet again, in making these claims, the Applicants demonstrate their lack of expertise in the field of investigations. Marion has explained why the witnesses have to be interviewed in Zimbabwe and in any event, bringing the witnesses from Zimbabwe to South Africa, would have to be through the SADC Policing

[130] SA at para 25.3 CB 3 p 546
[131] RA in paras 42, 104 and 106 CB 5 Vol 16 pp 1574, 1575, 1592, 1593

Protocol and not the First Applicant. We refer to the **NATO Committee** matter, [132] where that committee declined to recommend an investigation not on the basis of interviewing witnesses but on the basis of documentation supplied to it by Amnesty International, Human Rights' Watch, NATO and the Federal Republic of Yugoslavia. Due to the fact that the necessary evidence could not be obtained, it would have served no purpose to interview the witnesses themselves.

59. We submit therefore that Adv Mpshe SC and Commissioner Williams were correct in concluding that the outstanding evidence had to be obtained through legitimate channels which would not be possible due to the fact that the Government of Zimbabwe would not provide the necessary cooperation. Nowhere do the Applicants inform the Court of the high position which at least seven of the implicated parties hold in the current Government of Zimbabwe and how the Government of Zimbabwe would react to steps aimed at securing their arrest and prosecution in South Africa.

The appropriateness of using the First Applicant to gather evidence on behalf of SAPS

60. It is a fact that the First Applicant:

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[132] *Supra*

60.1 Sought to intervene in the Zimbabwean situation by invoking the domestic Rome Statute.

60.2 Was responsible for obtaining all the witness statements despite its self-confessed lack of expertise in the investigation of crimes against humanity.

60.3 Is the complainant in the matter.

60.4 Sought to dictate to the NPA how it should exercise its discretion to prosecute and to apply for warrants of arrest.

61. It is trite in South African law that complainants should not be investigators or prosecutors in their own matters. It is also trite that SAPS and the NPA are independent Government departments. The First Applicant has however seen fit to allocate all these separate functions to itself.

62. As has been demonstrated by Marion, [133] the conduct of the First Applicant has led to the following consequences which would seriously impact on any investigation should one be initiated. Yet again, these are issues which can be established by a mere perusal of the statements themselves.

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[133] Marion's "Sup A" CB 4 Vol 12 paras 15, 22 – 24 pp 1255, 1262 - 1266

62.1 A substantial number of statements being the product of copying and pasting;

62.2 The alteration of the content or format of certain of certain statements. The most serious example thereof being that of Witness 3. In the statement submitted to the Second Respondent there was no mention of him identifying any of the persons who allegedly tortured him but in the statement introduced by the Applicants he purports to identify two persons whose names have been deleted.

62.3 The failure to canvas key elements of the crimes with the witnesses.

62.4 The deliberate withholding of the submission of the material to the Second Respondent so as to coincide with the Zimbabwean election, thereby creating the perception that the First Applicant was biased in favour of the MDC.

62.5 The taking of statements from key officials in the MDC shortly before the election, thereby opening the door for the statements to be challenged on the basis that they were made for political purposes.

62.6 The making of a number of press statements which provided sufficient details of the case sought to be investigated as to identify not only the witnesses, but also other persons who are not witnesses but who were involved in the incidents.

62.7 The making of a press statement in which the names and positions of nine of the implicated parties were identified.

63. We submit that the above not only demonstrates the inappropriateness of having the First Applicant being involved in the investigation but that, were a prosecution to be instituted, the conduct thereof could be found to have violated the constitutional right of the accused to a fair trial. It is trite in South African law that the right of an accused to a fair trial includes the right to a fair investigation. See ***S v Botha en Andere (1)*** [134] and ***S v Nkabinde***. [135] In the latter case, the Court held that:

> *"... requirements of fairness and impartiality extending to the investigation that precedes a criminal trial ... the investigation must be conducted with the same degree of impartiality and fairness – where this is lacking in the investigation, the trial proceedings themselves may be tainted with unfairness to the extent that the trial court cannot hold that the accused has had a fair trial."*

In that matter, the Court also found that the police were expected to remain within the constraints of constitutional safeguards and that the investigation was unfair on the following grounds:

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[134] ***S v Botha en Andere (1)*** 1995 (2) SACR 598 (W)
[135] ***S v Nkabinde*** 1998 (8) BCLR 996 (N)

63.1 *"There had been a liberal tampering with facts during the course of the investigation."*

63.2 *"Witnesses were made part of the investigation team. These were persons who had a vested interest in the progression and success of the investigation, as well as the outcome of the trial. They can, by no means, be said to be clothed with that degree of impartiality and objectivity expected of any investigating officer with no personal stake."*

63.3 The accused had to be protected against *"excessive zeal on the part of organs of the State in their prosecution of the task to bring an accused criminal to book."*

64. The South African Courts have also commented as follows about the practice of copying and pasting:

64.1 ***S v Nkabinde***: [136]

> *"It is interesting that the words employed to express that notion were in each and every case, practically exactly the same. One does not require the deductive powers of a rocket scientist to infer that this common thread had a common origin."*

64.2 ***S v Raikane en Andere***: [137]

The Court held that the drafting of a statement on behalf of a witness, although done *bona fide*, amounted to a serious legal violation and *prima facie* violation of the Applicant's right to a fair trial.

64.3 ***S v Peter Msane & 19 Others***: [138]

> *"It appears that the police has statements noted on laptop computers when they interviewed Cloete, for example. Some paragraphs from*

[136] *Supra* at 1005
[137] ***S v Raikane en Andere*** 2005 (1) SACR 464 (T)
[138] *Supra* at 4385

these previous statements were simply "cut and pasted" into Cloete's statement. Most if not all the examples quoted to us are fairly innocuous, but the danger of contamination – even if unintentional – remains present."

64.4 The Courts have emphasised the necessity for objectivity in the investigation of serious cases. See ***S v T,*** [139] where the Court remarked as follows:

"Crimes of a sexual nature, particularly where they are perpetrated on young children, understandably evoke exceptionally strong emotions from many quarters in society. Far too often, however, rational thinking is completely overshadowed by the emotion which engulfs individuals."

65. Our Courts have strongly disapproved of private individuals usurping to themselves police powers. See ***S v Hena and Another***. [140] In that matter, the Court found that acceptable police investigation techniques were an integral part of the integrity of the Criminal Justice System. The Court found [141] that the practice of the police "*subcontracting their investigation functions to anti-crime committees*" was unlawful.

"Untrained civilians, not subject to the hierarchical discipline of the police service, and not subject to political and administrative oversight, took the law into their own hands."

