IN THE SUPREME COURT OF APPEAL OF SOUTH AFICA

SCA CASE NUMBER: 485/2012

NGHC CASE NUMBER: 77150/09

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE — FIRST APPLICANT

(Fourth Respondent in the Court *a quo*)

NATIONAL DIRECTOR OF PUCLIC PROSECUTIONS — SECOND APPLICANT

(First Respondent in the Court *a quo*)

and

SOUTHERN AFRICA HUMAN RIGHTS LITIGATION CENTRE — FIRST RESPONDENT

(First Applicant in the Court *a quo*)

ZIMBABWE EXILES FORUM — SECOND RESPONDENT

(Second Applicant in the Court *a quo*)

FIRST APPLICANT'S PRACTICE NOTE

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1. NAME AND NUMBER OF THE MATTER:

   See heading above.

2. **NATURE OF THE APPEAL:**

This is an application for leave to appeal against the whole of the judgment and orders of the North Gauteng High Court in case number NGHC 77150/2009 per Fabricius J. The application for leave to appeal, and if successful the appeal turns mainly on the interpretation of sections 4(1) and 4(3) of the Implementation of the Rome Statute of the International Criminal Court 27 of 2002 (hereinafter referred to as "the domestic ICC Act"). It involves principles of conventional international law, customary international law and comparable international law.

3. **JURISDICTION:**

In terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959 Brand JJA and Theron JJA on 18 September 2012 (Record Vol 8/1210) directed that the application for leave to appeal is referred for oral argument and that further the parties must be prepared to address the Court on the merits if called upon to do so.

4. **CONSTITUTIONAL QUESTIONS:**

The application for leave to appeal relates to the interpretation of provisions of a statute which was enacted to give effect to an international treaty. Although no constitutional issues have been directly raised, a consideration of the relevant issues, namely international obligations, customary international law and conventional international law may give rise to constitutional issues.

5. **ISSUES ON APPEAL:**

There are four distinct issues which must be decided:

5.1 Whether the appeal has been perempted due to the fact that the Applicants commenced implementing the orders of the court *a quo* after leave to appeal was refused.

5.2 In the event of the appeal not being perempted, whether leave to appeal should be granted by this Court.

5.3 In the event of leave to appeal being granted, whether the court *a quo's* interpretation of section 4(1) and section 4(3) of the domestic ICC Act is correct.

5.4 In the event of a finding in favour of the Applicants in regard to the aforesaid interpretation, whether it is dispositive of the entire review application as well of the issue of the Respondents' *locus standi in iudicio*.

6. **DURATION OF ARGUMENT:**

6.1 The First Applicant anticipates that argument will be completed within two days if in fact the issues on the merits have to be argued. Complex

arguments are made on both the issue of peremption and the interpretation of the domestic ICC Act. In addition the First Applicant seeks to argue the issue of the *locus standi* of the Respondents to have initiated a review.

6.2 An application in terms of Rule 16 of this Court's Rules have recently been launched by THE TIDES CENTER to be admitted as *amicus curiae*. If the application is granted, the appeal will most probably not be disposed of within one day.

7. **MORE THAN ONE DAY:**

A second day is necessary as indicated above.

8. **LANGUAGE OF THE RECORD:**

The record is in English.

9. **PORTIONS OF THE RECORD THAT NEED TO BE READ FOR THE PURPOSES OF THE APPEAL:**

The First Applicant is of the view that the following portions of the record need to be read for the purpose of the appeal:

Application for leave to appeal:

9.1 Pages 1 - 34: Notice of Motion and Founding Affidavits;

9.2 Pages 136 - 158: Notices of Applications for Leave to Appeal;

9.3 Pages 164 - 208: Respondents' Answering Affidavit and Annexures;

9.4 Pages 209 - 243: First and Second Applicants' Replying and Confirmatory Affidavit.

Record of Appeal:

9.5 Volume 1: pp 12 – 56: First Respondent's Founding Affidavit;

9.6 Volume 1: pp 83 - 135: First Respondent's Memorandum (Annexure NF5);

9.7 Volume 1: pp 155 – 187: First Respondent's Supplementary Founding Affidavit;

9.8 Volume 1: pp 194 – 205: First Applicant's reasons;

9.9 Volume 3: pp 434 - 435: Letter dated 15 December 2008 - Referral to First Applicant by Second Applicant;

9.10 Volume 3: pp 443 - 445: Decision by First Applicant dated 29 May 2009;

9.11 Volume 4: pp 459 – 561: First Applicant's Answering Affidavit;

9.12 Volume 4: pp 591 – 594 (paras 1 to 7); 617 – 620 (par 14); 632 – 638 (paras 25 to 27): Supporting Affidavit of Brigadier Marion;

9.13 Volume 6: pp 887 – 889 (paras 12 to 19); pp 902 – 903 (paras 47 to 50); pp 905 – 907 (paras 58 to 63); pp 938 - 942 (paras 113 – 114); pp 950 – 965 (paras 206 to 261): Respondents' Replying Affidavit;

9.14 Volume 8: pp 1104 - 1200: Judgment of court *a quo* dated 8 May 2012;

9.15 Volume 8: pp 1205 - 1208: Reasons for Judgment in applications for leave to appeal dated 7 June 2012.

10. SUMMARY OF SECOND APPLICANT'S ARGUMENTS:

10.1 Peremption of Appeal

When the conduct of the First Applicant is viewed in light of the relevant case law and principles governing peremption, the Respondents have failed to prove that peremption had taken place.

The implementing of a mandatory court order after leave to appeal had been refused cannot amount to unequivocally abandoning the intention to appeal. The First Applicant indeed and in fact on 8 June 2012 exercised and communicated an election to apply for leave to appeal. This fact was conveyed to the Respondents on 2 July 2012 and accepted as such. It is not a requirement of South African law that the implementation of a mandatory order be accompanied by a letter containing a reservation of rights.

10.2 Application for Leave to Appeal

Leave to appeal should be granted on the bases that the First Applicant has good prospects of success and the issues raised in the appeal are novel, involving international law principles and are of great importance to all parties concerned.

10.3 Merits

The issue relates to the correct interpretation of sections 4(1) and 4(3) of the domestic ICC Act. The First Applicant will argue that the court *a quo* and the Respondents erred in respect of general international law principles in that they conflated *prescriptive* jurisdiction with *enforcement* jurisdiction as provided by section 4 of the domestic ICC Act. In essence, the Respondents and the court *a quo* elevated the enforcement jurisdiction of section 4 of the domestic ICC Act to "absolute universal jurisdiction", whilst the prescriptive

jurisdiction embodies in section 4(3)(c) of the domestic ICC Act clearly connotes a "conditional universal jurisdiction."

