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

CASE NO: 77150/09

In the matter between:

SOUTHERN AFRICA HUMAN RIGHTS LITIGATION CENTRE	**1st APPLICANT**
ZIMBABWE EXILES FORUM	**2nd APPLICANT**

and

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

FOURTH RESPONDENT'S HEADS OF ARGUMENT

A. INTRODUCTION

1.

In this application the Applicants seek the following amended relief:

1.1 Reviewing and setting aside a decision taken on or about 19 June 2009 by the First, Second and/or Fourth Respondents refusing and/or failing to accede to the First Applicant's request originally dated 16 March 2008 that an investigation be initiated under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, into acts of torture as crimes against humanity committed by certain named perpetrators in Zimbabwe ("the impugned decision(s)");

1.2 Declaring the impugned decision(s) to be unlawful, inconsistent with the Constitution and invalid;

1.3 Declaring that the delay by the Respondents in arriving at the impugned decision(s) constitutes a breach of sections 179 and 237 of the Constitution;

1.4 Ordering the First, Second and Fourth Respondents to reconsider the First Applicant's request originally dated 16 March 2008.[1]

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[1] Amended Notice of Motion, Index, Court Bundle 1, pp 6a-6b.

2.

In due course, all the Respondents gave notice of their intention to oppose the application, but not all the Respondents served and filed answering papers in respect of their opposition.[2]

3.

The Respondents were called upon to dispatch the record of the decision together with such reasons as they are by law required to give or desire to make. The First and Fourth Respondents on 6 April 2010 served and filed their reasons[3] as they are required by law to give, together with the record of the proceedings[4] in terms of the provisions of Rule 53 of the Uniform Rules of Court.

4.

Subsequently and on 26 April 2010 (out of time) the Applicants amended their notice of motion and served a supplementary founding affidavit.[5]

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2 Although the Second Respondent initially gave notice of his intention to oppose the application, the Second Respondent together with his reasons, served and filed a notice to abide the decision of the Court.

3 First Respondent's Reasons, Index, Court Bundle 3, pp 568-573; Fourth Respondent's Reasons, Index, pp 574-585.

4 First Respondent's Record of Decision, Index, Court Bundle 3, pp 586-895; Fourth Respondent's Record of Decision, Index, Court Bundle 3, pp 896-1092.

5 Supplementary Founding Affidavit ("SFA"), Index, Court Bundle 3, pp 535-567.

5.

On 3 June 2010, the Fourth Respondent served and filed a notice in terms of Rule 35(12) on the Applicants, requesting them to produce documents referred to in the founding affidavit and the supplementary founding affidavit.[6] In response thereto and on 10 June 2010[7] the First Applicant provided the Fourth Respondent with certain of the documents. However, the request by the Fourth Respondent in terms of Rule 35(12) was only satisfied after receipt of the outstanding information on 10 August 2010[8] via correspondence received from the First Applicant.

6.

On or about 22 September 2010 and 13 October 2010 respectively, the answering affidavits of the First to Fourth Respondents[9] were served and filed.[10]

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6 We submit that the indexed papers do not contain a separate notices bundle and therefore attach a copy of the Rule 35(12) notice hereto as **Annexure "A"**.

7 We refer to a copy of the First Applicant's response dated 10 June 2010 annexed hereto as **Annexure "B"**.

8 We refer to a copy of First Applicant's response dated 10 August 2010 annexed hereto as **Annexure "C"**.

9 First Respondent's Answering Affidavit ("1st Resp. AA"), Index, Court Bundle 3, pp 1298-1369; First, Second and Third Respondents' Answering Affidavit ("1st, 2nd & 3rd Resp. AA"), Index, Court Bundle 4, pp 1432-1407; Fourth Respondent's Answering Affidavit (4th Resp. AA"), Index, Court Bundle 4, pp 1093-1195.

10 In this regard, we submit that it is an accepted practice that a party who has served a notice in terms of Rule 35(12) cannot ordinarily be told to draft and file his or her affidavits before he or she be given an opportunity to inspect and copy, or transcribe, a document or tape recording referred to in his or her adversary's affidavits: *Protea Assurance Co Ltd v Waverley Agencies CC* 1994 (3) SA 247 (C) at 249B.

7.

Thereafter and on 7 March 2011 (well out of time), the Applicants filed their replying affidavit.[11]

8.

Before addressing the legal arguments to be made on behalf of the Fourth Respondent, we submit that it is apposite at this stage to analyse the relief sought by the Applicants.

B. THE RELIEF SOUGHT BY THE APPLICANTS

9.

A proper analysis of the affidavits filed by the Applicants, reveals the following salient assertions made in support of the relief sought by the Applicants, namely:

9.1 That the Applicants bring the application in their own interests in terms of section 38(a) of the Constitution, pursuant to their

[11] Applicants' Replying Affidavit ("RA"), Index, Court Bundle 5, pp 1556-1671.

respective aims and objectives as concerned civil society organisations[12];

9.2 That the Applicants also bring the application on behalf of and in the interests of the victims of torture in Zimbabwe who cannot act in their own name, primarily for fear of reprisal, in terms of section 38(b) and (c) of the Constitution[13];

9.3 The Applicants further bring the application in the public interest in terms of section 38(d) of the Constitution, in that without effective prosecution of those guilty of torture as a crime against humanity in Zimbabwe there is a risk of South Africa becoming a safe haven for torturers who may travel here freely with impunity; effective measures available to the Respondents may help stem the fallout and its effect; that accountability must be sought for the Zimbabwean exiles as refugees and residents; and that South Africa as a responsible member of the international community should seek to hold

12 FA, paras 13.1 and 14, Index, Court Bundle 1, p 13.
13 FA, paras 13.2, 15 and 16, Index, Court Bundle 1, pp 13-14.

accountable those responsible for crimes that shock the conscience of all humankind[14];

9.4 That in terms of section 179 of the Constitution the National Prosecuting Authority ("NPA") has the power to institute criminal proceedings on behalf of the State and the First Respondent is the head of the NPA[15];

9.5 That the First Respondent must recognise South Africa's obligation under the principle of complementarity in the Rome Statute, to exercise jurisdiction over and to prosecute persons accused of having committed a crime as defined in the Rome Statute[16];

9.6 That the Second Respondent has the power to manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the Domestic ICC Act")[17];

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14 FA, paras 13.3, 17 and 18, Index, Court Bundle 1, pp 13-15.
15 FA, par 20.1, Index, Court Bundle 1, p 16.
16 FA, par 20.2, Index, Court Bundle 1, p 16.
17 FA, par 25, Index, Court Bundle 1, p 18.

9.7 That the Second Respondent has to date failed to initiate or has been prevented from initiating an investigation under the Domestic ICC Act, in response to the First Applicant's request[18];

9.8 That in terms of section 5(5) of the Domestic ICC Act, if the First Respondent declines to initiate the prosecution of a person under the Domestic ICC Act, the Third Respondent must be provided with full reasons for that decision and the Third Respondent is then obliged to forward the decision, together with reasons to the Registrar of the International Criminal Court in The Hague[19];

9.9 That given that the First Respondent has declined to initiate a prosecution in response to the First Applicant's request, the Third Respondent is called upon to explain the decision he took and to furnish the reasons that were required to be forwarded to the International Criminal Court[20];

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18 FA, par 27, Index, Court Bundle 1, pp 18-19.
19 FA, par 29, Index, Court Bundle 1, p 19.
20 FA, par 30, Index, Court Bundle 1, p 19.

9.10 That in the First Respondent's final communication with the First Applicant on 19 June 2009, the First Applicant was informed that the Acting National Commissioner of Police had advised the First Respondent that the South African Police Service does not intend to initiate an investigation and no reasons were provided for this decision[21];

9.11 That the application is accordingly directed against the refusal and/or failure by the First, Second and/or Fourth Respondents to take action in response to the fully substantiated request contained in the First Applicant's dossier[22];

9.12 That the representations by the First Applicant were made in terms of the Domestic ICC Act which empowers South Africa, *inter alia*, to investigate and prosecute crimes against humanity perpetrated by individuals who are not South African nationals or have not committed such crimes on South Africa's territory if such persons, after the commission of the crime, are present in the territory of the Republic[23];

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21 FA, par 33, Index, Court Bundle 1, p 20.
22 FA, par 34, Index, Court Bundle 1, p 20.
23 FA, par 38, Index, Court Bundle 1, p 21.

9.13 That the intention of the aforesaid representations was to secure some form of accountability for the people of Zimbabwe at a time when their own justice system has collapsed and to secure South Africa's interest against becoming a 'safe haven' for perpetrators of the most egregious international crimes[24];

9.14 That the request was prepared by the First Applicant in the knowledge that the Domestic ICC Act's requirement of "presence" could be satisfied since several of the perpetrators named in the representations travel to South Africa on official business i.e. for co-operative endeavours or to obtain desired commodities and services including healthcare[25];

9.15 That the First Applicant's representations include detailed testimony relating to the events that took place in Zimbabwe on 28 March 2007 i.e. the raid on Harvest House, the headquarters of the opposition party, Movement for Democratic Change (MDC)[26];

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[24] FA, par 39, Index, Court Bundle 1, p 22.
[25] FA, par 40, Index, Court Bundle 1, p 22.
[26] FA, par 41, Index, Court Bundle 1, p 22.