"Every policeman must be taken to know that he or she has been clothed with statutory authority to investigate crime and that this function cannot be 'sub-contracted' to untrained civilians."

66. In the case of ***The Prosecutor v Callixte Mbarushimana,*** [142] the ICC held that Article 54(1)(a) of the Statute required that investigators utilise professional and impartial techniques of witness questioning.

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[139] *Supra* in para 12
[140] ***S v Hena and Another*** 2006 (2) SACR 33 (SE)
[141] *Supra* at pp 41-42
[142] *Supra* at para 51

67. In a dissertation by Helen Durham, [143] the learned author indicated that the gathering of evidence of NGO's for international criminal litigation could create a range of problems if the task was undertaken incorrectly or with a lack of professionalism.

68. In 1995, the ICTY produced a paper, entitled "**Cooperation between Non-Governmental Organisations and the International Criminal Tribunal for the former Yugoslavia**". Therein the Prosecutor indicated that the interviewing of potential witnesses by persons not in the Prosecutor's office could jeopardize, hinder or interfere with investigations, contaminate witnesses or evidence and thereby prejudice the chances of a successful prosecution. In this regard, the Prosecutor indicated that non-Governmental organisations should provide the tribunal with the identity of individuals rather than taking detailed statements. Emphasis was placed on the witnesses being tainted by the NGO.

69. The making of press statements which imply the guilt of the accused is also a matter which has been condemned and has the potential to infringe on the right of an accused to a fair trial.

69.1 **Cassese** [144] has confirmed the importance of the presumption of innocence. He remarked: [145]

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[143] Helen Durham, entitled "**Increasing the Effectiveness of the International Criminal Court: The Contribution of Non-State Actors**"
[144] *Supra*
[145] *Supra* at pp 390-391

> *"Another issue that constitutes a sore point in international criminal proceedings is the media coverage of the detention and trial of the accused. Faced with such horrendous offences as war crimes, crimes against humanity, and genocide, the media tend to take it for granted that persons accused of such crimes by a prosecutor are guilty, and even to portray them as 'monsters' or 'butchers'. ... Ultimately, the question is one of self-restraint on the part of the prosecutor and the media."*

69.2 In the case of ***The Prosecutor v Francis Kirimi Mathaura & Others***, [146] the ICC commented as follows on the inappropriateness of the making of press statements:

> *"... it must be stated, as a matter of principle, that the safeguarding of the proper administration of justice and the integrity of the judicial proceedings requires the parties, participants and any person involved in the proceedings, to refrain from making public statements or engage in any other activity which could have an impact on the evidence or the merits of the case or could be perceived as showing a predetermination of the cause pending before the Court."*

69.3 In ***Zhang***, [147] the Federal Court of Appeal confirmed a decision of the Attorney General not to permit the Applicant to institute a private prosecution, because it would *"not be appropriate ... to allow charges to be laid and thereby identify and accuse persons of very serious offences without a full police investigation and a reasonable prospect of being able to bring the case to trial."* [148]

70. The Respondents indicated that the First Applicant's improper conduct in the investigation demonstrated its lack of objectivity and impartiality. The

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[146] ***The Prosecutor v Francis Kirimi Mathaura & Others***, Case No ICC-01/09-02/11, dated 5 May 2011 in para 6
[147] *Supra*
[148] *Supra* at para 8

First Applicant is completely unrepentant. In this regard, [149] it is contended that the First Applicant acted responsibly and diligently in the gathering of the evidence.

71. It is denied [150] that the media reports made by the First Applicant would enable the witnesses to be readily identified. We refer specifically to the press statement attached to Marion's affidavit as "CRCM6" where one of the counsel retained by the First Applicant is quoted as stating that the charges related to a police raid on the MDC offices on March, 28. In the press statement, attached as "CRCM5", it is alleged that the NPA had been asked to prosecute 18 top Zimbabwean security officials relating to the torture of MDC leader Morgan Tsvangirai and other MDC officials in a major crack-down in March the previous year, i.e. 2007. It is a matter of common knowledge that the torture of the MDC leader took place on 11 March 2007. In fact this date is even provided in the article published in the Mail & Guardian by the First Applicant which is attached as "CRCM4". In the same article it is alleged that a year had passed from the date of the arrest of 100 people in the MDC's Harare Head Quarters to the date of the holding of the Zimbabwean Election. In the article, attached as "CRCM3", it is alleged that the dossier related to a group of MDC activists who were arrested at the party's head quarters in Harare.

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[149] RA in para 178
[150] RA in para 129

72. We submit that the above material clearly demonstrates that the First Applicant's docket related to the torture of the MDC leader on 11 March 2007 and the raid on the MDC Head Quarters later the same month. The accounts of those two incidents as given by the witnesses clearly indicate that the alleged torturers would know who they were. We therefore regard the Applicants' denial thereof as being unacceptable and seriously impacting on their integrity. We want to, in this regard, also emphasise that the making of these statements was also in breach of the agreement between the First Applicant and the Second Respondent that the names of the witnesses and perpetrators would not be released.

73. We therefore submit that Adv Mpshe SC and Commissioner Williams were correct in finding that the First Applicant could not be entrusted with the investigation.

The negative impact on diplomatic initiatives, the functioning of SARPCCO and ongoing and future cooperation from the Zimbabwean Police

74. Adv Mpshe SC accepted the view of Commissioner Williams to the effect that an attempt to pursue the investigation would impact negatively on the functioning of SARPCCO and cooperation from the Zimbabwean Police. We refer to ***R (on the application of Corner House Research and another) v Director of Serious Fraud Office (BAE Systems plc,***

interested party), [151] where the House of Lords found that a Director in the Crown Prosecution Service was entitled to rely on the judgment or advice of others in making a decision to terminate an investigation.

> *"He might lawfully accord appropriate weight to the judgment of those with responsibility for national security who had direct access to sources of intelligence unavailable to him. In cases touching on foreign relations and national security the duty of decision on the merits lay with the government, and the courts were obliged to maintain the boundary between their role and that of the government."*

75. We submit that the affidavits of Commissioner Williams and Major General Jacobs provide a proper basis for this conclusion. We would have thought that it would have been obvious that the arrests and prosecutions of the Zimbabwean Minister - and Commissioner of Police would at the very least not carry the approval of the Zimbabwean Police. Nowhere in the affidavits do the Applicants inform the Court that such persons were on the list of implicated parties and we submit that the failure to allude to the high profile positions occupied in the Zimbabwean Government by at least seven of the implicated parties, is misleading in the extreme.