Section 4(1) of the domestic ICC Act merely criminalises the offences created therein in South Africa (territorial jurisdiction), and section 4(3) makes provision for extraterritorial prescriptive jurisdiction if one or more of the conditions specified in section 4(3) are satisfied. The Legislator adopted conditional or limited prescriptive universal jurisdiction. Extraterritorial enforcement jurisdiction (including investigations, prosecutions and criminal trials) may therefore only be initiated if the prescriptive requirements of section 4(3) are satisfied.

The Rome Statute, customary international law and comparable international law do not justify a different interpretation.

Accordingly, the presence of any offender in the Republic is a prerequisite for the initiation of an investigation by the First Applicant. To initiate an investigation under section 4(3)(c) without the offender being present would be contrary to the prescriptive provisions of the domestic ICC Act and will infringe upon the rule of law.

Consequently the Respondents cannot review the First Applicant's decision on any ground afforded in PAJA or in accordance with the rule of law.

11. **CORE BUNDLE:**

No core bundle will be utilised by First Applicant's counsel and reference will be made to the record and application.

12. **COMPLIANCE WITH RULES 8(8) AND 8(9):**

The correspondence relating to the compliance with Rules 8(8) and 8(9) is contained in the Record: Volume 8, pp 1211 - 1239.

13. **COMPLIANCE WITH RULE 10(3)(g)**

In terms of Rule 10(3)(g) of the above Honourable Court, our heads of argument do not exceed 40 pages and accordingly it was not necessary to obtain leave to file heads of argument in excess of 40 pages.

DATED at PRETORIA on this the 22 day of April 2013.

AC FERREIRA SC

I ELLIS

FIRST APPLICANT'S COUNSEL

IN THE SUPREME COURT OF APPEAL OF SOUTH AFICA

SCA CASE NUMBER: 485/2012

NGHC CASE NUMBER: 77150/09

In the matter between:

NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	FIRST APPLICANT (Fourth Respondent in the Court *a quo*)
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	SECOND APPLICANT (First Respondent in the Court *a quo*)

and

SOUTHERN AFRICA HUMAN RIGHTS LITIGATION CENTRE	FIRST RESPONDENT (First Applicant in the Court *a quo*)
ZIMBABWE EXILES FORUM	SECOND RESPONDENT (Second Applicant in the Court *a quo*)

FIRST APPLLICANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

A. INTRODUCTION:

1. This matter involves an application for leave to appeal by the Applicants, and if granted by this Court, the determination of the appeal itself.

2. The aforesaid is the result of this Court's order made on 18 September 2012,[1] referring the application for leave to appeal for oral argument in accordance with the provisions of section 21(3)(c)(ii) of the Supreme Court Act 59 of 1959. The order furthermore requires that the parties must be prepared to address the Court on the merits of the appeal, if called upon to do so. These heads of argument will therefore first address the application for leave to appeal and thereafter the merits of the appeal. However and before proceeding to do so, it is apposite to succinctly refer the Court to the historical facts of this matter.

B. BACKGROUND:

3. On 16 March 2008,[2] the First Respondent ("SALC")[3] requested the Priority Crimes Litigation Unit ("PCLU"),[4] a directorate within the Second Applicant ("NPA"), to investigate and prosecute crimes against humanity of torture allegedly committed by Zimbabweans in Zimbabwe against Zimbabwean

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[1] Vol. 8, 1210.
[2] Vol. 1, 26-27: Founding Affidavit (FA), par 45.
[3] The Second Respondent ("ZEF") was not a party to SALC's written request.
[4] The PCLU was cited as the Second Respondent in the proceedings before the court *a quo*.

victims, in accordance with the provisions of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("the domestic ICC Act").

4. The purpose of the domestic ICC Act is to provide for a framework to ensure the effective implementation of the Rome Statute ("the Statute") of the International Criminal Court ("the ICC Court") in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the ICC Court in certain circumstances; to provide for cooperation by South Africa with the ICC Court; and to provide for matters connected therewith.[5]

5. The request by SALC was accompanied by a memorandum compiled by counsel, setting out the legal bases for the request.[6] The contents of the memorandum indicate that SALC's request was premised on the provisions of section 4 of the domestic ICC Act.[7]

[5] The heading to the preamble of the domestic ICC Act. The underlining is our own.
[6] Vol. 1, 83-135.
[7] Vol. 1, 109-117.

6. However, the PCLU[8] not being vested with investigative powers, SALC's request was referred[9] to the First Applicant ("SAPS") in order for it to consider whether or not to initiate an investigation into the alleged crimes.

7. On 29 May 2009, the SAPS informed the NPA that it does not intend to initiate an investigation as suggested by SALC.[10] The NPA subsequently informed SALC of the SAPS's decision on the issue.[11]

8. In consequence thereof, SALC together with the Second Respondent ("ZEF") launched an application in the court *a quo*, seeking, *inter alia*, the review and setting aside of the decision, which according to them, was taken by the NPA, PCLU and/or SAPS,[12] in terms of either the provisions of the Promotion of Administrative Justice Act 2 of 2000 ("PAJA") or the rule of law.[13]

9. On 8 May 2012, the court *a quo* gave judgment[14] in favour of SALC and ZEF ("the Respondents"), coupled with an order couched in the form of a structural interdict.[15]

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[8] Vol. 2, 210, lines 13-15. According to the Presidential Proclamation, the PCLU is particularly tasked to "*...manage and direct the investigation and prosecution...*" of crimes contemplated in the domestic ICC Act.
[9] Vol. 3, 434-435.
[10] Vol. 3, 443- 445.
[11] Vol. 1, 151.
[12] Vol. 1, 7-8: Amended notice of motion, prayer 1.
[13] Vol. 1, 49-51: FA, paras 97 – 101.
[14] Vol. 8, 1104-1201: Judgment of Fabricius J, dated 8 May 2012. Reported as *South African Litigation Centre and another v National Director of Public Prosecutions and others* [2012] 3 All SA 198 (GNP); 2012 (10) BCLR 1089 (GNP).
[15] Vol. 8, 1202-1204: Order dated 8 May 2012.

10. Thereafter and within the prescribed time period allowed, the NPA[16] and SAPS[17] ("the Applicants") launched their applications for leave to appeal in the court *a quo*.

11. Pursuant to the applications for leave to appeal, the Respondents filed an application in terms of Rule 49(11) of the Uniform Rules of Court, that the order of the court *a quo* not be suspended pending an appeal.[18]

12. On 7 June 2012,[19] the court *a quo* dismissed the applications for leave to appeal without making an order in respect of the Respondents' application in terms of Rule 49(11).[20]

13. Subsequently and within the time period allowed in terms of section 21(2) of the Supreme Court Act 59 of 1959 read with this Court's Practice Directives,[21] the Applicants launched an application for leave to appeal to this Court, the merits of which will now be addressed.

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[16] Application for leave to appeal ("Appl. LTA"), 136-151: SAPS notice of application for leave to appeal dated 18 May 2012.

[17] Appl. LTA, 152-158: NPA notice of application for leave to appeal dated 24 May 2012.

