IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/OR PROSECUTIONS

INDEX:
CALATA GROUP VOLUME
BUNDLE 7: OLE BUBENZER

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. _____

In the matter between

LUKHANYO BRUCE MATTHEWS CALATA	1st Applicant
ALEGRIA KUTSAKA NYOKA	2nd Applicant
BONAKELE JACOBS	3rd Applicant
FATIEMA HARON-MASOET	4th Applicant
TRYPHINA NOMANDLOVU MOKGATLE	5th Applicant
KARL ANDREW WEBER	6th Applicant
KIM TURNER	7th Applicant
LYNDENE PAGE	8th Applicant
MBUSO KHOZA	9th Applicant
NEVILLE BELING	10th Applicant
NOMBUYISELO MHLAULI	11th Applicant
SARAH BIBI LALL	12th Applicant
SIZAKELE ERNESTINA SIMELANE	13th Applicant
SINDISWA ELIZABETH MKONTO	14th Applicant
STEPHANS MBUTI MABELANE	15th Applicant

Date: 17/01/2025
Certified a True Copy
of the Original
Nicola Irving
Nicola Grace Irving

NGI

THULI KUBHEKA	16th Applicant
HLEKANI EDITH RIKHOTSO	17th Applicant
TSHIDISO MOTASI	18th Applicant
NOMALI RITA GALELA	19th Applicant
PHUMEZA MANDISA HASHE	20th Applicant
MKHONTOWESIZWE GODOLOZI	21st Applicant
MOGAPI SOLOMON TLHAPI	22nd Applicant
FOUNDATION FOR HUMAN RIGHTS	23rd Applicant

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2nd Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	3rd Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	4th Respondent
MINISTER OF POLICE	5th Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	6th Respondent

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CONFIRMATORY AFFIDAVIT – OLE BUBENZER

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I, the undersigned,

OLE BUBENZER

do hereby make oath and state that:

1 I am an adult male, employed as Senior Legal Counsel in the European Central Bank, and presently resident in Germany. I am the author of the book Post TRC prosecutions in South Africa: Accountability for political crimes after the Truth and Reconciliation Commission's amnesty process ("**Post TRC prosecutions in South Africa**")

2 The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

3. I have read the notice of motion and a substantially complete version of the founding affidavit of Lukhanyo Bruce Matthews Calata and confirm the contents are true and correct insofar as they pertain to me and the content of Post TRC prosecutions in South Africa.

OLE BUBENZER

The Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to or solemnly affirmed before me at _____ on this the ____ day of _____ 20____.

_____

COMMISSIONER OF OATHS

Full Names:

Designation:

Address:

hc
NGI

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UVZ-Nr. 1947 /2024 K
Sb Ia/24 331 013

I,

Dr. Tim Kasper,
Civil Law Notary with office in Wiehl,

hereby certify that the signature on the document attached above was signed in my presence by

Mr. Ole Frederik Bubenzer, born on 23.07.1979,

residing at 60385 Frankfurt am Main, Heidestrasse 48, Germany,

identified by his identity card

Wiehl, 28th November 2024

Notary
-Dr. Tim Kasper-

DR. TIM KASPER
NOTAR IN WIEHL

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Chapter One

Dealing With the Legacy of the Past—Transitional Justice in South Africa

1. *The Apartheid Conflict*

Practically since the first Europeans settled in South Africa in the late 17th century, the native African population was disadvantaged and discriminated against.[1] Control over political instruments, the economy, natural resources and the majority of the land was reserved to whites. After the National Party (hereinafter NP), a predominantly *Afrikaner*[2] nationalist party, won the elections in 1948, the situation was aggravated further as the state of racial segregation and economic exploitation was institutionalised into law.[3] Black and coloured South Africans had

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[1] If not stated otherwise, the general historical information contained in this subchapter derives from R. Davenport and C. Saunders *South Africa* (2000) and *TRC Report*, vol. 1, chap. 2; vol. 3, pages 12–33. See on the discrimination and human rights violations on racial grounds which occurred before 1948: *TRC Report*, vol. 1, pages 25–28.

[2] The *Afrikaner* population descends from an amalgamation of the earliest European settlers, mainly coming from the Netherlands, Germany and France.