76. As far as the issue of the impact on negotiations is concerned, we submit that international relations are recognised as playing a role with the investigation and prosecution of international crimes. In this regard, we

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[151] ***R (on the application of Corner House Research and another) v Director of Serious Fraud Office (BAE Systems plc, interested party)*** [2008] 4 All ER 927 in para 23

refer to the ***Congo v Belgium*** judgment [152] as well as **Cassese's** article. [153]

77. The issue of the impact on negotiations however comprises half a sentence in Commissioner Wiliams's letter and is advanced as an additional ground to all the other grounds referred to. In the circumstances, even were this not to be a consideration, the investigation would nevertheless still have been declined on the other grounds which were dealt with in some detail in his letter. The argument on the issue of negotiations will involve lengthy discussions of the inter-phase between foreign policy and international crimes and human rights issues. In the circumstances the First Respondent abandons reliance on this ground but continues to rely on all the other grounds.

THE APPLICABILITY OF PAJA TO THE IMPUGNED DECISIONS

78. In ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)***, [154] the Court ruled that PAJA covered the field and that a litigant vindicating a right to lawful administrative action had to

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[152] *Supra*

[153] Cassese "*The Belgian Court of Cassation v the International Court of Justice: the Sharon and Others*" ***Journal of International Criminal Justice*** 1 (2003) at pp 437-452

[154] ***Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*** 2006 (2) SA 311 (CC) at paras 95 and 96

come under PAJA. See also ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others***.[155]

79. The Courts have applied the following tests when reviewing administrative action:

79.1 Where the action relates to a point of law, the test of correctness is applicable.[156]

79.2 Where the action relates to issues of fact, the test is one of reasonableness. In this regard the test is not whether the reviewing Court would have reached the same decision as the official but whether the decision was so unreasonable that no reasonable person would have made it. See ***Minister of Health and Another v New Clicks SA (Pty) Ltd and Others***.[157] The Courts have also cautioned that the reviewing Court should not usurp the functions of administrative agencies. The reviewing Court will pay respect to decisions of administrative agencies and attach due weight to findings of fact and policy. See ***Bato Star***[158] and in particular the following *dictum*:

> *"In doing so, a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of Government."*

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[155] ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*** 2004 (4) SA 490 (CC) at paras 25 and 26

[156] See ***Canada (Attorney General) v Amnesty International Canada*** 2009 FC 918 (CanLII) at para 47)

[157] *Supra* at para 186

[158] *Supra* at paras 44-45 and 48

See also ***Manong & Associates v Director General: Department of Public Works and Others***. [159]

79.3 As far as mixed findings of fact and law are concerned, these will be reviewed on a reasonableness standard, meaning that *"the decision should not be disturbed unless it falls outside a range of rational, articulate outcomes"*. [160]

80. We submit that the issue of the NPA powers and the interpretation of the mutual legal assistance instruments are legal issues and that the other grounds are factual.

81. Counsel for the First Applicant confirmed [161] that the institution of an investigation and prosecution was a discretionary power. We submit that in the light of the jurisprudence above, the Court should be less inclined to interfere with the exercise of a discretionary power as opposed to the failure to comply with a positive duty.

82. In the instant matter, the decision not to institute an investigation was taken by the Fourth Respondent and not the First Respondent. In accepting the decision, we submit that Adv Mpshe SC exercised a

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[159] ***Manong & Associates v Director General: Department of Public Works and Others*** 2005 (10) BCLR 1017 (C)
[160] See ***Canada (Attorney General) v Amnesty International Canada***, 2009 FC 918 (CanLII) in par 46
[161] Memorandum in paras 88 and 90

prosecutorial discretion and in the light of the authorities, referred to hereunder, the exercise of such discretion will be rarely set aside on review.

82.1 In ***Zhang***, [162] the Canadian Federal Court of Appeal found that the refusal to consent to a prosecution on charges of torture amounted to the exercise of prosecutorial discretion, which is reviewable "*when flagrant impropriety can be demonstrated and that the threshold to establish flagrant impropriety is very high.*"

82.2 In ***Corner House***, [163] the House of Lords held that:

> "*It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator ...* "
>
> "*The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised...:*
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> > '*the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.*'"
>
> "*Thirdly, the powers are conferred in very broad and unprescriptive terms.*"
>
> "*Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an*

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[162] *Supra* in para 13
[163] *Supra* in paras 30-32 and 41

objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice."

"The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect."

82.3 In ***R v Director of Public Prosecutions, ex parte Kebeline and Others; R v Director of Public Prosecutions, ex parte Rechachi***, [164] the House of Lords held that the Director of Prosecution's consent to a prosecution was not amenable to judicial review in the absence of dishonesty, *mala fides* or an exceptional circumstance.

82.4 In ***Suliman v National Directorate of Special Operations and Others***, [165] the Court referred to the **Kebilene** judgment, [166] and indicated that "*a measure of respect and deference should be shown by the courts to the decisions of the prosecution agencies to institute criminal trials as they, within their expertise, deem fit*".

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[164] *Supra*
[165] ***Suliman v National Directorate of Special Operations and Others*** 2010 (2) SACR 324 at para 35
[166] *Supra*

83. The Courts have held that the discretion to institute investigations is even wider than that to institute prosecutions.

83.1 In ***R (on the application of Bermingham and others) v Director of the Serious Fraud Office Bermingham and others v Government of the United States of America***, [167] it was held that:

> *"I entertain considerable reservation as to the propriety of the courts embarking at all on a challenge to the director's decision framed in such terms as these. There is much authority to the effect that the jurisdiction to conduct a judicial review of a public authority's decision to launch or not to launch a prosecution, though it undoubtedly exists, is to be exercised sparingly. Where the decision is not to prosecute, there cannot I think be a different rule; in any event there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision maker that there will very rarely be legal space for a reviewing court to interfere."*
>
> *"Here, of course, the decision sought to be reviewed is a decision not to investigate. The position as regards the judicial review jurisdiction is in my judgment a fortiori a decision whether to prosecute. The authority's (here, the director's) discretion is even more open-ended. It will involve consideration of the manner in which available resources should be deployed and whether particular lines of inquiry should or should not be followed. It is submitted for the director that absent bad faith or other exceptional circumstances a decision to investigate or not to investigate an allegation of crime is not subject to review. That is not quite right. It looks like an argument to limit the court's jurisdiction of judicial review; but the jurisdiction is as wide or as narrow as the court holds. The true proposition is that it will take a wholly exceptional case on its legal merits to justify a judicial review of a discretionary decision by the director to investigate or not."*