9.16 That the application concerns South Africa's obligations at two levels, namely South Africa's compliance with its international treaty obligations under the Rome Statute of the International Criminal Court and South Africa's domestic statutory obligations under the Domestic ICC Act as well as the Constitution[27];

9.17 That on 16 March 2008, the First Applicant hand-delivered a memorandum and accompanying docket of information and evidence to the Second Respondent regarding alleged international crimes committed in Zimbabwe on behalf of numerous victims, the parties agreed that the names of the victims and perpetrators would be kept strictly confidential out of real concern for the safety of the victims and also to ensure that none of the alleged perpetrators would be "tipped off" about the possibility of their being arrested in South Africa on the strength of an arrest warrant issued in response to the evidence contained in the docket[28];

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27 FA, par 43, Index, Court Bundle 1, p 23.

28 FA, paras 45-46, Index, Court Bundle 1, pp 23-24.

9.18 That the memorandum referred to above proffer that the First Applicant has gathered evidence which shows that certain Zimbabwean officials are guilty of the crime against humanity; that those officials visit South Africa from time to time and that, if and when they do so, South Africa is under a duty of international law and under the Domestic ICC Act to apprehend and prosecute them; and that it is the First Respondent's function under the Domestic ICC Act to discharge that duty on behalf of the state[29];

9.19 That the memorandum requested the First Respondent, through the Second Respondent, first, to consider the memorandum together with the evidence contained in the docket in order that it may with all reasonable speed decide to initiate an investigation under the Domestic ICC Act; second, if the need arises, that the First Respondent consult further with the First Applicant and its lawyers in respect of the further gathering of evidence; third that the First Respondent communicate its decision/s in respect of a prospective investigation to the Director of the First Applicant[30];

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29 FA, par 48, Index, Court Bundle 1, pp 25-26.

30 FA, par 50, Index, Court Bundle 1, pp 26-27.

9.20 That the prolonged refusal and/failure by the First and Fourth Respondents to act in conformity with their obligations under the Domestic ICC Act, as well as their obligations under section 179 of the Constitution read with the requirements of the National Prosecuting Authority Act, violates the constitutional principle of legality[31];

9.21 That the delays by the Respondents violate section 237 of the Constitution, resulting in the Applicants having amended their notice of motion to seek declaratory relief that the delays in question constitute a breach of sections 179 and 237 of the Constitution[32];

9.22 That it was incumbent on the Respondents to accord appropriate rate to the docket, since the evidence therein shows that identified individuals committed serious ICC crimes and that those individuals visit South Africa with sufficient

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31 Supplementary Founding Affidavit ("SFA"), par 18, Index, Court Bundle 3, p 542.

32 SA, par 18, Index, Court Bundle 3, p 542.

regularity as to make their arrest and prosecution a real prospect[33];

9.23 That the impugned decision(s) – amounting to a refusal and/or failure to institute an investigation and/or a prosecution – constitute(s) "administrative action" within the meaning of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively fall(s) to be reviewed under the constitutional principle of legality as derived from the rule of law[34];

9.24 That the Respondents prolonged refusal and/or failure to act in conformity with their obligations under the Domestic ICC Act must accordingly be reviewed and set aside by virtue of sections 6(2)(e)(ii), 6(2)(d), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(ii) and 6(2)(h) of PAJA[35];

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33 FA, par 96.9, Index, Court Bundle 1, p 45.
34 FA, par 97, Index, Court Bundle 1, p 46.
35 FA, par 99, Index, Court Bundle 1,pp 47-48.

9.25 That the Respondents ignored the fact that the torture docket itself provided a prosecutable case in its present form and they have never contended otherwise[36];

9.26 That the International Criminal Court itself might have compiled witness statements related to Zimbabwe based on a complaint even though Zimbabwe is not a party and whilst discretionary, a request to the International Criminal Court under Article 93(10) of the Rome Statute would be possible[37];

9.27 That the International Co-Operation in Criminal Matters Act 75 of 1996 ("the MLA Act") was enacted to give effect to South Africa's desire to co-operate internationally in the suppression of crimes on a wider scale and both South Africa and Zimbabwe have signed the SADC Protocol on extradition and mutual legal assistance ("MLA") in criminal matters ("SADC Protocol"), which the Respondents have failed to consider in the context of co-operation in the investigation of crimes under the Domestic ICC Act[38];

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36 SFA, paras 24 and 25.1, Index, Court Bundle 3, p 545.
37 SFA, par 25.3, Index, Court Bundle 3, p 546.
38 SFA, paras 25.4 to 26, Index, Court Bundle 3, pp 546-548.

9.28 That the First Respondent's suggestion that an investigation would terminate co-operation from the Zimbabwean Police in connection with ongoing and future criminal investigations is a bold exaggeration without any supporting evidence[39];

9.29 That there is no evidence to the effect whatsoever that the aforesaid supposition presumes that all co-operation from the Zimbabwean Police will automatically be withheld as a result of the investigation of the torture docket by the SAPS, including no supporting affidavit filed by the Minister of International Relations and Co-Operation[40];

9.30 That the concerns raised by the Respondents regarding the statements (affidavits), provided in the First Applicant's torture docket falling short of a thorough court-directed investigation are manifestly without substance and overblown[41];

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39 SFA, par 30.1, Index, Court Bundle 3, p 550.
40 SFA, paras 30.3 to 30.4, Index, Court Bundle 3, pp 550-551.
41 SFA, par 30.5, Index, Court Bundle 3, p 551.

9.31 That it is irrational and inexplicable for the First Respondent to assert that in his view it would have been inappropriate for the evidence to be gathered in an inadmissible manner[42];

9.32 That the Respondents' assertion that the First Applicant could not be used as an agent of the South African Police Service to gather evidence on its behalf is an obvious misdirection[43];

9.33 That the Fourth Respondent failed properly to consider the contents of the torture docket or the First Applicant's offer of assistance[44];

9.34 That the Respondents' contentions about the negative impact on South Africa's diplomatic initiatives in Zimbabwe and the international relations of the country amounts to unreasonable administrative action and is otherwise irrational, unconstitutional and unlawful[45];

9.35 That the Fourth Respondent's material errors of law include the following:

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42 SFA, par 30.8, Index, Court Bundle 3, p 552.
43 SFA, par 30.9, Index, Court Bundle 3, p 552.
44 SFA, paras 32 to 43, Index, Court Bundle 3, pp 553-556.
45 SFA, paras 44 to 48, Index, Court Bundle 3, pp 557-558.

9.35.1 the Respondents' failure to consider the applicable mutual legal assistance instruments as read with the Domestic ICC Act[46];

9.35.2 at no point in the torture docket or in subsequent correspondence did the Applicants call for clandestine investigations, instead they expected nothing more than the proper use of conventional investigative methods and co-operation mechanisms and the investigation and prosecution of the individuals concerned with due regard for the Government's obligations under the Domestic ICC Act[47];

9.35.3 that the Fourth Respondent has a peculiar yet manifestly erroneous view of the relationship between the Rome Statute and the Domestic ICC Act in respect of jurisdiction i.e. the jurisdictional provisions of the Rome Statute are irrelevant insofar

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46 SFA, par 49, Index, Court Bundle 3, p 558.

47 SFA, paras 51 to 52, Index, Court Bundle 3, p 559.

as the prosecution of a crime under section 4(3)(c) of the Domestic ICC Act is concerned;

9.35.4 that the Rome Statute primarily encourages prosecutions at the national levels through the principle of positive complementarity[48].

9.36 That the Applicants' argument in relation to "anticipated presence" is apparently shared by the Second Respondent and that the Applicants' assertions are a clear indication that the Domestic ICC Act's requirement of "presence" can be satisfied[49].

C. LEGAL PRINCIPLES:

10.

The enforceability of the relief claimed by the Applicants, and the allegations made in support thereof, will be discussed in accordance with the legal arguments as raised by the Fourth Respondent. However, before doing so, we respectfully submit the following:

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48 SA, paras 53 to 60, Index, Court Bundle 3, pp 559-563.

49 SA, paras 68 to 74, Index, Court Bundle 3, pp 565-566.

10.1 The Fourth Respondent raised three (3) points to be argued *in limine.* They are as follows:

10.1.1 that the Applicants lack the necessary *locus standi in iudicio*[50];

10.1.2 that the decision taken by the Fourth Respondent is not reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and the principle of legality[51]; and

10.1.3 that the establishment of the Zimbabwean Human Rights Commission provides an effective remedy for the alleged victims in Zimbabwe.[52]

10.2 We therefore intend to deal with each of these aforesaid arguments raised *in limine* hereunder. However and before doing so, we respectfully submit the following:

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50 4th Resp. AA, paras 17-27, Index, Court Bundle 4, pp 1101-1110.
51 4th Resp. AA, paras 28-35, Index, Court Bundle 4, pp 1110-1116.
52 4th Resp. AA, paras 36-42, Index, Court Bundle 4, pp 1116-1126.