[3] Racial segregation and discrimination was based on a range of acts, mainly the Population Registration Act of 1950, which provided for the classification of each South African according to four racial categories and the duty to carry a pass of racial identification; the Group Areas Act, which partitioned the whole country into zones for exclusive inhabitation by one of the racial groups and which provided for the eviction of millions of black and coloured South Africans from their land and property and the forced removal into townships and poor *bantustan* homelands; the Prohibition of Mixed Marriages Act of 1949; and the 1950 Immorality Amendment Act, which prohibited not only inter-racial marriages but all forms of sexual contacts between the

practically no political or economic rights, yet were simultaneously exploited as cheap labourers, a practice which was vital for the thriving economy. Officially independent states were created on minimal and poor parts of the country which were intended to serve as homelands for the respective African ethnic groups. This racist system of so-called *apartheid*[4] became a guiding principle of South African government politics for the following decades.

Inevitably, resistance grew to white supremacy and apartheid. An opposition organisation, which in 1923 became the African National Congress (hereinafter ANC), formed in 1912. In 1959 the other major opposition movement, the Pan Africanist Congress (hereinafter PAC), was established. The opposition was faced with an intransigent commitment to apartheid and white supremacy. Peaceful political protest was greatly obstructed by the authorities. The opposition movement therefore resorted to militant means of protest. In 1961 the ANC formed its armed wing, *uMkhonto weSizwe*[5] (hereinafter MK) which attacked the security forces and directed acts of sabotage at important state facilities.

The legitimate quest for equal rights was perceived by the government merely as a terrorist onslaught[6] on the integrity of the state and

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ethnic groups. See for a comprehensive account of the legislation: *TRC Report*, vol. 1, chap. 2, paras. 25–40. See on the socio-economic effects of apartheid on the new democracy: K. Naudaschder-Schlag and H.R. Schillinger 'Von der Rassentrennung zur Regenbogennation' in R. Zugehör (ed.) *Kap der besseren Hoffnung?* (1994) 9–62. See for a survey of the gross human rights violations committed during apartheid: M. Coleman (ed.) *A crime against humanity* (1998) and *TRC Report* vols 1–7.

[4] Apartheid in Afrikaans means separate- or apart-ness. The term refers to the official government policy and system of racial segregation, discrimination and white political hegemony, introduced by the NP in 1948 (R.B. Beck *The history of South Africa* (2000) 125). See generally on apartheid R.B. Beck *The history of South Africa* (2000) 125–53; P. Bonner et al. (eds) *Apartheid's genesis—1935–1962* (1993); W Beinart and S. Dubow *Segregation and apartheid in twentieth-century South Africa* (1995).

[5] *UMkhonto weSizwe* means "spear of the nation".

[6] Interview with Jan Wagener in Pretoria (May 8, 2006). The perceptions within security police are illustrated in H.D. Stadler *The other side of the story* (1997).

was increasingly met by force.[7] The resulting violent conflict reached its climax in the mid-1980s. During 1984 and 1989, 5600 people died as a result of political unrest.[8] Tens of thousands of people were detained during this period for political reasons without trial or court order.[9] Although security legislation had already been hugely extended, the state forces increasingly resorted to means that were criminal under South African law.[10] The South African Police (hereinafter SAP) abducted, tortured and murdered political opponents within and outside of South African borders. Secret death squads were established for this purpose.[11] Thus, the legitimate struggle of the black majority for equality and political as well as economic rights resulted in a violent conflict during which many gross human rights violations were committed on all sides.[12] The apartheid conflict extended to the South African

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[7] The opposition to apartheid was seen as part of a communist 'total onslaught' on South Africa which was to be countered by a 'total strategy' of force (*TRC Report*, vol. 2, chap. 1, paras. 108–11; M. Coleman (ed.) *A crime against humanity* (1998) 7–9).

[8] M. Coleman (ed.) *A crime against humanity* (1998) 42. Security force activities and vigilantism accounted for the majority of deaths. Vigilante groups operated in black communities. They were unofficial, yet directed and supported by the government to violently act against anti-apartheid activists.

[9] *TRC Report*, vol. 3, page 25. Cases of death in detention occurred frequently (M. Coleman (ed.) *A crime against humanity* (1998) 12 and 53–67; *TRC Report*, vol. 2, chap. 3, paras. 166–95).

[10] See for an elaboration on the scope of state crimes in South Africa: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 9–14.

[11] M. Coleman (ed.) *A crime against humanity* (1998) 118. The most notorious of these units was "Vlakplaas", named after a farm close to Pretoria where it was based. It operated from 1979 to the early 1990s (*TRC Report*, vol. 6, s. 3, chap. 1, paras. 157–79; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 23; V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 116–17). Revelations on such hit-squad activities were first made by Almond Nofomela, a former member of Vlakplaas, in 1989. This was followed by revelations of his former commander Dirk Coetzee and others (M. Coleman (ed.) *A crime against humanity* (1998) 119).