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[167] ***R (on the application of Bermingham and others) v Director of the Serious Fraud Office Bermingham and others v Government of the United States of America*** [2006] 3 All ER 239 in paras 63-64

83.2 In ***R v Police Commissioner of The Metropolis Ex parte Blackburn***, [168] the Court held that:

> *"Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter."*

83.3 In ***Hill v Chief Constable of West Yorkshire*** [169] the following was held:

> *"By common law police officers owe to the general public a duty to enforce the criminal law: see R v Metropolitan Police Comr, ex p Blackburn [1968] 1 All ER 763, [1968] 2 QB 118. That duty may be enforced by mandamus, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision on such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review."*
>
> *"The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and*

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[168] ***R v Police Commissioner of The Metropolis Ex parte Blackburn*** [1968] 1 All ER 763 at 769

[169] ***Hill v Chief Constable of West Yorkshire*** [1988] 2 All ER 238 at pp 240-241 and 244

> *attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted."*

84. We submit that we have demonstrated the correctness of the grounds upon which the decision was taken not to initiate an investigation. Adv Mpshe SC's exercise of his discretion to accept these reasons was properly exercised. As far as the grounds relating to sufficiency of evidence, mutual legal assistance evidence and the inappropriateness of the First Applicant being part of the investigation are concerned, Adv Mpshe SC found that Commissioner Williams' views on these matters accorded with his (Adv Mpshe SC's) vast experience as a very senior member of the NPA over a number of years. We therefore submit that there is no basis for finding that any grounds upon which the decision may be set aside in terms of Section 6 of PAJA, have been proved by the Applicants.

85. In ***Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others***, [170] it was held that insofar as relief is sought in terms of PAJA, Applicants can only succeed if they can establish that their rights have been adversely affected or that they hold a legitimate expectation. (Section 3(1) of PAJA). If this is not established, then it is of no assistance to the Applicants that they are acting in terms of Section 38(a) of the Constitution.

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[170] ***Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*** 2004 (12) BCLR 1298 (C) at p 1324

86. In ***Tulip Diamond FZE v The Minister of Justice and Constitutional Development and Others***, [171] the Court held that it had to be established whether the Applicants had any constitutional rights to just administrative action that may be violated by the impugned administrative decision. The Court also held that a foreigner (in that matter, a foreign company), located outside the country and with no business interests in the country, had no standing to invoke the protection and benefits of any enshrined constitutional right, such as fair administrative action.

87. In ***Kaunda***, [172] the Court found that the South African Constitution did not apply outside the borders of the Republic and could not be relied upon by South African citizens who were being tortured outside the country.

88. In ***Democratic Alliance v The Acting National Director of Public Prosecutions & Others***, [173] it was held that a complainant, who has a criminal charge withdrawn, does not have the right to challenge the decision of the NDPP, because an untenable situation would be created if every complainant "*in the thousand cases that are withdrawn each year*" could do so. The Court found that the decision to discontinue the

[171] ***Tulip Diamond FZE v The Minister of Justice and Constitutional Development and Others***, unreported South Gauteng High Court judgment case No 2010:18552 dated 9 June 2011
[172] *Supra*
[173] *Supra*

prosecution did not constitute any direct effect on the legal rights of the applicants in that matter:

88.1 a political party, purportedly acting in the public interest,

88.2 a private individual and a company which had claimed to have been prejudiced by the alleged corruption, which formed the basis of the prosecution which was discontinued.

89. We accept that any member of the public has the right to report the commission of a crime to the police in the same way that any member of the public can request the NPA to institute a prosecution. The issue is whether any such person has a right of redress in the event of the request receiving a negative response. Section 7 of the CPA enables a person who "*can prove a substantial or peculiar interest in the issue of the trial arising out of some injury which he individually suffered in the consequence of the commission of the said crime*" to apply for a certificate from the Director of Public Prosecutions who declined to prosecute, to institute a private prosecution. [174] The SAPS Act is silent on any remedy where a decision is taken not to initiate an investigation. In the light of the UK authorities we have referred to above, it would appear that UK law permits a wider right to redress than Section 3(1) of PAJA. We submit that the wider test of review applied by the UK

[174] See ***Singh v Minister of Justice and Constitutional Development and Another*** 2009 (1) SACR 87 (N)

authorities which we have referred to would not be applicable where it is in conflict with Section 3(1). [175]

90. We submit that the Canadian, UK and SA judgments, to which we have referred, all demonstrate a reluctance to review decisions not to prosecute or investigate. We submit that the Applicants do not have a right to have investigations initiated, but merely to have their requests properly considered by the relevant authorities. We submit further that this has in fact taken place in the instant matter.

91. When the request was made by the First Applicant, it was assessed by the Commander of the Unit responsible for the investigation of Rome Statute offences, the Divisional Commissioner in the Legal Services of SAPS and the Acting National Commissioner. The reasons advanced by the latter official were considered by the Acting National Director of Public Prosecutions, who satisfied himself that valid reasons had been provided. For the purposes of this review, the matter has been re-assessed by the National Director of Public Prosecutions, a Brigadier in the police with impeccable credentials and experience, as well as the Deputy Chief State Legal Adviser in charge of mutual legal assistance matters. Both these exercises have resulted in the same conclusion, namely that there is no basis for instituting the investigation.

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[175] See ***Sanderson v Attorney-General, Eastern Cape*** 1998 (1) SACR 227 (CC)

92. Our courts have held that the reference to "*any person*" in terms of Section 3(1) of PAJA was not intended "*to clothe all and sundry with locus standi ...*". [176] We submit that the Applicants have not demonstrated that their rights have been affected as required in the section. In fact, even when they were aware that their *locus standi* had been challenged by the Fourth Respondent, they were deliberately vague and instead of demonstrating what rights they had and how these had been affected they merely sidestepped the issue and referred to alleged non-compliances with "*the ICC Act*". [177]

93. As far as the First Applicant is concerned it has an interest in torture, the Rome Statute and the situation in Zimbabwe. We submit that once a proper decision had been made in respect of its request it ceased to have any further interest greater than that of the ordinary member of the public. We refer to ***Zhang*** [178] where the Court held that public interest related to ensuring that persons would not be accused of very serious offences without a full police investigation and trial. See also ***R v Finta*** [179] where the Court emphasised the stigma and consequences which would flow if the guilt of the accused was not established.