10.2.1 We confirm that it is undisputed that the First Respondent agreed with the reasons provided by the Fourth Respondent for making his decision.

10.2.2 In this regard, we were made privy to the legal arguments to be raised by the First Respondent in his heads of argument pertaining to the review, the declaratory order relating to the delay in reaching the impugned decision, the constitutional principle of legality and the order of costs.

10.2.3 Accordingly and in order to avoid prolixity we do not deem it necessary to repeat those legal arguments herein, with which we make common cause.

C.1 **First point *in* limine: The Applicants' lack of *locus standi in iudicio***

11.

We have already indicated hereinbefore[53] that the Applicants rely on the provisions of section 38(a) to (d) of the Constitution[54] as the bases of their standing in this matter. We submit that it is understandable why the Applicants do not rely on the provisions of section 38(e) of the Constitution; none of the alleged victims of the alleged crimes against humanity are members of the Second Applicant.[55]

12.

It is furthermore important that neither the First Applicant, nor the Second Applicant refers to any written mandate or powers of attorney by any of the alleged victims of the so-called crimes against humanity, mandating either of the Applicants to request an investigation or prosecution in terms of the Domestic ICC Act, on

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53 Paragraphs 9.1 through 9.3 *supra*.

54 Section 38 provides as follows:

"***ENFORCEMENT OF RIGHTS***

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members."

55 We refer in this regard to paragraph 5 *supra* and the contents of **Annexure "C"** hereto, which clearly indicates that the alleged victims are not members of the Second Applicant.

their behalf.[56] It is furthermore significant that the Applicants, being fully aware of the Fourth Respondent's arguments to be raised *in limine*, selected to deal with it at the end of their heads of argument, in an obvious attempt to diminish the devastating effect thereof on the merits of this application.[57] The Court will be requested during the hearing of this argument to first deal with the arguments raised *in limine*, before hearing any argument on the merits.

13.

It is a trite principle that the question of legal standing is not only a procedural matter but also a question of substance. It concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted. An applicant therefore has to show that it is the rights-bearing entity, or is acting on the authority of the entity, or that it has acquired its rights.[58]

14.

The phrase "*locus standi in iudicio*" is a requirement that a party to litigation must have a direct and substantial interest in the right,

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56 No authority to that effect is either to be found in the founding affidavit or the so-called docket.

57 Applicants' heads of argument, paras 296-332, pp 122-134.

58 *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA) at par [44]; *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & Another* [2009] 1 All SA 291 (SCA) at par [19].

which is the subject matter of the litigation, and in the outcome of the litigation.[59] It is then said that if a party does not comply with this requirement, he lacks legal standing.

15.

Although the aforesaid principle does not in general apply to the infringement of a right entrenched in the Bill of Rights, we submit that the facts of this matter are distinguishable from any other class action alleging an infringement of a right contained in the Bill of Rights, for the simple reason that the persons whose alleged interests and rights are affected in this instance, are all foreign nationals not present in the Republic of South Africa. [60]

16.

We will deal with each of the requirements of section 38(a)-(d) of the Constitution in turn hereunder to demonstrate that the Applicants lack the necessary standing in this application.

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59 *Van Huyssteen & Others NNO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C) at 301; *Beukes v Transitional Local Council, Krugersdorp* [1996] 2 All SA 480 (W); *McCarthy v Constantia Property Owners' Association* 1999 (4) SA 847 (C) at 851C-855E; *Kolbatschenko v King NO* 2001 (4) SA 336 (C).

60 The present matter is distinguishable from the following cases: *Van Huyssteen & Others NNO v Minister of Environmental Affairs and Tourism,* supra; *Beukes v Transitional Local Council, Krugersdorp,* supra; *McCarthy v Constantia Property Owners' Association*, supra; *Kolbatschenko v King NO,* supra.

C 1.1 Section 38(a) – Applicants acting in their own interest:

17.

The Applicants rely on section 38(a) of the Constitution in order to accord them standing in their own interest to complain about the violation of their own rights under section 33 of the Constitution as codified by PAJA.[61]

18.

We submit that the rights in terms of section 33 of the Constitution do not describe **the protected interests**. It merely describes the duties of those bound by the right. Those bound by the right must perform administrative actions that are lawful, reasonable and procedurally fair and they must give written reasons when their administrative actions adversely affect rights. The application of general rules to individual cases usually has a direct impact on the interests and conduct of individuals.

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[61] See paragraph 9.1 *supra.*

19.

It is apparent from the Applicants submissions contained in their heads of argument[62] in respect of this issue, that strong reliance is placed on the Constitutional judgment in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[63] in support of a different, broader approach to standing in constitutional litigation.

20.

The need for the aforesaid approach, as explained by O'Regan J in *Ferreira v Levin*[64] is however qualified as follows:

> *"...standing remains a factual question. In each case, applicants must demonstrate that they have the necessary interest in an infringement or threatened infringement of a right. The facts necessary to establish standing should appear from the record before the Court. As I have said, there is no evidence on the record in this case which would meet the requirements of s 7(4)(b)(i). The applicants have alleged neither a threat of a prosecution in which compelled evidence may be led against them, nor an interest in the infringement or threatened infringement of the rights of other persons."*

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62 Applicants heads of argument, paras 297-332, pp 122-134.

63 1996 (1) SA 984 (CC) ("*Ferreira v Levin*").

64 *Ferreira v Levin, supra* at par [230] and cited in par 304, p 125 of the Applicants heads of argument.

21.

Of particular importance however, is O'Regan J's reasoning for disagreeing with Ackermann J's[65] approach:

> "*Ackermann J … finds that persons acting in their own interest (as contemplated by s 7(4)(b)(i)) may only seek relief from the Court where their rights, and not the rights of others, are infringed. I respectfully disagree with this approach. It seems clear to me from the text of s 7(4) that a person may have an interest in the infringement or threatened infringement of the right of another which would afford such a person the standing to seek constitutional relief. In addition, such an interpretation fits best contextually with the overall approach adopted in s 7(4).*
>
> *There are many circumstances where it may be alleged that an individual has an interest in the infringement or threatened infringement of the right of another. Several such cases have come before the Canadian Courts. In R v Big M Drug Mart Ltd (1985) 18 DLR (4th) 321 (SCC) ((1985) 13 CRR 64), a corporation was charged in terms of a statute which prohibited trading on Sundays. The corporation did not have a right to religious freedom, but nevertheless it was permitted to raise the constitutionality of the statute which was held to be in breach of the Charter. A similar issue arose in Morgentaler, Smoling and Scott v R [1988] 31 CRR 1 in which male doctors, prosecuted under anti-abortion provisions, successfully challenged the constitutionality of the legislation in terms of which they were prosecuted. In both of these cases, the prosecution was based on a provision which itself directly infringed the rights of people other than the accused. The Canadian jurisprudence on standing is not directly comparable to ours, however, for their constitutional provisions governing standing are different, but the fact that situations of this nature arise is instructive of the need for a broad approach to standing.*

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65 Ackermann J (at par [38] of *Ferreira v Levin* held that s 7(4)(b)(i) can only mean that there must be an 'infringement of or threat to' a chap 3 right of the 'person acting in his or her own interest', for the 'relief referred to in para (a)' only becomes available when there is 'an infringement of or threat to' a chap 3 right. In terms of subpara (4)(b)(iii) B acts for A when A's chap 3 right is infringed or threatened with infringement and A is not in a position to seek such relief in his or her own name. In terms of subpara (4)(b)(i) A acts for himself or herself when A's chap 3 right is infringed or threatened with infringement and A is in a position to seek such relief in his or her own name. Paragraph (4)(a) determines when the right to invoke the aid of a Court arises; ss (4)(b) determines by whom that right (when it accrues) may be exercised. The *locus standi* of all categories of persons in para (4)(b) is qualified by para (4)(a).

In this case, however, although the challenge is s 417(2)(b) in its entirety, the constitutional objection lies in the condition that evidence given under compulsion in an enquiry, whether incriminating or not, may be used in a subsequent prosecution. There is no allegation on the record of any actual or threatened prosecution in which such evidence is to be led.

There can be little doubt that s 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted….In this respect, I agree with Chaskalson P (at paras [165]-[166]). This expanded approach to standing is quite appropriate for constitutional litigation. Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, s 7(4) casts a wider net for standing than has traditionally been cast by the common law."[66]

22.

It is clear from the aforegoing that an applicant may acquire standing on the basis of the infringement of a right of another person, provided that the applicant has a sufficient interest in the right.

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[66] *Ferreira v Levin, supra* at paras [226] – [229].

23.

We have already submitted[67] that real bearers of the interests and rights in the circumstances of this matter are the alleged victims of the so-called crimes against humanity, who are all foreign nationals not present in the Republic of South Africa.

24.