[12] G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte (eds) *Wirkungsforschung zum Recht* vol. III (2001) 291 at 293.

protectorate of South-West Africa, now known as Namibia.[13] Other neighbouring countries also suffered from what the TRC described as a 'reign of terror and destruction'[14] in that South Africa either waged war on unwanted governments, supported rebel movements to overthrow such governments or periodically attacked the ANC abroad.

2. *The Negotiated Transition and the Work of the TRC*

Heightening internal unrest and international pressure brought the last apartheid President F.W. de Klerk, who had come into power in September 1989, to start a process of democratic reform. After Nelson Mandela was released from prison in March 1990,[15] a period of negotiations began between representatives of the ANC and the government.[16] The consultations were aimed at facilitating the transition to a democratic state and establishing a new constitution. After an agreement was reached on the first democratic and human rights oriented constitution,[17] Nelson Mandela was elected President and the ANC won a majority of parliamentary seats in the first democratic elections in April 1994.

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[13] *TRC Report*, vol. 1, chap. 2, para. 53.

[14] Ibid., para. 21.

[15] Mandela had been sentenced to life imprisonment for high treason in 1963.

[16] The negotiations were accompanied by massive outbursts of violence, mainly resulting from clashes between supporters of the Zulu Inkatha Freedom Party and ANC members or sympathisers in Natal. Such conflicts were often instigated and fuelled by the state security forces. About 14,000 people died as a result of prolonged political conflicts all over South Africa during the negotiation period (*TRC Report*, vol. 2, chap. 7, para. 7), which is in total more than during the preceding decades of conflict (*TRC Report*, vol. 5, chap. 6, para. 126).

[17] The Interim Constitution (Act 200 of 1993) entered into force in April 1994 and was in 1997 replaced by the Constitution (Act 108 of 1996).

This heralded a period of transitional justice,[18] demanding that the legacy of apartheid—human rights violations and crimes—would not be ignored.[19] It was decided that such matters would be dealt with by a truth commission.[20] The Promotion of National Unity and Reconciliation Act[21] (hereinafter TRC Act) established the Truth and Reconciliation Commission.[22] The brief of the TRC was '[t]o provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed' between 1 March 1960 and 6 December 1993.[23] Under the terms of the act, a gross human rights violation constitutes any act of killing, abduction, torture or severe ill-treatment of any person or any attempt, conspiracy, incitement, instigation, command or procurement to commit such an act.[24]

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[18] Transitional justice basically circumscribes the way a democratic government takes over power from an oppressive regime and the choices taken in the course thereof with respect to, *inter alia*, the transition of state organs and the dealing with human rights violations committed under the former regime (D.A. Crocker 'Truth commissions, transitional justice, and civil society' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 99 at 99; M. Fenwick 'Dilemmas of transitional justice' (2003) 35 3 *The Seinan Law Review* 1 at 1). See generally on transitional justice N.J. Kritz (ed.) *Transitional justice* vol. I (1995); A.J. McAdams (ed.) *Transitional justice and the rule of law in new democracies* (1997); G. Werle (ed.) *Justice in transition* (2006).

[19] A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 142.

[20] The initiative to establish a truth commission was taken by the ANC, various human rights non-governmental organisations and leading personalities of the human rights sector (A. Boraine *A country unmasked* (2000) 11–46; E. Hahn-Godeffroy *Die südafrikanische Truth and Reconciliation Commission* (1998) 56–57).

[21] Act 34 of 1995. The act is available at http://www.doj.gov.za/trc.

[22] The process of establishing the legal framework of the TRC was accompanied by extensive debates in Parliament and the general public, which gave the TRC a high degree of democratic legitimacy (G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 287).

[23] Preamble of the TRC Act.

[24] Section 1 of the TRC Act.

The Commission's work started when its commissioners were appointed in December 1995.[25] It consisted of three committees: a committee on human rights violations, a committee on reparations and a committee on amnesty—the work of the latter is the most relevant for the goals of this book. The commission's operation terminated in 1998. In October 1998 it issued a five volume final report[26] in which it published the findings it reached from its hearings and investigations on the nature, extent and causes of human rights violations committed during its mandate period. Since the work of the Amnesty Committee was only concluded later, two further volumes were published in March 2003.