94. As far as the Second Applicant is concerned, it never requested an investigation nor did it feature as a party in any of the communications

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[176] See ***Vandenhende v Minister of Agriculture, Planning and Tourism, Western Cape, and Others*** 2000 (4) SA 681 (C)
[177] RA in para 61 CB 5 Vol 16 p 1580
[178] *Supra*
[179] *Supra*

or deliberations leading up to the First Applicant being informed that the Fourth Respondent had declined to initiate an investigation. Its Supporting Affidavit did no more than confirm the First Applicant's Founding Affidavit. Even when its *locus standi* was specifically challenged it did not file an affidavit but relied on the First Applicant on a hearsay-basis to try and establish *locus standi.* We submit in the circumstances that the Second Applicant cannot seriously contend that it was wronged by the impugned decision and that its true role is that of an intervener. In this regard the law is trite. An intervener must not simply reinstate what the other party says, but raise different issues in respect of which the Court's judgment would be poorer were these not debated. [180] We submit that the Second Applicant in fact has not made any contribution to this application.

95. As far as the persons who were allegedly tortured are concerned, they are permanent citizens and residents of Zimbabwe. In the light of the authorities we have referred to they are not entitled to avail themselves of the South African Constitution. Section 4(3)(c) does not alter the position as the deeming provisions apply only to arraigning the accused. They, however, would be entitled to request the NDPP to make a decision on their allegations and if the decision is not to prosecute they could apply for a certificate *nolle prosequi* in order to institute a private prosecution. The Applicants could assist them in this regard.

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[180] See ***Canadian Airlines International Ltd. v. Canada (Human Rights Commission) (F.C.A.)*** [2010] 1 FCR 226 at para 12; ***Abbott v. Canada*** [2000] 3 FC 482 in the head note

96. We therefore submit that the Applicants and the alleged victims have in no way been prejudiced by the decision made. This has to be distinguished from the situations recognized by the Courts in finding that the requirements of Section 3(1) of PAJA had been established, e.g. the termination of essential services, deportation and detention of illegal foreigners and the allocation of marine resources, etc.

Delay in making the decision

97. Adv Mpshe has conceded that with hindsight he would have referred the matter to SAPS sooner than in fact he did. It is a fact that despite the fact that the request was made on 14 March 2008 it was only formally referred to SAPS on 17 December 2008. We concede that this constitutes an unreasonable delay.

98. However, as Marion has established, none of the implicated parties were present in South Africa from 14 to 31 March 2008. What should have happened is that the request should have been referred immediately to SAPS and that SAPS establish whether the parties were in the country. In terms of Section 4(3)(c) of the domestic Rome Statute the presence of the implicated party in the country is a pre-requisite to the exercise of jurisdiction. We therefore submit that a prompt response would have resulted in the request being immediately declined on the basis that the

jurisdictional fact of presence as required in Section 4(3)(c) had not been established.

99. We therefore submit that it has not been established that the First Applicant suffered any prejudice as a result of the delay as unreasonable as it was. It is trite that the Courts will not set aside a decision unless it has been demonstrated that the delay has in fact resulted in prejudice. See ***Murray v. Canada (Human Rights Commission)***,[181] where the following was held:

> *"[32] ... but the delay in proceeding with this matter, not only the initial decision to entertain the complaint notwithstanding the delay in bringing it, but thereafter by change of investigator, and indecision within the bureaucracy of the Commission itself as to whether the complaint should be entertained or not, is extraordinary and unacceptable.*
> *[emphasis added]*
>
> *[33] The question is whether the delay was unreasonable, and whether prejudice results to the applicant from the delay. I find for the foregoing reasons that no prejudice resulted from the delay. However, I agree with the applicant that the delay was unreasonable.*
>
> *[34] Even if the delay constituted a breach of procedural fairness, the Commission would reach the same result if this Court directed a new inquiry. The Supreme Court of Canada has held that it is justifiable to disregard a breach of natural justice 'where the demerits of the claim are such that it would in any case be hopeless'."*

In ***Murray v. Canada (Human Rights Commission)***[182] the Court held as follows:

> *"[18] Murray complained about the delay in completing the investigation of her complaint. From September 2002 to December 2003 there is no record of any investigative activities nor has any explanation been offered by the Commission as to the cause of this inactivity. Even*

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[181] ***Murray v. Canada (Human Rights Commission)*** 2002 FCT 699 (CanLII), at paras 32-34
[182] ***Murray v. Canada (Human Rights Commission)*** 2004 FC 1541 (CanLII) at paras 18-20

assuming that some interviews occurred during this period, there is no apparent justification for the delay in dealing with Murray's complaint.

[19] However, substantial delay in and of itself is insufficient to overturn the Commission's decision. To be successful on this ground, Murray would have to establish real prejudice caused by inordinate delay. See Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307.

[20] The Court is unable to find a sufficient connection between the delay and any alleged prejudice. Moreover, the delay did not prejudice Murray's rights, the decision process or the decision itself'.

In ***Blencoe v. British Columbia (Human Rights Commission)*** [183] the court held:

> *"There must be proof of significant prejudice which results from an unacceptable delay. Here, the respondent's ability to have a fair hearing has not been compromised. Proof of prejudice has not been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. Unacceptable delay may also amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. A court must be satisfied that the proceedings are contrary to the interests of justice. There may also be abuse of process where conduct is oppressive..."*

100. We therefore submit that the Court should not set aside the decision on the basis of the delay in referring the request to SAPS. The First Applicant would have been within its rights to bring an application to compel a decision. [184] This would have been the most appropriate way of addressing the issue.

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[183] ***Blencoe v. British Columbia (Human Rights Commission)*** 2000 SCC 44; [2000] 2 SCR 307

[184] ***Noupoort Christian Care Centre v Minister of National Department of Social Development and Another*** 2005 (10) BCLR 1034 (T)

Discretion to review

101. We submit that it is trite that judicial review is a discretionary remedy. In his answering affidavit Adv Simelane in detail describes the grounds which would warrant the Court declining to review and set aside the decision even if the Applicants were to succeed on the merits thereof.

102. We merely make submissions on the law which supports Adv Simelane's motivation.

103. Adv Mpshe conceded that he did not take into consideration the obligations in terms of the international and domestic Rome Statutes when accepting Commissioner Williams' reasons. The Applicants submit this constituted a serious irregularity. We, however, submit that had the requirements of the two Statutes been considered, these would have provided additional grounds on which to decline the request. We submit that neither Statute authorises the type of investigation presented by the First Applicant.