[18] Although the papers filed in respect of the Rule 49(11) application do not form part of the record filed in this Court or the application for leave to appeal, we respectfully submit that same is mentioned in the court *a quo*'s reasons for refusing the applications for leave to appeal (Appl. LTA, 160, par 2). It should furthermore be common cause that the Applicants indeed opposed the Rule 49(11) application.

[19] Appl. LTA, 163: Order of the court *a quo* dated 7 June 2012.

[20] Appl. LTA, 162: Reasons for judgment dismissing the applications for leave to appeal, par 10. Fabricius J merely remarked the following: *"I may add that had I been persuaded to grant leave to appeal, I would have ruled that my order not be suspended pending the appeal."*

[21] If an application for leave to appeal is filed within 21 court days instead of within 21 ordinary days as required by s 21(2) of the Supreme Court Act 59 of 1959, it will for the time being not be necessary for the applicant to apply formally for condonation for the failure to comply with that provision: Practice Directions par 9 2005 (5) SA 1 (SCA).

C. APPLICATION FOR LEAVE TO APPEAL:

14. The Respondents oppose the application for leave to appeal on two bases. Firstly, that the appeal has been perempted.[22] Secondly, that the reasoning of the court *a quo* regarding the interpretation of the domestic ICC Act is not assailable.[23]

15. Because the success or otherwise of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, the argument on the application for leave to appeal would, to a large extent, have to address the merits of appeal. For this reason, only the issue of peremption will be addressed in detail under this heading.

(i) Peremption

16. The right of an unsuccessful litigant to appeal against an adverse judgment or order is waived if such a litigant by unequivocal conduct,[24] inconsistent with an intention to appeal, acquiesces therein.[25] This form of waiver is also called peremption of appeal.

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[22] Appl. LTA, 167: Respondents' Answering Affidavit (AA), par 8.
[23] Appl. LTA, 167-168: AA, par 9.
[24] *Tswelopele Non-profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) at 515C-D (with reference to *Hlatswayo v Mare & Deas* 1912 AD 232 at 241, and *Dabner v South African Railways and Harbours* 1920 AD 583 at 594).
[25] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A-B.

17. The party alleging peremption must prove the waiver, which requires proof of conduct that point indubitably and necessarily to a decision not to appeal.[26] If the facts proved are of such a nature that more than one inference may fairly be drawn from them, the party who sets up the case that there has been acquiescence must be held to have failed to have discharged the onus cast upon him.[27]

18. The doctrine of acquiescence is based on the principle that no person can be allowed to take up two positions inconsistent with one another, i.e. to approbate and reprobate *pari passu*. However, before a person can be said to have acquiesced in a judgment, and thereby to have lost the right to appeal, a right which he clearly has or at all events had, the Court must be satisfied upon the evidence that he has done an act which is necessarily inconsistent with his continued intention to appeal.[28]

19. It is clear that where submission to a court's order is not dictated by acquiescence, submission does not perempt the appeal.[29]

20. Where appellants therefore submitted to a mandatory order without ever abandoning the intention to appeal, out of respect for the court, it was held that

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[26] *Natal Rugby Union v Gould* [1998] 4 All SA 258; 1999 (1) SA 432 (SCA) at 443. In *Samancor Group Pension Fund v Samancor Chrome* [2010] 4 All SA 297; 2010 (4) SA 540 (SCA), this Court raised the issue *meru motu*.
[27] *Hlatswayo v Mare & Deas* 1912 AD 232 at 256.
[28] *Hlatswayo v Mare & Deas* supra at 259.
[29] *Cohen v Cohen* 1980 (4) SA 435 (ZA) at 439I-440A; 440D.

the right of appeal was not perempted.[30]

21. Moreover, in a recent decision by this Court it was held that "(w)hether the appellants were ill-advised not to appeal against the first order, but rather to try and comply with it, should not have the unacceptable result that this court is held to a mistake of law by one of the parties (and find that its appeal had perempted)."[31]

22. In view of the aforegoing principles, it is respectfully submitted that it is imperative to review the SAPS's conduct after the court *a quo* dismissed the applications for leave to appeal, in order to establish whether its conduct was inconsistent with an intention to appeal and in fact an acquiescence in the judgment.

23. In this regard, it is pertinent to refer to the letter by the SAPS to the NPA, dated 8 June 2012,[32] one day after the applications for leave to appeal was dismissed by the court *a quo*.

24. The first paragraph of the aforesaid letter reads as follows: "As you are aware, on 7 June 2012, the Court *a quo* dismissed the application for leave to appeal by both the NPA and SAPS. I believe that NPA is proceeding with a petition to

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[30] *Resident Magistrate Taungs v James* 1914 CPD 1064 at 1067-1068.
[31] *Government of the Republic of South Africa and Others v Von Abo* [2011] 3 All SA 261; 2011 (5) SA 262 (SCA) at par [18].
[32] Appl. LTA, 230: Annexure G to the SAPS's Replying Affidavit (RA).

the President of the Supreme Court of Appeal and I believe that the SAPS will follow suite (sic). Pending the lodging of the petition, the judgment is to the effect that an investigation must be implemented."[33]

25. Although the choice of the words "that an investigation must be implemented" in the last sentence referred to above, is unfortunate and should rather have been "that the order of the court *a quo* must be implemented", it is respectfully submitted that the gist of the letter however remains unaffected, i.e. that the SAPS persists with its intention to appeal the order and judgment of the court *a quo*. In addition, the letter also recorded the NPA's similar intention in that regard.

26. The SAPS decision to implement the order of the court *a quo*, pending the application for leave to appeal to this Court, cannot be viewed or considered as an abandonment of its right to appeal, for the simple reason that the Applicants were faced with the situation that the dismissal of the applications for leave to appeal by the court *a quo* effectively lifted the suspension of that court's order.

27. Accordingly and pending the launch of the applications for leave to appeal in this Court,[34] the Respondents could have brought contempt proceedings against

[33] Ibid. The remainder of the letter refers to portions of the order of the court *a quo* and requested the assistance of the PCLU in this regard.

[34] The order of the court *a quo* would be suspended pending an application for leave to appeal to this Court: *Beecham Group plc v SA Druggists Ltd* 1987 (4) SA 869 (T).

the Applicants for non-compliance with the order of the court *a quo*.[35]

28. It was therefore purely out of respect for the court *a quo* that the Applicants decided to implement that court's order and most certainly not with the intention to acquiesce in the judgment or to abandon their right to appeal.[36]

29. Regarding the subsequent exchange of communications after 8 June 2012, between officials of the NPA and SAPS, and the attorneys for the Respondents ("LHR"), it is respectfully submitted that at no stage was it either recorded or communicated to LHR that the Applicants have abandoned their right to approach this Court for leave to appeal, or that the Applicants accept and acquiesce in the judgement of the court *a quo*.