In this regard, it behoves no argument that the Constitution and more specifically the Bill of Rights contained in the Constitution cannot be applied extraterritorially and conversely also not be relied upon by foreigners not present in the Republic of South Africa, or for that matter anyone acting on their behalf.

25.

We respectfully submit the following regarding the extra-territorial application of the Constitution. In *Kaunda and Others v President of the Republic of South Africa and Others*[68], the Court had to consider the question whether, according to our municipal law the applicants, in that matter, had a right to diplomatic protection from the State,

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67 Paragraph 15 *supra*.

68 2005 (4) SA 235 (CC).

and if they can require the State to come to their assistance if they are extradited to another country.[69] The Court accepted that the State has a positive obligation to comply with the provisions of section 7(2) of the Constitution, which requires the State to "*respect, protect, promote and fulfil the rights in the Bill of Rights",* but stated that "*… that does not mean that the rights nationals have under our Constitution attach to them when they are outside of South Africa, or that the State has an obligation under section 7(2) 'to respect, protect, promote, and fulfil' the rights in the Bill of Rights which extends beyond its borders. Those are different issues which depend in the first instance, on whether the Constitution can be construed as having extraterritorial effect."*[70]

26.

In regard to the provisions of section 233 of the Constitution,[71] the following was stated on the enquiry into extraterritoriality of the Constitution:

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69 *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at par [30].

70 *Kaunda and Others v President of the Republic of South Africa and Others supra* at par [32].

71 Section 233 of the Constitution provides:
*"**Application of international law***
When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

"*The starting point of the enquiry into extraterritoriality is to determine the ambit of the rights that are the subject-matter of s 7(2). To begin with two observations are called for. First, the Constitution provides the framework for the governance of South Africa. In that respect it is territorially bound and has no application beyond our borders. Secondly, the rights in the Bill of Rights on which reliance is placed for this part of the argument are rights that vest in everyone. Foreigners are entitled to require the South African State to respect, protect and promote their rights to life and dignity and not to be treated or punished in a cruel, inhuman or degrading way while they are in South Africa. Clearly, they loose the benefit of that protection when they move beyond our borders.*"[72]

27.

In the same judgment, the extraterritoriality of International Law was discussed in the following terms:

"*It is a general rule of international law that the laws of a State ordinarily apply only within its own territory. It is recognised, however, that a State is also entitled, in certain circumstances, to make laws binding on nationals wherever they may be. This can give rise to a tension if laws binding on nationals conflict with laws of a foreign sovereign State in which the national is. As Dugard points out, sovereignty empowers a State to exercise the functions of a State within a particular territory to the exclusion of all other States. In most instances, the exercise of jurisdiction beyond a States' territorial limits would under international law constitute an interference with the exclusive territorial jurisdiction of another State. In* ***The Case of the SS Lotus****, the Permanent Court of International Justice described this principle as follows:*

> *'Now the first and far most restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention… All that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdictions rests in its sovereignty.'*

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[72] *Kaunda and Others v President of the Republic of South Africa and Others supra* at par [36].

> *As Brownlie and Shaw point out, the passage of which this forms a part has been criticised by a substantial number of authorities. The criticism emanates from a reading of the passage which appears to regard States as possessing very wide powers of jurisdiction which could only be restricted by proof of a rule of international law prohibiting the action concerned. As Shaw notes, however, two later judgments of the ICJ indicate that 'the emphasis lies the other way around'.*
>
> *… What seems to be clear is that when the application of a national law would infringe the sovereignty of another State, that would ordinarily be inconsistent with and not sanctioned by international law.*
>
> *In the case of **R v Cook**, the majority of the Supreme Court of Canada endorsed this understanding of the international law possession holding that 'the principle of the sovereign equality of States generally prohibits extraterritorial application of domestic law'."*[73]

28.

Accordingly and viewed from whatever perspective, the alleged victims of the alleged crimes cannot rely on any of the provisions of the Constitution *in absentia*, and the Applicants can conversely not rely on any infringement of interests or rights under the Domestic ICC Act, either in their own interest or on behalf of any of the alleged victims.

29.

We submit that the Applicants cannot allege or assume any "interest" in the rights of persons who have attained no rights under our

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[73] *Kaunda and Others v President of the Republic of South Africa & Others* supra at paras [38]-[41].

Constitution, for want of those persons' presence in the Republic of South Africa.

30.

The Applicants' reliance of a variety of case law[74] in their heads of argument in support of their professed standing in terms of section 38 of the Constitution, is misplaced – all those judgments relate to representative litigation on behalf of persons or members of the

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[74] *Kruger v President of the Republic of South Africa* 2009 (1) SA 417 (CC) – In this matter the Applicant , an attorney specializing in personal injury law, approached the Constitutional Court under section 172(2)(a) of the Constitution for confirmation of a High Court order declaring Proclamation R27 of 2006. *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) – The applicants (the Respondents in the Appeal Court) sought to interdict two tribal authorities in South-West Africa, *inter alia*, from inflicting corporal punishment upon any person on the ground that he is or is suspected of being a member or sympathizer of any of the organisations known as Demkop and Swapo respectively. *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) – This matter concerned the rights of foreign nationals who a physically in our country but who have not been granted permission to enter an have therefore not entered the country formally. The court in this instance held that the denial of the constitutional rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for protection, or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African Court. *Albutt v Centre for the Study of Violence and Reconciliation, and Others* 2010 (3) SA 293 (CC) – The applicant in this matter who had applied for pardon under the special dispensation for applicants who claimed that they were convicted of offences that were politically motivated, appealed to the Constitutional Court against the order of the High Court, and brought an application for direct access, challenging the constitutionality of section 1 of PAJA, should the court find that PAJA defined the exercise of the President's power to pardon as administrative action. The respondent in this matter was a coalition of non-governmental organizations resisting the application, acting on behalf of victims who could not act in their own name, in the interest of those victims and also in the public interest. *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) – The four applicants, all of whom had in the past received monthly disability grants, alleged that the respondents had suspended these grants in an unlawful manner and had done so to numerous other people in the Province. They therefore instituted legal proceedings in not only their own name but also on behalf of numerous other people who suffered the same fate.

public, present in South Africa. It is therefore clearly distinguishable from the present matter.

C 1.2 Section 38(b)-(d) – Applicants standing in a class action or public law application:

31.

In terms of the scope of section 38(b)-(e) it was pointed out that:

> "*… sub-sections (b) – (e) deal with the capacity of persons to bring challenges under the Bill of Rights in a representative capacity. Some of these provisions manifestly go beyond common-law rules of standing in this regard. Such extension accords with constitutionalism. Beyond this broad proposition there is no clarity at present as to what the outer reaches of these subsections are. For example, and with specific reference to s 38(c), the following are by no means easy questions to answer:*
>
> *(a) Whether a person bringing a constitutional challenge as a member of, or in the interests of, a group or class of persons requires a mandate from members of the group or class.*
>
> *(b) What it is that constitutes a class or group – what should be the nature of the common thread or factor be.*
>
> *(c) What entitles someone who is not a member of the group or class to act on behalf of those who are:*
>
> - *must such person demonstrate some connection with a member or some interest in the outcome of the litigation;*
> - *what should the nature of such 'connection' or 'interest' be;*
> - *in what way, if at all, must the 'interest' differ from that envisaged in s 38(a).*
>
> *(d) Whether a local government, even if it has the capacity to act on its own behalf in regard to a particular Bill of Rights issue,*

has the power (in the sense of vires) to do so in the interest of others."[75]

32.

We have already submitted that the Applicants also rely on the provisions of section 38(d) of the Constitution. This is what is known as the so-called "public law litigation". In *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another*,[76] Froneman J observed the following in respect of the provisions of section 38 of the Constitution, namely:

"*Section 38 is new and introduces far-reaching changes to our common law of standing (compare the remarks of Cameron J about a similar provision in the interim Constitution (the Constitution of the Republic of South Africa Act 2000 of 1993) in Beukes v Krugersdorp Transitional Local Council & Another 1996 (3) SA 467 (W) at 473C). There is no cogent reason for a restrictive interpretation of the provisions of this section because of the narrow content given to standing under the common law (compare Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1).*

Particularly in relation to so-called 'public law litigation' there can be no proper justification of a restrictive approach. The principle of legality implies that public bodies must be kept within their powers. There should, in general, be no reason why individual harm should be required in addition to the public interest of the general community. Public law litigation may also differ from traditional litigation between individuals in a number of respects. A wide range of persons may be affected by the case. … all this speaks against a narrow interpretation of the rules of standing."[77]

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75 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) at par [15].

76 2001 (2) SA 609 (E).

77 *Ngxuza & Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) at 618J-619D.

33.

However and with specific reference to the practical difficulties highlighted in *Maluleke v MEC, Health and Welfare, Northern Province*[78], Froneman J proceeded to list the practical objections to grant the kind of relief sought in representative or class litigation as follows:

> "*(1) The "floodgates' argument – that the courts will be engulfed by interfering busybodies rushing to court for spurious reasons; (2) the 'classification' difficulty – that often the common interest of the applicants and those they seek to represent will be broad and vague; (3) the 'different circumstances' argument – that seeing from the respondents' side the person seeking relief must be treated differently; (4) the 'res judicata' difficulty – that some members of the group may not wish to associate themselves with the representative litigation; and (5) the 'practical impossibility' argument – that it is impossible for the Courts to deal with cases involving thousands of people and that it would adversely affect the public administration if scares resources have to be used to defend such cases in Court.*"[79]

34.