The international Rome Statute:

104. The preamble establishes the obligations of the State Parties. We submit that the State Parties are required to ensure the effective prosecution of perpetrators by national measures and enhanced international co-

operation. As we have previously indicated in so doing the State Parties must not interfere in the internal affairs of any State.

The domestic Rome Statute:

105. This Statute requires the prosecution of persons who commit atrocities (i.e. the Rome Statute offences) before a South African court where possible or, in the event of a local prosecution not taking place, in the ICC. Article 12 of the International Statute limits State Parties' consent to the jurisdiction of the ICC only in respect of crimes committed in their territory or by their nationals. Although Article 14 enables a State Party to refer a situation to the ICC Prosecutor, the Prosecutor may only exercise his powers where the offence was committed in the State Party's territory or by its nationals.

106. We submit therefore that both Statutes impose an obligation to prosecute persons who are guilty of the Rome Statute offences. Obviously a pre-requisite for a prosecution would be a lawful and complete investigation establishing guilt to the required standard. In the light thereof we submit that neither Statute calls for an investigation as contemplated by the Applicants. In this regard we are of the view that the Applicants' material merely constitutes allegations which cannot be lawfully converted into evidence. Neither Statute calls for clandestine measures or for the arrest and prosecution of persons on inadequate grounds. Although the domestic Rome Statute requires that attention be paid to the obligation of

complementarity we submit that there was compliance therewith in that the First Applicant's material was assessed in order to determine whether it could be investigated or not.

107. We submit that ***S v Basson*** [185] does not impose any other obligations. It is clear that that matter dealt with the case where an investigation had been conducted and the prosecutor had instituted a prosecution. It was the Court which struck the matter from the roll. We submit that the obligation created in that matter is only in respect of cases which are properly before the Courts: [186]

> "... *Given the nature of the charges, the SCA should have given appropriate weight and attention to these considerations, even in the absence of any argument on these issues by the State. Given the extreme gravity of the charges and the powerful national and international need to have these issues properly adjudicated, particularly in the light of the international consensus on the normative desirability of prosecuting war criminals, only the most compelling reasons would have justified the SCA in exercising its discretion to refuse to rule on the charges.*"

108. We submit that the provisions of Section 4(3)(c) of the domestic Rome Statute are also decisive. In terms of that provision jurisdiction is only established if the accused is present in the Republic after the commission of the crime. In his affidavit Marion has confirmed that the majority of the implicated parties have never visited the country or have ceased to visit it. There would therefore be no lawful basis for conducting an investigation against these persons. In respect of the only two persons who visit the country on a regular basis these are the persons who were implicated by

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[185] ***S v Basson*** 2007 (1) SACR 566 (CC)
[186] *Supra* at para 184

virtue of "*command responsibility*". Marion has confirmed that there is no evidence against them. Any evidence against them would have to be forthcoming from the government of Zimbabwe and as has been explained the necessary co-operation will not be provided.

109. In its memorandum counsel for the Applicants sought to persuade the NPA that the initiation of an investigation and the issue of warrants of arrests could take place prior to the arrival of the accused in the country. They in this regard relied on the dissenting judgment in ***Congo v Belgium***, [187] **Abi-Saab**'s article, [188] the **Princeton Principles on Universal Jurisdiction**, the implementation of the 1957 UK Geneva Conventions Act and a "*logical*" argument that the perpetrator would leave prior to the investigation if it only commenced upon his arrival.

110. We submit that these authorities are unhelpful in determining the correct interpretation of Section 4(3)(c) of the domestic Rome Statute.

111. In the ***Congo v Belgium*** judgment, the paragraph quoted, [189] must be read in the context of the previous paragraph, [190] where a comparison is drawn between a voluntary exercise of universal jurisdiction and various treaties relating to transnational crimes based on the *aut dedere aut judicare* principle. It should be noted that Belgium had adopted the

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[187] *Supra*
[188] Abi-Saab "*The Proper Role of Universal Jurisdiction*"
[189] *Supra* at para 58
[190] *Supra* at para 57

principle of absolute universal jurisdiction, which was not dependent on any factor other than the commission of the crime. The judgment itself recognised that there was no established practice in which States exercised universal jurisdiction nor were all States required to "*legislate up to the full scope of jurisdiction*". [191] It is significant that after this matter, Belgium amended its legislation so as to dispense with absolute universal jurisdiction. [192] As **Cassese** also in his textbook quoted *supra* indicates at pp 285-286 the more widespread version of universal jurisdiction is the narrow notion where the State derives jurisdiction at the place where the accused is apprehended. In this instance the presence of the accused on the territory is a condition for the exercise of jurisdiction. At p301 **Cassese** also confirms that there are no international rules imposing on States the obligation to act upon a specific ground of jurisdiction.

112. The **Princeton** principles on universal jurisdiction also deal with absolute universal jurisdiction and do not have the status of customary international law. See Woolman, [193] where customary international law is defined as:

> "*A custom will become a rule of customary international law where it is a sufficiently widespread practice adopted by states out of a sense of legal obligation.*"

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[191] *Supra* at para 45
[192] See Cassese's article *supra*
[193] Woolman ***Constitutional Law of South Africa*** at 30-4

113. The **Abi-Saab** article [194] is in general terms and is not of assistance in the interpretation of the section in question.

114. The 1957 Geneva Conventions Act specifically, in Section 1(2) thereof, provided for absolute universal jurisdiction. Section 153 of The Police Reform and Social Responsibility Act 2011 now places a restriction on the issue of warrants under the 1957 Act. Significantly, counsel did not refer to the UK International Criminal Court Act of 2001, where, in terms of Section 51(2), extraterritorial jurisdiction was limited (in respect of crimes against humanity) to those committed by UK nationals or residents (corresponds with Sections 4(3)(a) and (b) of the domestic Rome Statute). Attached as "MS7" to Advocate Simelane's affidavit, is the policy of the UK Police, relating to the implementation of this Act, in terms of which it is clear that investigations based on anticipated presence will not automatically follow.

115. As far as the logical argument is advanced, we submit that it is flawed. Firstly, if an investigation is initiated prior to the arrival of the accused, then the accused will simply not come to the country. **Cassese** [195] points out that if the accused never enters the country hundreds of complaints will have been investigated about which the authority can do nothing. If regard is had to Section 4(3), we submit that if there is evidence under oath, implicating the accused, there is no reason why he cannot be

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[194] *Supra*
[195] Textbook *supra* at p290

arrested and why mutual legal assistance and additional evidence be obtained so as to justify his prosecution. In our view, the argument would only be valid if there was no adequate evidence and as we have demonstrated, proper evidence is necessary, to prove crimes against humanity.