30. Instead, on 2 July 2012,[37] the NPA unequivocally confirmed that the Applicants have not abandoned their application for leave to appeal. This was in response to a letter from LHR dated 27 June 2012,[38] wherein LHR specifically records that they assume that the Applicants have decided against pursuing their appeal against the order of the court *a quo*.[39]

31. The Respondents at no stage after 2 July 2012, disputed the Applicants right to have launched an application for leave to appeal in this Court, or for that matter

[35] Appl. LTA, 213: RA, par 4.
[36] Appl. LTA, 214: RA, par 6.
[37] Appl. LTA, 201: Annexure NFA5 to AA.
[38] Appl. LTA, 199-200: Annexure NFA4 to AA.
[39] Appl. LTA, 200: Annexure NFA4 to AA, par 3.

informed the Applicants that their conduct have perempted their right to appeal. The issue of peremption of the appeal was only raised by the Respondents for the first time in their answering affidavit to the application for leave to appeal.

32. It is respectfully submitted that the Respondents lack of response to the NPA's communication of 2 July 2012, clearly indicates an acceptance of the Applicants election[40] to pursue their right to appeal.

33. The latter contention is undubitably demonstrated by the contents of the letter by LHR dated 24 July 2012.[41] In this letter, LHR merely notes that the Applicants have launched their application for leave to appeal and records that the Respondents have instructed them to oppose leave to appeal.[42]

34. However and after noting that the Applicants have, despite their application for leave to appeal, already opted to continue the investigation,[43] LHR in their letter simply records that "(s)hould your clients discontinue the investigation or should the investigation not be conducted in terms of the above court order, we will have no other choice but to again approach Judge Fabricius for an order in terms of Rule 49(11) pending the outcome of the leave to appeal application or,

[40] *Clarke v Bethal Co-Operative, Society* 1911 TPD 1153 at 1161.
[41] Appl. LTA, 231-232: Annexure H to RA.
[42] Appl. LTA, 232: Annexure H to RA, par 5.
[43] Ibid, par 6.

in the event that leave to appeal is granted, pending the finalisation of the appeal."[44]

35. It is common cause that the Respondents have not approached the court *a quo* for an order in terms of Rule 49(11), since the launch of the application for leave to appeal in this Court.

36. Moreover, the contents of LHR's letter dated 24 July 2012, do not even in the slightest suggest that the Applicants have perempted their right to appeal.

37. It is with respect submitted that the contents of the NPA's letter of 25 July 2012,[45] inadvertently provided the Respondents with the opportunity to raise peremption of appeal against the Applicants in their opposition of the application for leave to appeal. In response to the LHR letter dated 24 July 2012, the NPA records that the lodging of the application for leave to appeal to this Court automatically suspends the court *a quo*'s orders.[46]

38. Further and in order to avoid another Rule 49(11) application being launched by the Respondents and its attendant costs, the letter contains the proposal that the DPCI[47] and the PCLU will continue with the investigation, subject to the

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[44] Ibid, par 8.
[45] Appl. LTA, 207-208: Annexure NFA9 to AA.
[46] Appl. LTA, 207: Annexure NFA9 to AA, par 2 (last sentence).
[47] The Directorate for Priority Crimes Investigation ("DPCI") was established as a division of the South African Police Service ("SAPS"), by the South African Police Service Amendment Act 57 of 2008 (the "Amendment Act"). In terms of section 3 of the Amendment Act, Chapter 6A was inserted in the SAPS Act. Accordingly, section 17C of the SAPS Act formally established the DPCI. In terms of section 17A of

Respondents furnishing an undertaking that they will not raise as a legal argument, that the continuation of the investigation constitutes a concession as to the correctness of the judgment of the court *a quo*, nor any form of abandonment of the application for leave to appeal. In other words the initiation of the investigation is not to be construed as peremption of appeal.[48]

39. Needless to say, the Respondents refused to furnish the Applicants with such undertaking, with the consequential result that the order of the court *a quo* remained suspended.

40. It is respectfully submitted that the conduct of the Applicants referred to above, does not warrant this Court to conclude that it points indubitably and necessarily to a decision not to appeal.

41. In the premises, the Respondents have failed to prove peremption of the appeal.

(ii) **Reasonable prospect of success on appeal**

42. In order to succeed in the application for leave to appeal, the Applicants have to persuade this Court that there is a reasonable prospect of success on appeal.[49]

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the SAPS Act, a national priority offense is defined as organised crime, crime that requires national prevention or investigation, or crime which requires specialized skills in the prevention and investigation thereof, as referred to in section 16(1) of the SAPS Act.

[48] Appl. LTA, 207-208: Annexure NFA9 to AA, par 3.
[49] *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343C-G.

43. We submit in this regard, that although the importance of a matter is not on its own a justification for granting leave to appeal,[50] the subject matter of this appeal is of such a nature that the consequences of the order of the court *a quo*, will affect all parties concerned regarding the future application of the domestic ICC Act. Pronouncement by this Court will therefore provide legal certainty pertaining to the parties' future conduct in this regard.

44. It is further submitted that there is a reasonable possibility that this Court may, on a conspectus of the submissions made hereunder, agree with the SAPS's interpretation of the domestic ICC Act, which involves novel legal principles which are, with respect, deserving of this Court's attention.[51]

45. Moreover, as we will indicate below, the issues raised in this appeal attract principles of customary international law upon which no judicial pronouncement has been made by a court in South Africa.

46. The merits of the appeal will accordingly be addressed in what follows.

D. MERITS OF APPEAL:

[50] *Janit v Van den Heever NO* [2000] 4 All SA 520 (W) at paras [4]-[5].
[51] *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2003 (5) SA 354 (SCA) at par [23].

47. It is common cause between the parties that this appeal centres on the interpretation of section 4 of the domestic ICC Act.[52] The principle rules of interpretation of statutes are therefore at the foreground in this appeal.

(i) **Rules of interpretation**

48. The primary rule in the interpretation of statutes is to give effect to the object and purpose of the statute. The nature of the statute and the purpose for which it was enacted are important when it comes to matters of interpretation. This Court has embraced the purposive approach, whereby statutory words must be interpreted in the context of the statute as a whole including its purpose.[53] In other words, legislation must be interpreted by having regard to the "mischief" that it was intended to address.[54]

49. Even when the language is unambiguous, the purpose of the Act and other wider contextual considerations may be invoked in aid of a proper construction.[55]

50. Clauses in empowering legislation couched in permissive language have often been construed as making it the duty of the person in whom the power is

[52] Appl. LTA, 23-24: FA, par 44, read with AA, paras 11 and 13, 168, and RA, par 35, 229.
[53] *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras [16]-[19].
[54] See, for example, *Glen Anil Development Corporation Limited v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 727-8.
[55] *Stopforth v Minister of Justice; Veenendal v Minister of Justice* 2000 (1) SA 113 (SCA) par [21].

reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied.[56]

51. 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.[57]

52. 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.[58] The courts have therefore frequently emphasised that the law requires reasonable and not perfect lucidity.[59]

53. It is therefore imperative to determine the intention of the Legislature pertaining to the purpose of section 4 of the domestic ICC Act. We submit that it is therefore apposite to at this stage consider the scheme of the domestic ICC Act.