In proceeding to discuss each of these objections in turn, the Court in dealing with the first objection, namely the 'floodgates' objection, made the following remark:[80]

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78 1999 (4) SA 367 (T) at 373J-374E.

79 *Ngxuza* supra at 623B-624A.

80 That is after Froneman J held that the 'floodgates' objection is met by the improbability of it happening with reference to *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) SA 1095 (Tk) at 1106E-G where Pickering J dealt with this argument as follows:
'*It is well, however, to bear in mind a remark made by Mr Justice Kirby, President of the new South Wales Court of Appeal… namely that it may sometimes be necessary to open floodgates in*

> "*But I also think that the possibility of unjustified litigation can be curtailed by making it a procedural requirement that leave must be sought from the High Court to proceed on a representative basis prior to actually embarking on that road. This Division does not at present have practice directions to that effect nor am I aware of any such directions in other Divisions, but it is certainly an issue that I hope will receive attention soon.*"[81]

35.

Extrapolating on Froneman J's suggestion that procedural requirements[82] be formulated as aforesaid, Traverso DJP in the matter of *First Rand Bank Ltd v Chaucer Publications (Pty) Ltd*[83] held that it will be necessary to approach a court for directions if someone wishes to institute a class action. In doing so the applicant ought to show that –

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order to irrigate the arid ground below them. I am not persuaded by the argument that to afford locus standi to a body such as First Applicant in circumstances as these would be to open the floodgates to a current of frivolous or vexatious litigation against the State by cranks or busybodies. Neither am I persuaded, given the exorbitant costs of Supreme Court litigation, that should the law be so adapted cranks and busybodies would indeed flood the courts with vexatious or frivolous applications against the State. Should they be tempted to do so, I have no doubt that an appropriate order of costs would soon inhibit their litigious order.' Ngxuza supra at 624A-D.

81 *Ngxuza* supra at 624E.

82 The procedural requirements to be formulated are as follows:

(a) That leave must be sought from the High Court to embark on a representative basis prior to actually embarking on that road.

(b) The determination of a common interest sufficient to justify a class action takes place prior to the institution of the proceedings.

(c) That it be a requirement that the representing party give sufficient notice to all the affected parties so that they may associate or disassociate themselves from the proposed litigation.

83 2008 (2) SA 592 (C).

35.1 there has been a contravention of a fundamental right protected by the Bill of Rights;

35.2 on the probabilities the breach has been of a general nature and not limited to the applicant;

35.3 the infringement of the right is a justifiable issue; and

35.4 the applicant has standing to sue on his own behalf and on behalf of other persons whose rights are similarly affected.[84]

36.

The Applicants in this matter did not avail themselves of the aforesaid requirements in approaching the Court for directions prior to the launch of this application. In this regard, we further submit that it is perfectly understandable why the Applicants refrained from doing so. The Applicants would not have been able to convince a court that they have the necessary *locus standi* to institute a class action for lack of satisfying the aforesaid. We say this for the following reasons:

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[84] *First Rand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) at 599H-600C.

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

36.2 In the Applicants' heads of argument it is specifically submitted that the Applicants have the necessary standing in terms of section 38(a) of the Constitution in that the First Applicant has standing to complain about the violation of its own administrative justice rights under section 33 of the Constitution (as codified in PJA), and about the violation of sections 237 and 195 by the Respondents, not to mention the violation of the principle of legality.[85]

36.3 The Applicants furthermore submit that this application concerns a review in terms of PAJA. They furthermore submit that in view of the fact that PAJA was enacted in order to give effect to the constitutionally protected right to administrative

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[85] Applicants' Heads of Argument, par 310, p 127.

justice, protected in section 33 of the Constitution, section 38's provisions regarding standing should be read into PAJA.[86]

36.4 We should at this stage interpose and submit that the latter contention by the Applicants, viewed against what we have already submitted in this paragraph, without doubt demonstrates the fallacy in the Applicants' argument that they have *locus standi* in this matter. We submit this for the simple reason that the Applicants cannot convincingly argue that they have standing to litigate on their own behalf and on behalf of the victims of the alleged crimes, or that the Applicants and the victims' rights are similarly affected, either under PAJA or the principle of legality. Simply put - the decision sought to be reviewed by the Applicants does not affect any of the Applicants' rights derived from the Domestic ICC Act.

36.5 Similarly put, the decision sought to be reviewed cannot be said to have adversely affected the rights of any of the alleged victims and which has a direct and external legal effect, whether in violation of their administrative justice rights,

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[86] Applicants' Heads of Argument, par 302, p 124.

sections 237 and 195 rights, or the principle of legality, for the simple reason that the alleged victims are all foreign nationals not present in the Republic of South Africa.[87]

36.6 In other words, and in the event that the Applicants had approach a court for directions prior to the institution of a class action, the Applicants would not have been able to convince a court of the following:

36.6.1 that there has been a contravention of their fundamental rights, as shared by the alleged victims, protected by the Bill of Rights, or that on the probabilities the breach has been of a general nature and not limited to the Applicants (which of course can never be in view of the fact that all the alleged victims are foreigners not present in the Republic of South Africa who cannot rely on the Constitution);

36.6.2 that the infringement of the Applicants rights is a justiciable issue;[88]

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87 We refer in this regard to paragraphs 17 to 30 *supra.*

88 We submit that this is an important issue which we will specifically deal with hereunder in terms of the "doctrine of effectiveness".

36.6.3 the Applicants, although they may have standing to litigate on their own behalf in a matter, would not have been able to convince a court under the present circumstances that they have the standing to litigate on their own behalf and on behalf of the alleged victims, being foreign nationals not present in the Republic of South Africa, because the Applicants rights and the alleged victims' rights are not similarly affected.

37.

In this regard, we submit that the determination of a common interest sufficient to justify class or group or representation, will depend on the facts of each case. The common interest must relate to the alleged infringement of a fundamental right as required by section 38 of the Constitution. We submit that the facts in this matter do not, even remotely indicate the latter.[89]

[89] *Ngxuza* supra at 624F. We further repeat our arguments in paragraphs 17 to 30 *supra*.

38.

We respectfully submit that the Applicants will also not be able to defeat an objection of practical impossibility as raised in the *Ngxuza*-matter.[90] In this regard, Froneman J held that:

> "practical impossibility for the courts and public administration, is one that really begs the question of standing. If there is a clearly defined class of people who have been wronged in the manner required by section 38 of the Constitution, it is no answer to either the judicial or administrative arms of Government to say that it will be difficult to give them redress. If it means that Courts will have to act in new and innovative ways to accommodate them, then so be it. The short answer to the administration is that they should ensure that they act within the principle of legality: if they do it is unlikely that they will be faced with the kind of litigation that arose in this matter."

39.

We submit that it is practically impossible to imagine that a court would have granted the Applicants leave to institute a class action on behalf of foreign nationals not present in the Republic of South Africa, who themselves cannot rely on any of the rights in the Bill of Rights, or for that matter on any of the provisions contained in the Constitution.[91] Furthermore, there is no evidence presented by any of the Applicants that the alleged victims are even aware of the First Applicants request submitted to the First Respondent, or that the

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90 *Ngxuza* supra at 625A-B

91 We submit that this issue will be dealt with in more detail under the discussion of the effectiveness of the judgment hereunder.

alleged victims authorised them to launch this application or to litigate on their behalf.

40.

In this regard it is significant that the Applicants in their heads of argument[92], for the first time rely on an alleged violation of the Respondents obligations in terms of section 195[93]of the Constitution. We submit in this regard that the provisions of section 195 of the

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92 Applicants heads of argument, paras 107-110, pp 50-52.

93 Section 195 of the Constitution reads as follows:

"195 Basic values and principles governing public administration

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to-

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."

Constitution first of all places obligations on the Public Administration towards the South African public at large and/or any foreigner finding himself or herself within the borders of South Africa. There is therefore, with respect, no obligation in terms of the provisions of section 195 of the Constitution upon any of the Respondents towards any foreign national not present in South Africa.

41.

We finally submit that in the event that this Court should find that the Applicants have the necessary *locus standi* under the circumstances of this matter, whether in terms of section 38(a), (b), (c) or (d) of the Constitution, it will undoubtedly open the floodgates in respect of litigation of this nature, i.e. requiring the protection of the rights and interests of groups or classes of persons not present within the borders of the Republic of South Africa.

42.

In the premises, we submit that the Applicants failed to satisfy the requirements of sections 38(a)-(d) of the Constitution. They did not demonstrate a sufficient interest in the alleged rights of the alleged victims of crime and therefore lack the necessary standing to act on their own behalf or on behalf of the alleged victims of crimes.