116. Belatedly only in their Heads do the Applicants seek to rely on the issue of a warrant of arrest for the President of Sudan by a South African Magistrate. Their reliance on this warrant is misplaced because it was not issued in terms of Section 4(3)(c) of the domestic Rome Statute, but in terms of either Sections 8 or 9 thereof. These provisions relate to the execution of a warrant issued by the ICC and as a simple reading of the relevant sections reveals, completely different legal provisions apply. [196]

117. We submit that the proper interpretation of Section 4(3) lies in the interpretation of legislation and law directly related thereto:

117.1 There is no international obligation to grant persons entry to a country in order to arrest them. [197]

117.2 The South African Legislator adopted conditional universal jurisdiction as opposed to absolute universal jurisdiction. The

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[196] Statement by the Director General, Department of International Relations and Co-Operation, dated 31 July to 2 August 2009, published on the South African Government Information Service

[197] Department of Justice, ***Canada's Crimes against Humanity and War Crimes Program Summative Evaluation Final Report*** dated October 2008 at p 41

Applicants in essence seek to elevate conditional universal jurisdiction to absolute universal jurisdiction in conflict with the intention of the Legislator. In terms of Section 4(3) jurisdiction is triggered either by the nationality of the victim or perpetrator or, where this is not established, by the perpetrator being present in the country. As we have already demonstrated, the international Rome Statute does not call for absolute universal jurisdiction. The adoption of limited universal jurisdiction is not in breach of international law. Interestingly one of the First Applicant's counsel published an article to the effect that the international Rome Statute imposed a limitation on the exercise of extraterritorial jurisdiction in terms of the domestic Statute. [198]

117.3 Although Section 4(3) of the domestic Rome Statute commences by referring to the securing of the jurisdiction of a South African court we submit that it is not triggered by the arrest of the accused. We say so because, if this were the case, Sections 4(3)(a), (b) and (d) would be superfluous because if the accused had been arrested in South Africa Section 4(3)(c) would apply and then the nationality of the victim or perpetrator would be irrelevant. We submit that Section 4(3) should be interpreted as defining the circumstances under which South Africa will exercise extraterritorial jurisdiction. In this regard we submit that

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[198] See Du Plessis "*The Creation of the ICC Implications for Africa's despots, crackpots and hotspots*" ***African Security Review*** 12(4) 2003 at pp 1-15

the initiating of an investigation would be the first step in the exercise of such jurisdiction. The reference to the crime being deemed to have been committed in South Africa once the jurisdictional facts set out in the section had been established is also indicative of the fact that the investigation should be initiated on the basis of the establishment of these facts.

117.4 Consequently we submit that the presence of the accused in the country is a pre-requisite for the initiation of an investigation in terms of Section 4(3)(c). We submit that the **Powell**-judgment [199] would also be applicable to the illegality of any investigation initiated by SAPS without a lawful basis. See also the ***New Clicks*** case, [200] where the Court held that functionaries are confined to the exercise of powers vested in them by empowering legislation. Where these powers are exceeded, the actions are illegal and invalid. See also ***Woodlands Dairy (Pty) Ltd and Another v Competition Commission***. [201] In the light of the principles of sovereignty and comity neither the Constitution nor the SAPS-Act confers extraterritorial enforcement powers on the police. South African law is not ordinarily of extraterritorial effect and consequently SAPS will derive the right to investigate extraterritorial offences in terms of

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[199] *Supra*
[200] *Supra* in para 101
[201] ***Woodlands Dairy (Pty) Ltd and Another v Competition Commission*** 2010 (6) SA 108 (SCA)

the definitions of Statutes creating such offences. In their Heads, the Applicants allege that an investigator should have been appointed and a docket registered. This could only have taken place in the event of SAPS having jurisdiction to initiate an investigation, which was not the case.

117.5 Section 4(3)(c) is modelled on Section 7(3.71) of the Canadian Criminal Code. In ***R v Finta*** [202] the Court held that the intention of this provision was to apply to persons present in the country:

> "*Parliament's intention was to extend the arm of Canada's criminal law in order to be in a position to prosecute these extraterritorial acts* ***if the alleged perpetrators were discovered in our midst***." (Our emphasis)

The Court held that Section 7(3.71) was a purely jurisdiction-endowing provision and consequently that the jurisdictional facts had to be established. In that matter the accused had not disputed that he was present in Canada but the Court found that proof that he had committed a crime against humanity as opposed to an ordinary crime had to be established as a jurisdictional issue. In the event of these requirements not being satisfied the Court would have to find that the exception to the rule of non-extraterritorial application had not been met and that the Court would have to decline jurisdiction. As a result of this judgment Canada amended its provisions relating to jurisdiction.

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[202] *Supra* at p51

The South African Legislator elected not to adopt the amended provision. We submit therefore that ***R v Finta*** will be persuasive in the interpretation of Section 4(3)(c). We refer to ***S v Basson*** [203] where the Court accepted that as a general proposition South African criminal law is not extraterritorial effect.

117.6 As further proof of the fact that the Legislator did not intend that Section 4(3)(c) be invoked prior to the arrival of the accused in the country is the fact that it did not enact a provision authorising the issue of an arrest warrant prior to arrival. Consequently Section 43 of the CPA will apply in respect of any application for a warrant of arrest in respect of a Rome Statute offence. Section 43(1)(b) requires that the warrant be issued by the magistrate in whose district the accused is in or suspected of being in. As Du Toit *supra* in Chapter 5 points out an arrest constitutes a serious restriction on the individual's freedom of movement, dignity and privacy. Consequently arrest is fully regulated by legislation and is only lawful when effected in accordance with the relevant statutory provisions. This is consistent with the dictum in ***Beheersmaatschappij*** [204] where the Court held that the invoking of an intrusive measure required a lawful statutory basis. Countries which do invoke measures prior to the presence of the accused have legislation specifically

[203] 2007 *supra* at para 223
[204] *Supra*

authorising this conduct. See for example Section 9 of the Canadian Crimes against Humanity and War Crimes Act of 2000 (the South African Legislator elected not to incorporate this provision into the domestic Statute) as well as Section 8(1)(c) of the New Zealand International Crimes and International Criminal Court Act.