The TRC found that the state and its security agencies accounted for the majority of gross human rights violations.[27] It found that during the political struggle between the late 1970s and early 1990s, state bodies increasingly made use of criminal measures in terms of the laws at the time. For example, occurrences such as extra-judicial killings of opposition members took place.[28] The Commission further found that the use of torture was systematic and widespread within the ranks of the SAP.[29] Many cases were recorded by the TRC where opposition members had been abducted, tortured and often killed by the security forces.[30] Such practices were condoned and authorised by leading police and security branch officials.[31] The Inkatha Freedom Party (hereinafter IFP) supported the state in its criminal activities.[32] The TRC found

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[25] See *TRC Report*, vol. 1, chap. 3, paras. 1–6 and chap. 6, para. 4.

[26] See sections 3(1)(d), 4(e), 43(1)(b) and 44 of the TRC Act.

[27] *TRC Report*, vol. 6, s. 5, chap. 2, para. 7.

[28] *TRC Report*, vol. 5, chap. 6, para. 77; *TRC Report*, vol. 6, s. 5, chap. 2, paras. 72–90; *TRC Report*, vol. 2, chap. 3, paras. 221–320, 509. See for testimonies received in amnesty applications and hearings on death squad activities of the various regional security branches *TRC Report*, vol. 6, s. 3, chap. 1, paras. 155–307.

[29] *TRC Report*, vol. 2, chap. 3, para. 220; *TRC Report*, vol. 6, s. 5, chap. 2, para. 16.

[30] *TRC Report*, vol. 6, s. 5, chap. 2, paras. 50–71; *TRC Report*, vol. 2, chap. 3, paras. 278–424. The security branch sometimes also killed its own members when it believed they were unloyal (*TRC Report*, vol. 2, chap. 3, paras. 425–56).

[31] *TRC Report*, vol. 6, s. 5, chap. 2, para. 17.

[32] *TRC Report*, vol. 5, chap. 6, para. 77.

that the IFP was responsible for numerous killings in attacks on often unarmed ANC members and supporters and other gross human rights violations under the auspices of government policies.[33] With respect to the ANC and MK, the Commission took into account that it was the declared policy of the ANC to avoid the loss of civilian lives, but found nonetheless that civilians were killed and that MK members independently targeted persons outside of the ANC official policy in a manner which resulted in gross human rights violations.[34]

3. *Accountability for Past Human Rights Violations in the South African Context: Conditional Amnesties and Prosecutions*

The concept of amnesty within the TRC process is of paramount importance for the present research. Its parameters will be outlined in the following.

The question of criminal accountability was highly controversial at the negotiations.[35] The former government, the NP and the security forces of the apartheid state lobbied strongly for a general amnesty.[36] Although sympathies for a general amnesty could also be found among leading ANC members, such an approach was mostly seen as untenable.[37] A

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[33] Ibid., para. 121.

[34] Ibid., para. 136; *TRC Report*, vol. 6, s. 5, chap. 3, paras. 28–47. See generally on the liberation movement *TRC Report*, vol. 5, chap. 6, paras. 130–50.; *TRC Report*, vol. 6, s. 5, chaps. 3 and 5.

[35] See for the debates on amnesty: A. Boraine *A country unmasked* (2000) 275–86; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 53; L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 32–35; P. Parker 'The politics of indemnities, truth telling and reconciliation in South Africa' (1996) 17 1–2 *Human Rights Law Journal* 1 at 1–7.

[36] Interview with Jan Wagener in Pretoria (May 8, 2006); L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 34.

[37] A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 143.

general amnesty was felt to be counterproductive to the establishment of a human rights culture and unconducive to the consolidation of the new democratic order, which demanded recognition of and reconciliation with the legacy of the past.[38] Many ANC members demanded strict prosecution of those responsible for apartheid crimes and Nuremberg-style trials of the leaders.

However, a concession had to be made in this regard in order to secure the support of the security forces during the negotiation period and to facilitate a peaceful transition to democracy with the support of the former elites.[39] It was agreed that amnesty should be granted in some form for gross human rights violations committed during the conflicts of the past.[40] The post amble of the Interim Constitution, headed National Unity and Reconciliation, eventually incorporated the following statement concerning amnesty:

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.[41]

As no specific agreement could be reached, the determination of the precise form of the amnesty had to be left open for later implemen-

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[38] Ibid., 142; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 52.