C.2 NON-REVIEWABILITY OF DECISION OF FOURTH RESPONDENT

C.2.1 Applicability of PAJA to impugned decision:

43.

The Applicants[94] assert that the Fourth Respondent's refusal to institute an investigation constitutes "administrative action" within the meaning of PAJA, alternatively falls to be reviewed under the constitutional principle of legality.

44.

We make common cause with the arguments raised by the First Respondent in his heads of argument[95] on this issue and repeat the contents thereof as if specifically stated herein.

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94 FA, par 97, Index, p 46.

95 First Respondent's heads of argument, paras 78-96, pp 96-109

C.2.2 The rule of law:

45.

The doctrine of the rule of law is constitutionally entrenched in section 1(c)[96] of the Constitution. The Constitutional Court has made decisive use of this doctrine in a number of cases, in which the principles of legality, equality and rationality, were identified.

46.

In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,[97] the principle of legality was confirmed in the following terms:

> *"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the Interim Constitution is a principle of legality."* [98]

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96 Section (1)(c) of the Constitution reads as follows:
"The Republic of South Africa is one sovereign democratic state founded on the following values: …
(c) Supremacy of the constitution and the rule of law."

97 1999 (1) SA 374 (CC).

98 *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*, supra at par [58].

47.

In *New National Party v Government of the Republic of South Africa*[99], the Constitutional Court acknowledged the principles of rationality and equality. The court derived from the rule of law a general requirement that Parliament and other constitutional actors must exercise their powers rationally, which entail non-arbitrariness, tested by seeking a rational connection between an action and the achievement of a legitimate purpose. This test is however, performed before testing for a violation of the Bill of Rights.[100]

48.

The Constitutional Court formulated the principle of rationality in *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa.*[101] It was held that the Constitution places the following constraints on the exercise of public power:

> *"...it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement.*

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99 1999 (3) SA 191 (CC).

100 *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at paras [19]-[20] and [24].

101 2000 (2) SA 674 (CC).

> *If it does not, it falls short of the standards demanded by our Constitution for such action."*[102]

49.

In this regard it is apposite to refer to the provisions of section 165(4) of the Constitution. This section reads as follows:

> *"Organs of state, through legislative and other measures, must assist and protect the courts to ensure the interdependence, impartiality, dignity, accessibility and effectiveness of the courts."* (Our emphasis)

50.

The *ratio* behind the duty imposed on organs of state by section 165(4) of the Constitution, is based upon the fundamental value upon which the Republic of South Africa as democratic State is founded, being the supremacy of the Constitution and the rule of law (section 1(c) of the Constitution).[103]

51.

Section 2 of the Constitution defines the Supremacy of the Constitution as follows:

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[102] *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at par [89].

[103] Referred to in fn 90 *supra*.

> *"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

52.

In addition, section 7(1) of the Constitution dictates that the Bill of Rights is the cornerstone of democracy in South Africa, enshrining the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

53.

Section 7(2) of the Constitution provides that the State *"must respect, protect, promote and fulfill the rights in the Bill of Rights"*, whilst section 8(1) stipulates that the *"Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state"*.

54.

Confirming the democratic value of equality, section 9(1) provides that everyone is *"equal before the law and has the right to equal protection and benefit of the law"*.

55.

In *De Lange v Smuts NO and Others*[104], the Constitutional Court highlighted the significance of the obligation on the government, by stating the following:

> *"In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional State) 'citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors'*
>
> *This it does through its courts and legal system generally…"*[105]

56.

The citations above therefore confirm the *"legislative"* measures provided for in section 165(4). The question as to the meaning of *"other measures"* referred to in this section now needs to be addressed.

57.

In *Modderklip Boerdery (Edms) Bpk*[106], the court described *"other measures"* as follows:

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104 1998 (3) SA 785 (CC).

105 *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at paras [31] and [32]; *Mjeni v Minister of Health and Welfare Eastern Cape* 2000 (4) SA 446 (Tk) at 452E-F; *Modderklip Boerdery (Edms) Bpk v President President van die Republiek van Suid-Afrika en andere* 2003 (1) All SA 465 (T) at 503; *Kaunda and Others v President of the RSA and Others* (2) 2004 (10) BCLR 1009 at 1055 par [182].

> *"Die ander maatreëls van artikel 165(4) is nie noodwendig maatreëls wat spesifiek ontwerp is met die doel om die howe te beskerm nie. Indien daar bestaande beleid en programme is waardeur die afdwinging van 'n hof se bevel verseker kan word, dan is die plig daar om dit behoorlik aan te wend as die gevolg van sodanige aanwending sal wees dat beskerming van die effektiwiteit van die hof sal plaasvind..."*[107]

58.

Thereafter the court referred to the findings made by the Constitutional Court in *Government of the RSA and others v Grootboom and others*,[108] in respect of socio-economic rights, which the court found to be applicable, *mutatis mutandis,* in that matter:

> *"...The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the State's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations."*[109]

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106 2003 (1) All SA 465 (T).

107 *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika en andere* 2003 (1) All SA 465 (T) at 503.

108 *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

109 *Government of the RSA and others v Grootboom and others* 2001 (1) SA 46 (CC) at para [42]; *Modderklip Boerdery (Edms) Bpk v President President van die Republiek van Suid-Afrika en andere* 2003 (1) All SA 465 (T) at par [43]; *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC) para [100].

59.

The obligation imposed by section 165(4) of the Constitution has also been described in the following terms:

> *"The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order."*[110]

60.

In this regard, we submit that the latter description directly relates to the "effectiveness" of a court order. In other words, a court will not readily grant an order in the knowledge that its enforcement will not be effective. We therefore submit that the "doctrine of effectiveness", relating to the power of a court to grant an effective judgment is now constitutionally entrenched by section 165(4) of the Constitution.

61.

Prior to the advent of the Constitution, the principle of effectiveness related to the power of a court to give an effective judgment rather

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110 *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 453C-D; *Modderklip Boerdery (Edms) Bpk v President President van die Republiek van Suid-Afrika en andere* 2003 (1) All SA 465 (T) at par [43].

than to the execution of that power in any particular case.[111]

62.

However, we submit that rule of law, viewed against the provisions of section 165(4) of the Constitution, as referred to above encapsulates the principle that an organ of state will not fulfil its constitutional obligations if it allows a court to grant an order which an organ of state is impossible to give effect to.

63.

We respectfully submit that that is exactly what the Applicants propose. In order to demonstrate the impossibility of such an order being effective, we make the following submissions:

63.1 We make common cause with the arguments raised by the First Respondent in his heads of argument[112], regarding the impossibility of the Fourth Respondent to make use of legitimate channels for obtaining evidence from Zimbabwe [113] ; the inappropriateness of using the First

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111 *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A).
112 First Respondent's heads of argument, paras 78-96, pp 96-109.
113 First Respondent's heads of argument, paras 34-59, pp 63-85.

Applicant to gather evidence on behalf of the SAPS[114]; and the negative impact on diplomatic initiatives, the functioning of SARPCCO and ongoing and future cooperation from the Zimbabwean Police.[115] We do not deem it necessary to repeat those arguments herein.

63.2 Suffice to submit that there are no "legislative" measures to assist the Fourth Respondent in conducting an investigation as the Applicants would have it.

63.3 In view of the facts of this matter, there are no "other measures" available to the Fourth Respondent in order to fulfil his obligations in terms of section 165(4) of the Constitution.

63.4 Accordingly, the Applicants seek relief that would not only have an impact on the foreign relations that our Government have with Zimbabwe, but would undoubtedly also interfere with the domestic affairs of Zimbabwe. On these issues, the Constitutional Court stated the following:

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114 First Respondent's heads of argument, paras 60-73, pp 85-94.
115 First Respondent's heads of argument, paras 74-77, pp 94-96.

> *"The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels States to respect the sovereignty of one another; no State wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The State must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene. It is therefore generally accepted that this is a province of the executive, the State should generally be afforded a wide discretion in deciding whether and in what manner to grant protection in each case and the judiciary must generally keep away from this area. That is not to say the judiciary has no role in the matter."*[116]

63.5 It is submitted that the exercise of the alleged obligations (to conduct an extraterritorial investigation), as the Applicants ask the Court to enforce upon the Fourth Respondent, would undoubtedly be a misconstruction of their powers, and could lead to the loss of good faith of not only the member states of the African Union, but indeed the league of nations. The relief, if granted will compel the Fourth Respondent to intrude upon the domestic and internal affairs of Zimbabwe. Accordingly, such action would most certainly impede on the diplomatic relations between

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[116] *Kuanda & Others v President of the RSA & Others (2)* 2004 (10) BCLR 1009 (CC) 1020 par [172].

member states of the African Union, and ultimately defeat the Rule of Law.

63.6 Our courts' reasoning and decisions on the "*legislative"* and "*other measures"*, referred to above, comprise substantive performance on the part of the Fourth Respondent's section 165(4) duties, on the facts of this case.