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[56] *Public Servants Association v National Commissioner of SA Police Service* 2007 (2) SA 71 (SCA) at [23].
[57] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at [89] to [92].
[58] *Van Der Spuy and Another v Malpage* [2005] 2 All SA 635 (N) at 643.
[59] *Durban Add-Ventures Ltd v Premier of the Province of KwaZulu-Natal* 2001 (1) SA 389 (N) at 400C.

(ii) **Scheme and purpose of the domestic ICC Act**

54. As we have already submitted earlier, the domestic ICC Act provides for a framework to ensure the effective implementation of the Rome Statute ("Statute") of the International Criminal Court ("ICC") in South Africa.[60] The Statute is an international agreement, ratified by South Africa which became law in South Africa upon the promulgation of the domestic ICC Act.[61]

55. In this regard, section 2 of the domestic Act provides as follows:

> "2. **Applicable law**
>
> In addition to the Constitution and the law, any competent court in the Republic, hearing any matter arising from the application of this Act must also consider and, where, appropriate, may apply-
>
> (a) conventional international law, and in particular the Statute;[62]
> (b) customary international law; and
> (c) comparable foreign law."

56. We respectfully submit that the provisions of section 2 above, provide the context in which this Court must view the purpose and scheme of the domestic ICC Act.

57. In this regard, the provisions of sections 232[63] and 233[64] of the Constitution are applicable in this instance.

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[60] Paragraph 4 supra.

[61] In terms of section 231(4) of the Constitution, any international agreement becomes law in the Republic when it is enacted into law by national legislation.

[62] We submit that the provisions of Article 15(4) of the Statute, which enjoins the prosecutor of the ICC and the Pre-Trial Chamber first to consider whether the ICC will have jurisdiction before an investigation is initiated, are equally applicable in this instance.

[63] Section 232 of the Constitution reads as follows:

58. Section 3(d) of the domestic ICC Act further provides that one of the objects of the Act is to enable, as far as possible and in accordance with the principle of complementarity as referred to in Article 1 of the Statute, the NPA to prosecute and the High Courts to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances.

59. The relevant provisions of section 4 of the domestic ICC Act provide as follows:

"4 **Jurisdiction of South African courts in respect of crimes:**

(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.

...

(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

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"232 **Customary International law**
Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

[64] Section 233 of the Constitution provides the following:

"233 **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."

(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."[65]

60. It is submitted that the scheme and purpose of the domestic ICC Act clearly envisage extraterritorial criminal jurisdiction of the Republic over the crimes defined in section 4(1) of the domestic ICC Act. This in itself attracts principles of customary international law, hence the specific provision of section 2 in the domestic ICC Act.

61. It is therefore necessary to examine extraterritorial jurisdiction against the principles of international law and comparable foreign law.

(iii) **International law on jurisdiction**

62. In view of the novelty and complexity of the main issue to be determined in this appeal, it is necessary to depart from Rule 10(3)(b)(ii) in order to demonstrate the wide acceptance of the various principles on international law enunciated hereunder.

63. It is generally accepted that the term "extraterritoriality" refers to the exercise of jurisdiction by a nation state over conduct occurring outside its borders.[66]

[65] Our emphasis.

64. A state's jurisdiction, under international law, refers to its power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them.[67]

65. Jurisdiction takes various forms. The longstanding practice of states makes it clear that criminal jurisdiction must be considered in its two distinct aspects, i.e. jurisdiction to prescribe[68] and jurisdiction to enforce.[69]

(a) **Jurisdiction to prescribe**

65. Jurisdiction to prescribe (also called legislative or substantive jurisdiction) is the power to make rules, issue commands or grant authorizations that are binding upon persons and entities. The legislature exercises prescriptive jurisdiction in enacting legislation.[70]

(aa) **Bases of prescriptive jurisdiction**

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[66] Danielle Ireland-Piper *Extraterritorial Criminal Jurisdiction: Does the long arm of the law undermine the rule of law?* Vol. 13 [2012] 122 Melbourne Journal of International Law 127 (*"Ireland-Piper"*). *R v Klassen* 2008 BCSC 1762 (CanLII) at par [61] (*"Klassen"*).

[67] *R v Hape* 2007 SCC 26, [2007] 2 S.C.R. 292 par [57] at 325 (*"Hape"*). Roger O'Keefe *Universal Jurisdiction: Clarifying the basic concept* (2004) 735 Journal of International Criminal Justice 2 736 (*"O'Keefe"*).

[68] Jurisdiction to prescribe or prescriptive jurisdiction, sometimes called 'legislative' jurisdiction, refers to a state's authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling: *O'Keefe* at 736.

[69] Jurisdiction to enforce or enforcement jurisdiction, sometimes called 'executive' jurisdiction', refers to a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts: *O'Keefe* at 736.

[70] *Hape* par [58] at 325. See also *Klassen* at par [62]; *Canadian Security Intelligence Service Act (Re) (F.C.)* 2008 FC 301 (CanLII) at par [61] (*"Canadian SIS Act"*).

66. Regarding jurisdiction to prescribe, state practice reveals a number of accepted bases or "heads" of jurisdiction,[71] pursuant to which, as a matter of general international law, states may assert the applicability of their criminal law, each of these heads being thought to evidence a sufficient link between the impugned conduct and the interest of the prescribing state.[72]

67. The two heads of jurisdiction unquestionably available to states in respect of all offences are territoriality and, in relation to extraterritorial offences, nationality, i.e. a state may criminalize conduct performed on its territory, as well as conduct performed abroad by one of its nationals.[73] Under customary law, the universality principle is reserved for international crimes such as piracy, genocide and crimes against humanity.[74]

- **Territoriality**[75]

67. The territoriality principle may be invoked where conduct either takes place within a nation's borders (subjective territoriality) or the effects of the conduct are felt within the nation's borders (objective territoriality).[76]

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[71] *O'Keefe* at 738; *Ireland-Piper* at 130.
[72] *O'Keefe* at 738. *Ireland-Piper* at 130. According to Ireland-Piper (at 130), some international jurisprudence also recognises a 'protective principle' and an 'effects principle', which dictate respectively that a state can assert jurisdiction over foreign conduct that threatens national security of that has effects within that state. O'Keefe (at 739) confirms that the effect principle as basis of criminal jurisdiction over extraterritorial conduct by aliens remains controversial, if apparently not objectionable in all cases.
[73] *O'Keefe* at 739.
[74] *Ireland-Piper* at 130.
[75] *Klassen* at paras [68]-[69].
[76] *Ireland-Piper* at 130. *Hape* par [59] at 326.