[39] G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 275. It is commonly accepted that a compromise on amnesty was the price which invariably had to be paid in order to avoid civil war and in order to make a negotiated settlement possible at all. (Mbeki as cited in A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 143; A.M. Omar 'Foreword by A.M. Omar' in M.R. Rwelamira and G. Werle (eds) *Confronting past injustices* (1996) vii at x).

[40] G. Werle 'Without truth no reconciliation' (1996) 29 *Verfassung und Recht in Übersee—Law and politics in Africa, Asia and Latin America* 58 at 64–65.

[41] Post amble of the Interim Constitution of South Africa, Act 200 of 1993.

tation. The amnesty model eventually incorporated in the TRC Act empowered the Amnesty Committee to grant amnesty only on certain conditions and restrictions.[42] First of all, violators had to apply for amnesty.[43] According to section 20(1)(b) of the TRC Act, amnesty could only be granted for an act, omission or offence which was associated with a political objective and was committed in the course of the conflicts of the past during the period of 1 March 1960 to 10 May 1994.[44] Applications for amnesty could only be submitted until 30 September 1997.[45] An additional decisive precondition in section 20(1)(c) of the TRC Act for attaining amnesty stated that the applicant had to make a full disclosure of all relevant facts concerning the crime to which the application related.[46] Thus, if any of the preconditions, most notably the full disclosure or political objective requirements, were not satisfied, amnesty would be denied. This legal mandate applied to all crimes, regardless of whether they were committed by the liberation movements or the state security forces.[47]

Despite the extensive public and parliamentary debates which preceded the enactment of the amnesty legislation, the amnesty scheme was not based on popular and political consensus. Many victims strongly contested the basic notion of amnesty and demanded retributive justice, prosecutions and trials.[48] The former apartheid government and security force representatives, however, perceived the TRC to be a one-sided

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[42] Sections 16–22 of the TRC Act.

[43] Section 18 of the TRC Act.

[44] The time frame for amnesty had later been extended. The political objective criteria is more concretely outlined in sections 20(2) and 20(3) of the TRC Act. See further on these so-called 'Noorgaard Criteria' and the political offence criteria J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 37–8, 63 and 278–335; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 221–61.

[45] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 144.

[46] See on this criteria: J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 249–78; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 261–70.

[47] A. Boraine *A country unmasked* (2000) 69.

[48] A. Boraine 'Truth and reconciliation in South Africa' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 141 at 149.

exercise of victor's justice and a raw deal for their side.[49] They had expected what they had advocated for all along, a general amnesty.[50] As will become apparent below, such positions still strongly influence the political discussions on post-TRC prosecutions.

However, the TRC was and continues to be held in high regard internationally. This is because with conditional amnesty and especially the onus to make a full disclosure it introduced a unique and unprecedented way of dealing with past atrocities in a transitional society.[51] The model was heralded as an innovative moral and legal achievement.[52] While many other countries adopted a course of blanket amnesty and forgetting of the past,[53] South Africa put in place a scheme by which it could uphold accountability, avoid total impunity[54] and unearth the truth regarding past human rights violations.

Amnesty was not designed to replace prosecutions entirely. It was only to be granted in exchange for a process of public truth telling. Criminal and amnesty proceedings, thus, ran parallel to each other. In the wake of the TRC, it clearly follows as a logical consequence from this concept as well as from the legal setup of the amnesty provisions that those perpetrators who were not granted amnesty for their politically motivated crimes must be prosecuted.[55] After the work of the Amnesty

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[49] Interview with Johan van der Merwe in Pretoria (May 5, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006); F.W. de Klerk as cited in A. Boraine *A country unmasked* (2000) 275 at footnote 10.

[50] Ibid.

[51] A. Boraine *A country unmasked* (2000) 269; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 3; G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 287. See for other truth commissions: P.B. Hayner 'Fifteen truth commissions' in N.J. Kritz (ed.) *Transitional justice* vol. I (1995) 262–89.

[52] E. Kiss 'Moral ambition within and beyond political constraints' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 68 at 76.

[53] A. Boraine *A country unmasked* (2000) 269. See also K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 23–159.

[54] A. Boraine *A country unmasked* (2000) 283.

[55] M.E. Bennun 'Some procedural issues relating to post-TRC prosecutions of human rights offenders' (2003) 16 *South African Journal of Criminal Justice* 17 at 17.