63.7 We further submit that the obligations which the Applicants seeks to impose on the Fourth Respondent cannot go beyond those permitted by, *inter alia*, sections 195, 237 and 165(4) of the Constitution, and can most certainly not be enforced extraterritorially. The Fourth Respondent is therefore obliged:

> *"…to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the state's obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case."*[117]

63.8 It is submitted that the enforcement of the duty on the Fourth Respondent to give effect to the Applicants request

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[117] *The President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 at par [43].

for an investigation, would most certainly lead to a large scale disruption in the public and international order.

64.

Accordingly, it cannot serve the equality, legality and reasonable principles of the rule of law to impose such an obligation on the Fourth Respondent, as it would compel the Fourth Respondent to function as an "International Police Service", without any authorisation to act as such.

65.

We therefore submit that the Fourth Respondent's decision is not reviewable under PAJA or the Rule of law.

C.3 THE ZIMBABWEAN HUMAN RIGHTS COMMISSION:

66.

A scathing attack is levelled against both the First and Fourth Respondents for not having made use of mutual legal assistance instruments in order to investigate the allegations contained in the

docket. We have already indicated above [118] that the Fourth Respondent is, in any event, precluded from launching an investigation through the application of legislative or other measures.

67.

The Fourth Respondent's reference to the establishment of the Zimbabwe Human Rights Commission as an alternative remedy available to the alleged victims, was met by another scathing attack by the Applicants regarding its intended application and relevance in this instance.[119]

68.

To summarize, the Applicants refer to a number of media and civil society reports in order to indicate that the Zimbabwean Minister of Justice and Legal Affairs, Patrick Chinamasa was quoted as saying "*[t]his commission will not have powers to investigate human rights violations… before the enactment of the amended number 19, unless such violations have continued after the amendment 19.*"[120] In this regard, we submit that the various media and civil society reports specifically refer to the fact that Minister Chinamasa's remark does

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118 We refer in this regard to paragraph 63 *supra*.
119 SFA, paras 216-221, Index, pp 1626-1628.
120 SFA, Annexure "NFreply2", Index, pp 1661-1671.

not refer to the correct factual position. We say this for the simple reason that the remark was made in view of the "proposed Human Rights Commission Bill", which bill has not yet been brought to cabinet for approval.[121]

69.

The Applicants' condemnation of the relevance of the Zimbabwe Human Rights Commission can therefore not be elevated to factual material upon which this Court can make a definitive finding. At worst for the Fourth Respondent, the upshot of the proposed Human Rights Commission Bill is that an exact time frame within which the Zimbabwe Human Rights Commission will function, has not yet been established.

70.

It is a trite principle of our common law as well as the provisions of PAJA, that a court will not judicially review an administrative decision, if the applicant has not exhausted all his or her available remedies. We submit that this principle is also applicable in this instance. We refer in this regard to the fact that the Applicants conveniently refrain from indicating that they attempted to assist the alleged victims of

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[121] SFA, Annexure "NFreply2", Index, p 1666.

the crimes against humanity to obtain redress within Zimbabwe. The Applicants merely make a bold statement to the effect that there is a total collapse of the rule of law in Zimbabwe, without so much as tendering a jot or tittle of evidence that such a total collapse of the rule of law effectively precludes the alleged victims to obtain any remedy in Zimbabwe.[122]

71.

We further submit that the establishment of the Zimbabwe Human Rights Commission is a fact which this Court should take into account, especially in view of the impossibility of the Fourth Respondent giving effect to the relief sought by the Applicants as already state above.

72.

In the event that the Court should not uphold the arguments raised *in limine*, we submit the following in respect of the merits of the Applicants relief.

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[122] FA, par 7, Index, Court Bundle 1, p 11.

D. THE MERITS

73.

It is common cause that this application requires an interpretation of the Domestic ICC Act.

74.

It is furthermore common cause that South Africa adopted the Domestic ICC Act pursuant to the Rome Statute of the International Criminal Court, 1998.

75.

We further submit that there is no South African case law in point regarding the Domestic ICC Act and the Honourable Court is therefore tasked to adjudicate this novel issue.

76.

In view of our analysis of the relief sought by the Applicants referred to in paragraph 9 *supra*, we submit that the crux of this application concerns an interpretation of section 4(3)(c) of the Domestic ICC Act.

77.

In this regard, we respectfully submit that section 4(3)(c) of the Domestic ICC Act in essence provides for the jurisdictional requirements to be met in order to clothe a South African court with the necessary jurisdiction to adjudicate upon a matter contemplated in the Domestic ICC Act.

78.

It is common cause that all the alleged victims of the crimes against humanity are resident in Zimbabwe, are not and have never been resident in South Africa and are not members of the First or Second Applicants.[123]

79.

It is furthermore common cause that none of the alleged acts of torture were committed in the Republic of South Africa, by South African citizens or against South African citizens.[124]

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123 We submit that this fact was confirmed by the Applicants in their response to Fourth Respondent's notice in terms of Rule 35(12) to which we have already referred in paragraph 5 *supra*. See also: 4th Resp AA, par. 20, Index, Court Bundle 3, p.1103 and the lack of response thereto in RA, par 209, Index, Court Bundle 5, p 1624.

124 *Infra*.

80.

Section 4(3) of the Domestic ICC Act reads as follows:

> "*(3) In order to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if-*
>
> *(a) that person is a South African citizen; or*
>
> *(b) that person is not a South African citizen but is ordinarily resident in the Republic; or*
>
> *(c) that person, after the commission of the crime, is present in the territory of the Republic; or*
>
> *(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic."* (Our emphasis)

81.

In view of the issues which are common cause between the parties, it is apparent that the Applicants can only rely on the provisions of section 4(3)(c) of the Domestic ICC Act in order to secure the jurisdiction of this Court.

82.

In the absence of the *rationes jurisdictionis* dictated by section 4(3)(c) of the Domestic ICC Act, the relief sought by the Applicants

will ineluctably lead to a *brutum fulmen*, or, as we have already submitted a non-effective order.[125]

83.

The Applicants submit that section 4(1)[126] of the Domestic ICC Act specifically provides that our Government adopted an absolute "universal jurisdiction" in respect of crimes committed in terms of the Domestic ICC Act, and that section 4(3)(c) should be interpreted as if the words "anticipated presence" appear therein.

84.

We will accordingly discuss the merits of each of the aforesaid propositions made by the Applicants insofar as the First Respondent has not dealt with same in his heads of argument. The legal principles pertaining to the interpretation of acts of parliament by necessity play a pivotal roll in this regard.

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125 We refer in this regard to the arguments made in paragraphs 61 to 65 *supra*.

126 Section 4(1) of the Domestic ICC Act reads as follows:

"*(1) Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment."*

D.1 Principles pertaining to the interpretation of legislation:

85.

The proper approach to be followed when interpreting any statutory provision is that the court will read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the matter of the statute, its apparent scope and purpose, and, within limits, its background. In the ultimate result, the court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference of the facts of the particular case which is before it.[127]

86.

Clauses in empowering legislation couched in permissive language have often been construed as making it the duty of the person in

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127 *Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and another* 1962 (1) SA 458 (AD) at 476E-G; *Clearing Agents, Receivers & Shippers v The Member of the Executive Council: Transport, KwaZulu-Natal, and Minister of Transport and Commissioner for the South African Revenue Service* [2008] 1 All SA 1 (SCA) at [6].

whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied.[128] Whether or not it should be so construed depends on the language used and the general scope and objects of the empowering legislation. In this regard, it has been held that seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; clearer the language the more it dominates over the context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context.[129]

87.

It follows that the intention of the Legislature must be ascertained from the statute as a whole and no single consideration, however important it may seem to be, is necessarily conclusive.[130] The courts have therefore frequently emphasised that the law requires reasonable and not perfect lucidity.[131]

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128 *South African Railways v New Silverton Estate Ltd* 1946 AD 830 at 842; *Public Servants Association v National Commissioner of SA Police Service* 2007 (2) SA 71 (SCA) at [23].

129 *Jaga v Dönges NO* 1950 (4) SA 653 (A) at 664E-F; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [89] to [92]; *Public Servants Association v National Commissioner of SA Police Service* supra at [23].

130 *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (D) at 189A; *McLoughlin NO v Turner* 1921 AD 537; *Van Der Spuy and Another v Malpage* [2005] 2 All SA 653 (N) at 643.

131 *R v Pretoria Timber Company (Pty) Ltd* 1950 (3) SA 163 (A) at 176H; *Durban Add-Ventures Ltd v Premier of the Province of KwaZulu-Natal* 2001 (1) SA 389 (N) at 400C.

88.

The first and most important principle of statutory interpretation is that legislation should, so far as possible, be given its ordinary meaning. The well-established "golden rule" of statutory interpretation requires that where the language of a statute is clear and unambiguous, then the grammatical or ordinary meaning of the words must be given effect to, unless that would lead to some absurdity, repugnancy or inconsistency with the rest of the instrument.[132] In other words, the ordinary meaning of the words of a statute may only be modified so as to avoid an absurdity or inconsistency.

89.