- **Nationality**[77]

68. The nationality principle can provide a basis for jurisdiction where a state's citizen or corporation is either a victim (passive nationality) or a perpetrator (active nationality).[78] Under international law, a state may regulate and adjudicate regarding actions committed by its nationals in other countries, provided enforcement of the rules takes place when those nationals are within the state's own borders.[79]

- **Universal**[80]

69. Criminal jurisdiction over the extraterritorial conduct of non-nationals also attaches to certain specific offences on the basis of universality, i.e. in the absence of any other acceptable prescriptive jurisdictional nexus.[81] In terms of universal jurisdiction, a state may assert jurisdiction over acts committed, in other countries, by foreigners against other foreigners.[82] It should however be emphasized that universal jurisdiction is a species of jurisdiction to prescribe.[83]

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[77] *Klassen* at paras [68]-[69].
[78] *Ireland-Piper* at 130.
[79] *Hape* par [60] at 327; *Klassen* at par [87].
[80] *Klassen* at paras [68]-[69].
[81] *O'Keefe* at 739-740; *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, International Court of Justice, 14 February 2002 ("*Arrest Warrant*") Separate Opinion Guillaume P, par 12 at 40; par 16 at 43-44; Separate Opinion Koroma J, par 9 at 61, Joint Separate Opinion Higgins, Kooijmans and Buergenthal JJ at paras 61-65 at 81-83; Dissenting Opinion Van Den Wyngaert par 59 at 173-174.
[82] *Hape* par [61] at 327.
[83] *O'Keefe* at 737.

(b) **Jurisdiction to enforce**

70. Enforcement jurisdiction (or executive jurisdiction) is the power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld. In essence, enforcement jurisdiction refers to the state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter), which might be referred to as investigative jurisdiction.[84]

71. Criminal investigations implicate enforcement jurisdiction, which, pursuant to the principles of international law, cannot be exercised in another country absent the consent of the foreign state or the application of another rule of international law under which it can be so exercised.[85]

72. While concurrent jurisdiction over prosecutions of crimes linked with more than one country is recognised under international law, the same is not true of investigations, which are governed by and carried out pursuant to territorial jurisdiction as a matter inherent in state sovereignty. Any attempt to dictate how those activities are to be performed in a foreign state's territory without that state's consent would infringe the principle of non-intervention.[86]

(aa) **Bases of enforcement jurisdiction**

[84] Ibid. See also *Canadian SIS Act* at par [60].
[85] *Hape* par [105] at 351.
[86] *Hape* par [105] at 351.

73. Whilst jurisdiction to prescribe can be extraterritorial, jurisdiction to enforce is, by contrast, strictly territorial. A state may not enforce its criminal law in the territory of another state without that state's consent.[87]

74. The territorial character of jurisdiction to enforce is seen most clearly in the impermissibility, as of right, of extraterritorial police powers: the police of one state may not investigate crimes and arrest suspects in the territory of another state without that state's consent.[88]

75. It is also reflected in the judicial sphere: criminal courts of one state may not, as of right, sit in the territory of another, or subpoena witnesses or documents, or take sworn affidavit evidence abroad.[89]

(c) **Adjudicative jurisdiction**

76. Adjudicative jurisdiction is the power of a state's courts to resolve disputes or interpret the law through decisions that carry binding force.[90]

77. However, according to O'Keefe, this distinction is generally unnecessary in the criminal context.[91] The trial and in the event, conviction and sentencing of an

[87] *O'Keefe* at 740; *Arrest Warrant* - Separate Opinion Guillaume P par 4 at 36; Joint Separate Opinion Higgins, Kooijmans and Buergenthal JJ par 54 at 79; Dissenting Opinion Van Den Wyngaert par 49 at 167-168. *Hape* par [105] at 351; par [145] at 366.
[88] *O'Keefe* at 740; *Hape* par [105] at 351.
[89] *O'Keefe* at 740.
[90] *Hape* par [58] at 325-326.

individual for conduct prohibited by a state's criminal law is as much a means of executing or enforcing that law as is the police's investigation, arrest, charging and prosecution of the individual under it.[92]

78. Accordingly, a state's criminal courts therefore have no greater authority under international law to execute the state's criminal law than have the police or other coercive organs or agents of the state, i.e. neither can operate as of right in the territory of another state.[93]

(d) **Interaction between jurisdiction to prescribe and enforcement jurisdiction**

79. A state's jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but, because the author of the conduct is abroad, not to enforce it. At the same time, general international law does not prohibit the issuance of an arrest warrant for a suspect or the trial of an accused *in absentia*, the legality of both being a question for the municipal law of each state.[94]

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[91] *O'Keefe* at 737. He distinctly qualifies it with the following: The application of a state's criminal law by its criminal courts is simply the exercise or actualization of prescription: both amount to an assertion that the law in question is applicable to the relevant conduct. Accordingly, a state's criminal courts have no greater authority under international law to adjudge conduct by reference to that state's criminal law than has the legislature of the state to prohibit the conduct in the first place.
[92] *O'Keefe* at 737.
[93] *O'Keefe* at 737.
[94] *O'Keefe* at 740-741.

80. The jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other. The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, and *vice versa*.[95]

81. At the same time, while jurisdiction to prescribe and jurisdiction to enforce are mutually distinct, the act of prescription and the act of enforcement are, in practice, intertwined. A state's assertion of the applicability of its criminal law to given conduct is actualized, as it were, when it is sought to be enforced in a given case. Nonetheless, the act of prescription can still be said to take place when the prohibition in question is promulgated. It might well be that the question of when prescription occurs is distinct from the question when state responsibility for the arrogation of exorbitant prescriptive jurisdiction can be said to be engaged, although the latter might, in turn, depend upon the way in which responsibility is invoked.[96]

(e) **Requirement of "presence"**

82. The assertion of prescriptive jurisdiction over an offence that takes place abroad cannot be founded on territoriality simply because the offender subsequently enters the territory of the prescribing state: regardless of how it is enforced, an assertion of prescriptive jurisdiction over conduct taking place

[95] *O'Keefe* at 741.
[96] *O'Keefe* at 741.

outside the territory of the prescribing state is an assertion of extraterritorial jurisdiction for which an alternative legal justification must be found.[97]

83. We respectfully submit that section 4(3)(c) of the domestic ICC Act is a manifestation of universal jurisdiction to prescribe,[98] i.e. at the time of the commission of the offence, no other accepted head of prescriptive jurisdiction is needed to link the prescribing state (the Republic) to the offender.

84. However, section 4(3)(c) of the domestic ICC Act requires subsequent presence of the offender in the territory of the Republic. In this sence universal jurisdiction to prescribe is referred to as "conditional universal jurisdiction" as opposed to "absolute universal jurisdiction".[99] On a proper construction and interpretation of section 4(3)(c), universal jurisdiction is one of the heads of prescriptive jurisdiction provided for in the domestic ICC Act. The requirement of the subsequent presence of the offender is a limitation strictly relating to enforcement jurisdiction.[100]

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[97] *O'Keefe* at 742. Judge Loder in his dissenting opinion in *The S. S. Lotus (France v Turkey)*, 1928 PCIJ Series A, No. 10, par [109] notes: "...a law [cannot] extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in the territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of the State and the subsequent presence of the guilty person cannot have the effect of extending the jurisdiction of the State."