117.7 We submit that from the placing of the First Applicant's material before the Second Respondent until the filing of the Replying Affidavit the Applicants have failed to demonstrate that any of the named implicated parties are in fact present in the country. In the Summary of Evidence this was dealt with in paras 78-80 thereof where reference was made to a person who is not one of the implicated parties having received medical treatment in Johannesburg and one of the perpetrators having travelled to South Africa for investigations. On the Applicants' own version this perpetrator was, after two visits, denied further entry and thereafter all the charges against the suspects withdrawn. There was an unsubstantiated further claim that Zimbabwean officials travel to South Africa for official reasons. In the Replying Affidavit it is suggested that the implicated parties illegally "*sneak*" into the country in the same manner as illegal immigrants. Yet again no proof has been provided that this has taken place and we submit it is manifestly improbable that Ministers and Directors-General

would conduct themselves in such a manner. Nowhere in their Heads do the Applicants establish that the element of presence has been proven.

118. In the light thereof, combined with the issues relating the inadequacy of the First Applicant's material and mutual legal assistance, we submit that the ordering of a reconsideration would constitute a *brutum fulmen.* The presence of the implicated parties is problematic and not satisfied in respect of the majority of them. The necessary evidence cannot be obtained and the First Applicant's material is tainted.

119. A further factor which we submit would mitigate against the Court ordering a reconsideration is the conduct of the Applicants which Adv Simelane has described as being inconsistent with the administration of justice and more akin to a publicity exercise. [205]

120. Finally, we submit that were the Court to order a reconsideration, this would have to be directed to the Head: DPCI in accordance with the amendments to the SAPS Act. The Head: DPCI has not been cited as a Respondent although he is aware of this application and filed a Confirmatory Affidavit. The Applicants failed to join him once they were aware of this fact.

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[205] Adv Simelane's "AA" in para 61

THE CONSTITUTIONAL PRINCIPLE OF LEGALITY

121. The Applicants have submitted that they rely on this ground in addition or in the alternative to the review in terms of PAJA. We submit that essentially the same issues apply here as apply to the review and to the delay. We consequently submit that the application on this ground should also be dismissed. We refer to ***Majake v Commission for Gender Equality and Others,*** [206] where the Court held that this principle required that Government institutions exercise *"no power and perform no function beyond that conferred upon it by law."* We submit that we have demonstrated that the First Respondent acted fully within the scope of the law and that the investigation proposed by the First Applicant fell outside that scope.

Additional Issues Raised in Applicants' Affidavits

122. A paragraph-by-paragraph reading of the Affidavits raises numerous issues and a *seriatim* response thereto would lead to inordinately lengthy Heads of Argument.

122.1 As far as the Founding and Supplementary Affidavits are concerned, we submit that Advocates Mpshe SC and Simelane have

[206] ***Majake v Commission for Gender Equality and Others*** 2010 (1) SA 87 (GSJ) in para 57

responded to each point and we propose to deal with these issues further in oral argument, if necessary.

122.2 As far as the Replying Affidavit is concerned, obviously Advocates Mpshe SC and Simelane could not respond thereto. We however submit that the essential issues have already been dealt with in these Heads and we respond at this stage only to three issues, namely:

122.2.1 The claim [207] that Advocate Simelane did not *"focus attention on only one or more of the low-ranking perpetrators"*. This flies in the face of Marion's affidavit to the effect that none of the low-ranking perpetrators had ever visited the country.

122.2.2 The claim [208] that Adv Simelane, in conjunction with other State departments, should deny the implicated police officers Visas to enter the country. We submit that this would require proof that they were guilty of crimes and, as Marion and Bester have demonstrated, the evidence is inadequate.

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[207] RA in para 174.8 CB 5 Vol 16 p 1615
[208] RA in para 174.10 CB 4 Vol 16 p 1615 - 1616

122.2.3 The claim [209] that Adv Mpshe SC made a decision not to prosecute. Adv Mpshe SC has explained why he did not make a decision and why the First Applicant was aware of that fact. We merely submit that if a decision not to prosecute had been made, then the relief should not be the initiation of an investigation, but rather a request for a certificate *nolle prosequi* as contemplated in Section 7 of the CPA. We refer to para 5(b) of the Prosecution Policy, attached as "MS2" to Adv Simelane's affidavit, which is to the effect that a decision not to prosecute is normally of final effect.

CONCLUSION AND ORDER OF COSTS

123. In conclusion we submit that the Court should dismiss the application in its entirety.

124. It is trite that the Courts have held that where applications raise important constitutional issues, it is inappropriate for an order of costs to be made. [210]

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[209] RA in para 66 CB 5 Vol 16 p 1581

[210] See ***President of the Republic of South Africa and Others v Quagliani; President of the Republic of South Africa and Others v Van Rooyen and Another: Goodwin v Director General, Department of Justice and Constitutional Development and Others*** 2009 (8) BCLR 785 (CC)

125. We submit that this application did raise important constitutional issues relating to both PAJA and the Rome Statute. The Applicants however seek an order of costs, although they now appear to backtrack therefrom in their Heads. We submit that the complexity of the issues justifies the costs of two counsel and that the conduct which Adv Simelane described as being inconsistent with the interests of justice makes such an order appropriate. Although the First Applicant was not provided with reasons as to why the request for an investigation had been declined (because of the advice of the Second Respondent, upon whom they placed great reliance), it could have requested these reasons in the six months that it took to launch this application. [211]

RC MACADAM

SC BUKAU

COUNSEL FOR THE FIRST RESPONDENT

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

[211] See ***The Director of Public Prosecutions v King*** Unreported Transvaal Provincial Division Case No CC257/2005 at para 5.3

ANNEXURE A

ABBREVIATIONS

AA:	Answering Affidavit
CB:	Court Bundle
CPA:	Criminal Procedure Act
DG: DoJ&CD:	Director-General: Department of Justice and Constitutional Development
Domestic Rome Statute:	Implementation of the Rome Statute of the Criminal Court Act, No 27 of 2002
DPCI:	Directorate Priority Crimes Investigations
ICC:	International Criminal Court
ICCMA:	International Co-operation in Criminal Matters Act, No 75 of 1996
ICTY:	International Criminal Tribunal for the Former Yugoslavia
NATO:	North Atlantic Treaty Organization
NDPP:	National Director of Public Prosecutions
NGO:	Non-governmental organization
NPA:	National Prosecuting Authority
PAJA:	Promotion of Administrative Justice Act, No 3 of 2000
PCLU:	Priority Crimes Litigation Unit
RA:	Replying Affidavit
SA:	Supplementary Affidavit
Sup A:	Supporting Affidavit
SADC:	Southern African Development Community
SAPS:	South African Police Service
SARPCCO:	Southern African Regional Police Chief Council Organisation
UN:	United Nations
Vol:	Volume

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