Committee was concluded in May 2001,[56] the TRC accordingly recommended in its final report that:

> Where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. In this regard, the Commission will make available to the appropriate authorities information in its possession concerning serious allegations against individuals (excluding privileged information such as that contained in amnesty applications). Consideration must be given to imposing a time limit on such prosecutions. Attorneys-general must pay rigorous attention to the prosecution of members of the South African Police Service (SAPS) who are found to have assaulted, tortured and/or killed persons in their care. In order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted.[57]

Equally President Mandela on the occasion of the tabling of the TRC Report in Parliament in February 1999 stated that '[a]ccountability does need to be established and where evidence exists of a serious crime, prosecution should be instituted within a fixed time frame.'[58]

Against the background of this concept the importance of post-TRC prosecutions for the whole process of dealing with past human rights abuses in South Africa becomes obvious. Since the concept of amnesty in South Africa was premised on the fact that those who were not granted impunity would be prosecuted, the issue of post-TRC prosecutions strongly affects the credibility and legitimacy of the entire process.[59] The amnesty process would be rendered paradoxical and might 'unravel into a farce', as Fernandez puts it strongly, if no prosecutions

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[56] Due to the workload and ongoing amnesty hearings the Amnesty Committee's operation had to continue (*TRC Report*, vol. 6, s. 1, para. 3).

[57] *TRC Report*, vol. 5, chap. 8, para. 14.

[58] Opening address by President Nelson Mandela in the special debate on the report of the Truth and Reconciliation Commission (National Houses of Parliament) (Feb. 25, 1999).

[59] G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte (eds) *Wirkungsforschung zum Recht* vol. III (2001) 291 at 297; G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 282.

take place in the aftermath of the TRC.[60] An evaluation of the success or failure and the overall justice of the TRC process must therefore inevitably take into account whether and how post-TRC prosecutions take place.[61] It is the purpose of this book to provide the basis for such an evaluation by examining the scope of post-TRC prosecutions in the following chapters.

7115 applications were registered by the TRC.[62] Of this total, 5143 applications were refused administratively, without a public hearing, mostly since no political objective was found to exist in the events referenced.[63] 1973 applications were dealt with in public hearings in terms of section 19(3)(a) and (b) of the TRC Act, meaning that the applications conveyed a prima facie politically related offence and a gross human rights violation in terms of the TRC mandate.[64] This number of applications relates to 1701 individual applicants. 1100 amnesty decisions were published in respect thereof.[65] 857 applicants of those were aligned to the ANC, 85 to the IFP, 116 to the PAC or the

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[60] L. Fernadez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 79; M.E. Bennun 'Some procedural issues relating to post-TRC prosecutions of human rights offenders' (2003) 16 *South African Journal of Criminal Justice* 17 at 36.

[61] R.C. Slye 'Comment on the papers by Lovell Fernandez, Jeremy Sarkin and Volker Nerlich' in G. Werle (ed.) *Justice in transition* (2006) 83 at 84; G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte *Wirkungsforschung zum Recht* vol. III (2001) 291 at 301.

[62] *TRC Report*, vol. 6, s. 1, chap. 3, para. 4. See for an empirical study of the amnesty decisions: A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785–828.

[63] J. Sarkin 'The amnesty hearings in South Africa revisited' in G. Werle (ed.) *Justice in transition* (2006) 43 at 47. About 65 per cent of the applications were received from persons who were already convicted and served jail terms (*TRC Report*, vol. 6, s. 1, chap. 2, para. 74).

[64] J. Sarkin 'The amnesty hearings in South Africa revisited' in G. Werle (ed.) *Justice in transition* (2006) 43 at 48.

[65] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 795. Pedain points out that all applications concerning *prima facie* political conduct were published on the Commission's website (http://www.doj.gov.za/trc).

Azanian Peoples Liberation Army (hereinafter APLA) and 289 to the security forces.[66] Very few applications were received from the South African Defence Force (hereinafter SADF).[67] 1499 of those applicants submitted applications which concerned offences falling in the ambit of the committee's jurisdiction in terms of section 20(1) of the TRC Act.[68] Of the remainder, 105 applicants were high-ranking ANC members, whose applications generally related to political activities, but were refused since they did not specify a specific violation or circumstance to be considered.[69] Of the applications that were dealt with in public hearings, 1164 were granted, 806 were denied.[70]

The figures give an indicator of how many cases, potentially worthy of prosecution, might arise from the TRC amnesty proceedings. Considering the scale of human rights violations in the period of South Africa's history, which is relevant for the TRC's inquiries, the number of amnesty applications must be considered rather low.[71] Thus there are potentially hundreds of cases for which amnesty was not applied that could be relevant to future criminal prosecutions. The amnesty proceedings suffered especially from a lack of applications by figures from the upper ranks of politics and commanders of the security forces of the apartheid state.[72] The vast majority of amnesty applicants, especially from the state security forces, were ordinary rank and file officers.