[98] *O'Keefe* at 759.

[99] The best example of "absolute universal jurisdiction" is article 7 of the Belguim's Code of Criminal Procedure 1878, which provided that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed", without any condition or limitation prescribed thereto. In *Arrest Warrant*, reference was however made to this form of prescriptive jurisdiction as "universal jurisdiction *in absentia*." O'Keefe in his article, severely criticises this approach.

[100] *O'Keefe* at 755.

85. In applying the aforesaid principles to the provisions of section 4 of the domestic ICC Act, it is clear that the legislature asserted prescriptive jurisdiction over the crimes defined in section 4(1) of the domestic ICC Act, based on subjective territoriality (section 4(1)), nationality (sections 4(3)(a) and (b)), passive nationality (section 4(3)(d)) and universality (section 4(3)(c)).

86. The principle of universality in international law does not require that states pursue investigations and prosecutions where a suspect is not within their territory and not susceptible to their law enforcement agencies. At the same time, neither does international law preclude a state from seeking the extradition of a non-national who is outside its territory, in order to try that person for international crimes. However, this is an issue broadly within the discretion of states and will vary as a matter of law and policy from one state to another.[101]

(iv) **Comparable foreign law**

87. An example of similar legislation enacted with extraterritorial effects is to be found in Canada's Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, which addresses crimes of universal jurisdiction. Section 6(1) of that

[101] Ibid.

statute provides that every person who commits genocide, a crime against humanity or a war crime outside Canada is guilty of an indictable offence. Pursuant to s. 8, such person may be prosecuted in Canada: (a) if at the time of the offence the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, *after the time of the offence was committed, the person is present in Canada.*[102]

88. As of August 2003, Belgian authorities can exercise jurisdiction over alleged perpetrators of genocide, crimes against humanity and war crimes who are either Belgian nationals or Belgian residents, including perpetrators who became residents or citizens after the crime was committed.[103]

89. The legislative enactments of some European countries specifically prescribe that a suspect be physically present or likely to be present in the territory of the state before a prosecution is initiated.[104]

90. In some countries, presence or anticipated presence is the precondition for an investigation to be opened by police authorities.[105]

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[102] Our emphasis added.

[103] In the *Arrest Warrant* case, article 7 of Belgium's Code of Criminal Procedure, which provided that "The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed," was termed as 'universal jurisdiction *in absentia*', a form of prescription jurisdiction not widely accepted.

[104] Human Rights Watch Vol 18, NO 5(D) *Universal Jurisdiction in Europe: The State of the Art*, p 28.

[105] Ibid.

(v) **The powers of the NPA, SAPS and the PCLU**

91. We have already submitted hereinbefore that the PCLU does not have investigative powers.[106]

92. The mere fact that the PCLU is according to Presidential Proclamation,[107] particularly tasked to "*...manage and direct the investigation and prosecution...*" of crimes contemplated in the domestic ICC Act, cannot equate to the authority to initiate the investigation.[108]

93. Section 205(3) of the Constitution[109] is explicit in the sense that it assigns to the SAPS the power to prevent, combat and investigate crime.[110]

94. It follows that the PCLU's prerogative to 'manage and direct the investigation' is made subject to the SAPS's decision to initiate such investigation. Absent an SAPS investigation, the PCLU has nothing to 'manage and direct' – it can only fulfil its mandate with the active co-operation of the SAPS.

95. In this regard, section 5 of the domestic ICC Act, which provides for the institution of prosecutions in South African courts, also bear relevance.

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[106] Paragraph 6 *supra*.
[107] Vol. 2, 210.
[108] Appl. LTA, 16, par 29 - In regard to the provisions of section 17F(4) of the South African Police Service Act 68 of 1995, as amended.
[109] The Constitution does not have extraterritorial effect: *Kaunda and Others v President of the RSA and Others* 2005 (4) SA 235 (CC) at par [38].
[110] *Glenister v President of the Republic of South Africa and Others; Helen Suzman Foundation as Amicus Curiae* 2011 (7) BCLR 651 (CC) at paras [77]-[78].

96. In terms of section 5(3) of the domestic ICC Act, the National Director (the Second Applicant) must, when reaching a decision on whether to institute a prosecution contemplated in this section, give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity as contemplated in Article 1 of the Statute,[111] has jurisdiction and the responsibility[112] to prosecute persons accused of having committed a crime.

97. It is submitted that the aforesaid provision constitutes an additional check and balance to be performed by the Second Applicant, in order to ensure that any investigation by the SAPS and the management and direction thereof by the PCLU, are done within the Republic's national criminal jurisdiction. In other words, that the enforcement jurisdiction was executed in accordance with the prescriptive jurisdiction.

(vi) **Respondents' arguments in the court *a quo***

98. It is first of all significant that the Respondents' argument raised on the papers in the court *a quo*, was in essence that section 4(3)(c) of the domestic ICC Act

[111] Article 1 of the Statute provides as follows: "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to *national criminal jurisdictions*. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute." (Own emphasis).

[112] Our emphasis added.

should apply on the facts of this matter based on the "anticipated presence" of the perpetrators.[113]

99. However, during the hearing of the matter, the Respondents pursued the following arguments:

- That in order to give effect to the principle of universal jurisdiction, and to confer jurisdiction on domestic courts for international crimes, the domestic ICC Act deems that all crimes contemplated by that Act, wherever they may occur, are committed in South Africa.[114]

- That the Constitution, and its protections must be considered as extending to victims of the alleged torture raised in the torture docket.[115]

- That the decisive factor on *locus standi* in the present context is the domestic ICC Act.[116]

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[113] Vol 1, 27: FA, paras 46.1- 46.2, referring to the Memorandum (Vol.1 110-117: Annexure NF5 to FA, paras 52-69).
[114] Vol. 8, 1152, 20-24: Judgment par 13.
[115] Vol. 8, 1153, 3-58: Judgment par 13. According to the Respondents it was legally irrelevant that the victims were tortured in Zimbabwe, because the domestic ICC Act requires that they are to be regarded as having been tortured in South Africa: Vol. 8, 1152, 24-1153, 3: Judgment par 13.4.
[116] Vol. 8 1157, 23-1158, 5: Judgment par 13.4.