It is therefore imperative to determine the intention of the Legislature pertaining to the purpose of section 4(3)(d) of the Domestic ICC Act. We submit that the following dictionary definitions are relevant in order to determine same, namely:

89.1 The Oxford Paperback Dictionary & Thesaurus' meaning of the word "present" is "being or existing in a particular place";

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[132] *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 804. See also *Venter v R* 1907 TS 910 914-915; Lourens Du Plessis (2007) *Re-Interpretation of Statutes* (Butterworths LexisNexis, Durban), at page 104, fn.28, and cases cited therein.

89.2 The Funk and Wagnalls Practical "Standard" Dictionary of the English Language' meaning of the word "present" is "being in a place or company referred to or contemplated: opposed to *absent*".

89.3 The freedictionary.com meaning of the word "present" as an adjective is "in attendance, in the company of, in the presence of, in the vicinity, in view, near at hand, nearby, nigh, on hand, on the spot, *praesens*…".

90.

According to the purposive approach to statutory interpretation, meaning must be given to legislation in a manner that is consistent with the object or purpose of the legislation. In other words, legislation must be interpreted by having regard to the "mischief" that it was intended to address.[133]

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[133] See, for example, *Glen Anil Development Corporation Limited v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 727-8.

91.

When assessing the Applicants' interpretation, it is necessary to bear in mind the SCA's admonition that "*it is not the function of a court to do violence to the language of a statute and impose its views of what the policy or object of a measure should be*."[134] The reasons for such restraint have been explained by Schutz JA[135]:

> "*The difficulty, which faces any argument which claims better knowledge of what the legislature intended than what the legislature itself appears to have had in mind when it expressed itself as it did, is to establish with reasonable precision what the unexpressed intention contended for, was".*

92.

We shall indicate below that the Applicants' interpretation seeks to do the very thing which Schutz J A warned against: that is, to claim better knowledge of what the drafters intended than what the drafters clearly had in mind when they formulated the precise language of section 4(3)(c) of the Domestic ICC Act.

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134 *Standard bank Investment Corporation v Competition Commission* 2000 (2) SA 797 (SCA) at par [16].

135 *Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA) at par [9].

93.

On the Applicants' argument, the words "anticipated presence" must be read into section 4(3)(c) of the Domestic ICC Act. It is significant that the Applicants do not specifically deal with this issue in their heads of argument.[136]

94.

It is, however, not permissible to read words into a legislative provision under the guise of interpreting that provision. "Reading-in" is a special constitutional remedy that may be resorted to in certain circumstances where interpretation cannot achieve the desired result. The Constitutional Court has explained this as follows:[137]

> "*There is a clear distinction between interpreting legislation in a way which 'promote(s) the spirit, purport and objects of the Bill of rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a) … The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid."*

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136 The Applicants instead elect to rely on the Princeton Principles in this regard. We are in full agreement with the First Respondent's argument that the Princeton Principles are not legally binding.

137 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at par [24].

95.

In short, the Applicants ask this Court impermissibly to read words into section 4(3)(c) of the Domestic ICC Act under the guise of interpreting the meaning of section 4(3)(c) of the Domestic ICC Act and to interpret the provisions of section 4(1) of the Domestic ICC Act in isolation.

D.2 The principle of absolute "universal jurisdiction":

96.

In view of the legal principles referred to above, it is clear that section 4(1) of the Domestic ICC Act, viewed in conjunction with the remaining provisions of that Act can never be regarded as awarding the South African courts with absolute "universal jurisdiction".

97.

We submit that the *rationes jurisdictionis* of South African courts are specifically provided for in section 4(3) of the Domestic ICC Act, thereby limiting the South African courts' jurisdiction, to a "conditional" universal jurisdiction, i.e. conditional upon the fulfilment

of the requirements contained in section 4(3) of the Domestic ICC Act.

98.

We therefore submit that there is no merit in the Applicants contention that our courts are afforded absolute universal jurisdiction and we make common cause with the First Respondent's arguments in this regard.

99.

In addition, we refer the Court to Resolution 65/33 adopted during the 65th session of the General Assembly of the United Nations, specifically regarding *"The scope and application of the principle of universal jurisdiction"*.[138]

100.

In the aforesaid Resolution, the General Assembly takes note with appreciation of the report of the Secretary-General (A/65/181),

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[138] We attach a copy of the resolution hereto as Annexure "D".

prepared on the basis of comments and observations of Governments.[139]

101.

Under the heading "Distinctions drawn in respect of universal jurisdiction", the following is stated:

> *"16. In this connection, comments were also made drawing a distinction between universal jurisdiction that was absolute, unlimited or unconditional and universal jurisdiction that was conditional or limited. The former, inter alia, allowed for the exercise of universal jurisdiction in criminal proceedings by default or in absentia, without the perpetrator being present in the territory of the forum State. The latter applied once one or several conditions for the reasonable exercise of extraterritorial jurisdiction would have been fulfilled, the common factor being the presence of the alleged offender in the territory of the forum State. Additional considerations, based on the specificities of a national jurisdiction, included the prohibition of extradition of the alleged offender to the territorial State or State of nationality, or the need for a specific request or consent of a duly designated authority. Some Governments stressed that, as a general rule, universal jurisdiction within their jurisdiction could only be exercised when the perpetrator was present in their territory at the time when formal proceedings were initiated.*[140]

102.

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139 Report A/65/181. For the ease of this Court's reference, we also attach a copy of the report hereto as **Annexure "E".**

140 Par 16 of the Report, **Annexure "E"** hereto.

In addition, under the discussion of specific conditions, restrictions or limitations of universal jurisdiction, the report specifically discussed the "jurisdictional link" with reference to the following:

> "*75. The application of universal jurisdiction, in some jurisdictions, was contingent upon the fact that no other jurisdiction has stronger jurisdictional link, or upon the establishment of jurisdictional link to the forum State, such as nationality or residence or presence of the perpetrator or victims on the territory (e.g., South Africa, Tunisia). In some cases, the requirement of a "close link" (e.g., domicile, ordinary residence, asylum-seekers or refugees) attached to specific crimes, such as war crimes (e.g., Switzerland), although it was also noted that such a requirement may have to be abandoned as a consequence of obligations assumed under the Rome Statute (e.g., Switzerland).*
>
> *76. In certain countries, prosecution was subject to the presence of the alleged perpetrator in the territory of the State asserting jurisdiction at the time the proceedings were initiated (i.e., the person was arrested or fount in the territory) (e.g., Austria, Cameroon, the Czech Republic, Denmark, France, Malaysia, the Netherlands, Norway, Slovenia, South Africa, Switzerland, the United States), or prosecutors would decide not to proceed if the alleged perpetrator was not present or his presence was not to be expected (e.g., Germany). Presence was linked to specific crimes (e.g., Cameroon, the Republic of Korea), including piracy, human trafficking, slave trade or drug trafficking (e.g., Cameroon), or financing of terrorism, money-laundering and crimes against the safety of maritime and air traffic (e.g., Tunisia)."*[141]

103.

In view of the aforesaid it is undoubtedly evident that the Domestic ICC Act does not accord the South African courts with absolute,

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[141] Paras 75-76 of the Report, **Annexure "E"** hereto.

unconditional or unqualified jurisdiction. The Applicants' reliance on such form of jurisdiction in this instance is therefore totally misplaced and contrary to the principle of legality.

D.3 "Anticipated presence":

104.

It is evident from the plain meaning of the word, "present" in section 4(3)(c) of the Domestic ICC Act that it does not include anticipated presence.

105.

In any event, when applying the aforesaid legal principles on the interpretation of section 4(3)(c) of the Domestic Act, it is clear that the Applicants seek to read words into this section, which first of all is not reasonably necessary because the provisions of section 4(3)(c) are clear and unambiguous. Second, reading-in is a special constitutional remedy to be applied following upon a declaration of constitutional invalidity under section 172(1)(a) of the Constitution.

106.

The Applicants do not seek the invalidity of section 4(3)(c) of the Domestic ICC Act.

107.

Lastly and in view of the observations of the United Nations report referred to above, it is clear that the conditional universal jurisdiction of the South African courts is specifically defined by the principle of "presence". Accordingly, the Applicants proposal of "anticipated presence" is not only impermissible but also contrary to conditional universal jurisdiction and the principle of legality.

E. CONCLUSION:

108.

On a conspectus of all the evidence, the Applicants has failed to show that the decision not to initiate an investigation is susceptible to be reviewed either under PAJA or in terms of the principle of legality.

They have also failed to make a case for reconsideration of the Fourth Respondent's decision on any valid, lawful and reasonable basis.

109.

The Applicants were fully apprised of the cogent reasons why the launch of this application would not be in the best interest of justice. We refer in this regard to the solution offered by the court[142], which proposes a suitable costs order to prevent unfounded and frivolous litigation. We submit that this application falls to be dismissed with costs, inclusive of the costs of two counsel.

DATED at **PRETORIA** on this the **13th** day of **FEBRUARY 2012**.

ADV AC FERREIRA SC
ADV I ELLIS
COUNSEL FOR FOURTH RESPONDENT

[142] We refer to paragraph 34 *supra*.