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[66] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 804. Pedain points out that the numbers are by no means representative for the number of human rights violations committed by each respective group.

[67] *TRC Report*, vol. 6, s. 3, chap. 1, para. 4.

[68] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 804–5.

[69] Ibid., 805.

[70] J. Sarkin 'The amnesty hearings in South Africa revisited' in G. Werle (ed.) *Justice in transition* (2006) 43 at 48.

[71] Ibid., 46.

[72] A. Pedain 'Was amnesty a lottery?' (2004) 121 *South African Law Journal* 785 at 806–7.

There was basically no participation by the military.[73] Significantly, the amnesty process also lacked the participation of IFP members, despite the fact that IFP members were the second most active group of perpetrators with respect to gross human rights violations.[74] In 1998, however, the TRC handed over to the prosecution authorities a list containing approximately 300 references to names and cases, resulting from the various TRC hearings, which the Commission considered worthy for further criminal investigation.[75]

4. *Criminal Trials During the 1990s*

As has been pointed out above, criminal proceedings took place before and during the operation of the Amnesty Committee.[76] However, very few trials took place regarding the former security forces and only two convictions of former security police members were recorded during the 1990s.[77] After the confessions surrounding the death squad unit Vlakplaas,[78] initial investigations were launched into the apartheid state's secret hit squad activities.[79] Subsequently, a special prosecution team headed by Transvaal Attorney-General Dr. Jan D'Oliveira was established to conduct the investigation and prosecution of hit-squad

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[73] M. Fullard and N. Rousseau 'Truth, evidence and history' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 195 at 199.

[74] Ibid., 200.

[75] E. Kiss 'Moral ambition within and beyond political constraints' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 68 at 78.

[76] See on the tense relationship of the Amnesty Committee, its investigation unit and the prosecutors: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 240–41; *TRC Report*, vol. 1, chap. 11, para. 93.

[77] See for the only comprehensive study on the prosecution of apartheid crimes during the 1990s: V. Nerlich *Apartheidkriminalität vor Gericht* (2002).

[78] See *supra* Chapter 1 note 11.

[79] The Harms- and later the Goldstone-Commissions were charged with conducting such investigations (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 116–22; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 77–84.

activities.[80] The team consisted of prosecutors and investigators, and could therefore, contrary to the normal process, conduct its own investigations. This was vital in order to maintain a high degree of independence and efficiency.[81]

The first trial involved Eugene de Kock, former commander of Vlakplaas from 1985 to 1993.[82] De Kock was charged in February 1995 on 121 counts, 12 of which related to murder.[83] De Kock had been a central figure in a wide range of secret security force operations. He was, however, charged mainly for crimes which did not have a primarily political background.[84] De Kock was found guilty on 89 charges in August 1996 and was sentenced to two terms of life and 212 years of imprisonment.[85] After his conviction de Kock cooperated intensively with the prosecution authorities and testified on secret hit squad activities and concomitant command structures.[86]

In another case, the investigations of the D'Oliveira Unit led to charges against the former Eastern Cape security policemen Gideon Nieuwoudt, Gerhard Lotz, Wybrand du Toit, Jacobus Kok and Marthinus Ras in August 1996. They were charged with the murder of three black members of the police service and an *askari*[87] in December 1989.[88]

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[80] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 122–24.

[81] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

[82] *TRC Report*, vol. 2, chap. 3, appendix, para. 19 at page 317.

[83] See on the de Kock trial: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 124–34.

[84] This in part was due to the fact that such crimes were less difficult to prove but also since it was still unclear at the time how politically motivated crimes would be dealt with on a political level (ibid., 223–43).

[85] *TRC Report*, vol. 6, s. 3, chap. 1, para. 16. See for an analysis of the verdict: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 129–34.

[86] De Kock's testimonies also contributed chiefly to the amnesty process in that they urged perpetrators to apply for amnesty. According to the TRC de Kock accounted for about 48 per cent of all applications from security branch personnel (*TRC Report*, vol. 6, s. 3, chap. 1, para. 16).

[87] *Askari* is a term used for black members of the security police, who were liberation movement activists 'turned' to security policemen.

[88] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 134–37.

The case became known as "Motherwell-Four".[89] Nieuwoudt, du Toit and Ras were sentenced in June 1996 to 20, 15 and 10 years imprisonment respectively. The three later applied for amnesty and never had to serve their respective prison sentences.