- That section 4(3)(c) of the domestic ICC Act dealt with the fact whether or not an accused person should be present at a trial in the context of the Act.[117]

- That section 4(3)(c) gave statutory recognition to the principle that a court exercising criminal jurisdiction could only do so if the relevant accused was present and that it had nothing to do with the power to conduct investigations.[118]

- That the multi-disciplinary approach to be adopted by the Applicants in respect of crimes defined in the domestic ICC Act, makes it obvious that the NPA had the power to prosecute those crimes and in order to achieve that, the NPA would have the power to investigate to crimes.[119]

100. The court *a quo* endorsed the Respondents' aforesaid arguments and in addition made the following findings, namely:

- That section 4(3) of the domestic ICC Act goes beyond "normal" jurisdictional requirements and that in this context, section 3 of the

[117] Vol. 8, 1194, 10-12: Judgment par 32.
[118] Vol. 8, 1193, 21-24: Judgment par 32.
[119] Vol. 8, 1180, 1-1181, 12: Judgement par 25.

domestic ICC Act requires that a prosecution be enabled as far as possible.[120]

- That in the context of the domestic ICC Act it is not decisive that the crimes contemplated by this Act were not committed in South Africa and that section 3 of the domestic ICC Act makes that clear, with the result that the Respondents have *locus standi* in the litigation.[121]

- That section 4(1) of domestic ICC Act has no requirement of presence.[122]

(vii) **First Applicant's submissions**

101. The crux of the issue in this case is the applicability of section 4(3) of the domestic ICC Act to the activities of SAPS (and for that matter the NPA) in respect of extraterritorial crimes.

102. We submit that the powers of prescription and enforcement are both necessary for the application of section 4(3) of the domestic ICC Act. This section is prescriptive in that it sets out what the SAPS and the NPA may or may not do in exercising the state's powers. In other words, section 4(3) of the domestic

[120] Vol. 8, 1158, 22-25: Judgment par 13.4.
[121] Vol. 8, 1159, 5-9: Judgment par 13.4.
[122] Vol. 8, 1173, 15: Judgment, par 21.

ICC Act cannot be applied if compliance with its legal requirements cannot be enforced.

103. Simply put, in order for not only SAPS but also the NPA and our courts to enforce the provisions of section 4(3)(c) of the domestic ICC Act, the offender must be physically present in the Republic after having committed the offence. To suggest otherwise would mean that the enforcement jurisdiction far exceeds the prescriptive jurisdiction of section 4(3)(c). We reiterate that the investigation by the SAPS and any subsequent prosecution or criminal trial, relate to the enforcement of the prescriptive jurisdiction of section 4(3).

104. The presence of an offender is therefore not only required in respect of the trial, but any investigative process preceding same. The fact that section 4(3) is silent on any investigation does not entail that the investigative jurisdiction embodied in this section equates to absolute universal jurisdiction. This assumption will not only exceed the prescriptive jurisdiction but also infringes on the international accepted principle that enforcement jurisdiction is strictly territorial.

105. The finding by the court *a quo* that section 4(3)(c) of the domestic ICC Act was enacted to prevent *in absentia* trials, is superfluous having regard to the provisions of section 35(3)(e) of the Constitution and section 158(1) of the

Criminal Procedure Act 51 of 1977. The aforementioned provisions definitively preclude *in absentia* trials.

106. The Respondents' contention that the provisions of section 4(3)(c) of the domestic ICC Act, caters for the "anticipated presence" of the offender, is wrong. The plain grammatical meaning of the words does not connote mere anticipation of presence of the alleged offender. To argue otherwise would mean that reading-in must apply, which was never the Respondents case. In any event, reading-in entails a constitutional remedy subsequent upon a finding of invalidity of section 4(3)(c) of the domestic ICC Act.

107. Enforcement of compliance with section 4(3) of the domestic ICC Act means that when the SAPS and the NPA act, they must do so in accordance with the requirements of section 4(3) so as to give effect to South African law as it applies to the exercise of the Republic's power at issue. Since enforcement is not possible due to the absence of the offender, and enforcement is necessary for section 4(3)(c) to apply, neither extraterritorial application nor territorial enforcement of section 4(3) is possible.

108. The alleged offences having been committed in Zimbabwe, by Zimbabweans against Zimbabweans, it is clear that the Respondents could only rely on the provisions of section 4(3)(c) of the domestic ICC Act in order to secure the enforcement jurisdiction of SAPS.

109. In the absence of the *rationes jurisdictionis* dictated by section 4(3)(c) of the domestic ICC Act, the order granted by the court *a quo* ineluctably leads to a *brutum fulmen*. The SAPS cannot be expected to investigate a crime which is not deemed to have been committed in the Republic.

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

111. The decision whether to initiate an investigation or not lies exclusive within the province of SAPS and neither with the PCLU nor the NPA.

112. The SAPS in essence persists with its argument that absent the *rationes jurisdictionis* dictated by section 4(3)(c) of the domestic ICC Act, the Respondents have no *locus standi* to approach a court in terms of section 38 of the Constitution for a review of the decision either under PAJA or the rule of law.

113. It is respectfully submitted that in the absence of the jurisdictional condition of the presence of the offender as provided for in section 4(3)(c) of the domestic ICC Act, the SAPS had no prescriptive jurisdiction to apply the provision

(enforcement jurisdiction). It follows that no rights which could have been adversely affected had been acquired by either the Respondents or the persons which they aimed to represent. It cannot be said that SAPS infringed on the rule of law in the event of it being unable to enforce the law.

114. In view of the aforesaid, we submit that the Respondents as well as the court *a quo* erred in their reasoning and interpretation of section 4 of the domestic ICC Act, by conflating the principles of jurisdiction to prescribe and enforcement jurisdiction, applicable under the domestic ICC Act.

E. CONCLUSION:

115. The interpretation of section 4(1) and 4(3)(c) proffered by SAPS, cuts through all the findings made by the court a quo in regard to all the grounds of review. The fifth ground of review did not substantially influence the decision made by the SAPS. The most fundamental consideration which influenced the decision was the SAPS' interpretation of section 4 of the domestic ICC Act.

116. In the premises, it is submitted that:

116.1 The First Applicant be granted leave to appeal;

116.2 The First Applicant be awarded costs of the application for leave to appeal before the court *a quo*;

116.3 The First Applicant be awarded costs of the application for leave to appeal to this Honourable Court;

116.4 The First Applicant be awarded costs occasioned by the employment of two counsel in both instances;

117. It is finally submitted that the appeal be upheld and that the order of the court *a quo* be substituted with an order in the following terms:

"The Respondents' application for review is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel."

DATED AT PRETORIA ON THIS 22 DAY OF APRIL 2013.

ADV AC FERREIRA SC
ADV I ELLIS
COUNSEL FOR FIRST APPLICANT

LIST OF AUTHORITIES

(Cases marked with asterisk are the main authorities to which particular reference may be made during oral argument)

1. *South African Litigation Centre and another v National Director of Public Prosecutions and others* [2012] 3 All SA 198 (GNP); 2012 (10) BCLR 1089 (GNP).
2. **Tswelopele Non-profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA).
3. **Hlatswayo v Mare & Deas* 1912 AD 232.
4. *Dabner v South African Railways and Harbours* 1920 AD 583.
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