In a trial closely connected to the de Kock prosecution, the security policemen Peter McIntyre, Andries Venter, Jaques Else and their superior Philip de Beer were charged in November 1996 with the murder of Sweet Sambo, who died in police custody in 1991.[90] As McIntyre, Venter and Else had already been charged and acquitted on assault charges in connection with Sambo's death in 1994, they successfully pleaded *autrefoi acqui*[91] and were accordingly acquitted.[92]

In April 1997, former Vlakplaas commander Dirk Coetzee and four other policemen were charged with the murder of lawyer and political activist Griffiths Mxenge in Durban in 1981.[93] Coetzee and two others were found guilty in May 1997 but shortly thereafter all received amnesty by the TRC.[94]

The investigations of the D'Oliveira team also concerned other security branches and the military. In October 1996 General Jack Cronjé and Jaques Hechter of the Northern Transvaal security branch were charged on 33 counts, including 27 counts of murder and four of attempted murder between 1986 and 1987.[95] Cronjé and Hechter immediately tendered amnesty applications, including the crimes in

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[89] *TRC Report*, vol. 6, s. 1, chap. 4, paras. 111–19; *TRC Report*, vol. 3, chap. 2, para. 301.

[90] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 144.

[91] See for the double jeopardy pleas: *infra* Chapter 2(2.4).

[92] De Beer's indictment hinged on the other charges and could thus not be pursued (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 145).

[93] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 146–53. The revelations of Nofomela and Coetzee in 1989 (see *supra* Chapter 1 note 11) related to the Mxenge murder. The prosecution was not conducted by the D'Oliveira team but by KwaZulu-Natal Attorney-General Tim McNally.

[94] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 149. Decision no AC/97/0041. Transcripts of decisions of the Amnesty Committee are available at http://www.doj.gov.za/trc/amntrans/index.htm.

[95] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 153–54.

question, which were eventually successful.[96] The trial was therefore not concluded.[97]

Ferdinand Barnard, a member of the special unit Civil Cooperation Bureau,[98] which was attached to the SADF, was charged in September 1997 with the murder of human rights activist David Webster in May 1989, the attempted murder of the later ANC Minister of Justice, Dullah Omar, and a number of other political and non-political deeds.[99] Barnard was convicted in 1998 on 25 counts, including the murder and attempted murder counts. He was sentenced effectively to life imprisonment.[100]

The trial with the highest political impact started in Durban in December 1995. It resulted from investigations of the independent Investigative Task Board and Investigative Task Unit into the political violence between IFP and ANC supporters in KwaZulu-Natal before and during the negotiation period.[101] The last apartheid Minister of Defence, Magnus Malan, and 29 others, among them former high-ranking SADF generals such as former SADF chief Jan Geldenhuys and Jacobus "Kat" Liebenberg, were charged with their alleged involvement in the murder of 13 ANC supporters in Natal in 1987, the KwaMakutha massacre, and for conspiracy to murder various ANC and United Democratic Front (hereinafter UDF)[102] activists during the late 1980s. During the so-called "Operation Marion", which took place in the Namibian Caprivi Strip in 1986, the SADF instructed and trained about 200 Inkatha supporters in paramilitary combat techniques to fight the ANC.[103] The charges alleged that the murders were committed by the Caprivi recruits with

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[96] Decisions no. AC/99/0031 and AC/99/0030.

[97] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 154.

[98] CCB. The CCB's initial task was to attack opposition members abroad but it later also operated in South Africa.

[99] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 158–67.

[100] Ibid., 167.

[101] Ibid., 184–211.

[102] The UDF was an association of various anti-apartheid organisations, founded in 1983 (R. Davenport and C. Saunders *South Africa* (2000) 495).

[103] *TRC Report*, vol. 2, chap. 5, paras. 236–56.

the support of the SADF generals.[104] The trial ended in an acquittal of the accused due to various circumstances.[105]

On the whole, therefore, the trials contributed very little to the examination of the criminal apartheid past in terms of revealing new information on past conflict related atrocities and crimes.[106] This can be attributed to the fact that, on the one hand, political issues were not sufficiently investigated in most trials or simply ignored, and on the other, only a few trials took place with only two convictions.[107] Nevertheless, the prosecutions, which took place parallel to the amnesty process, contributed significantly to the work of the TRC as they had a major effect on the number of amnesty applications. The threat of prosecution was the decisive incentive for the vast majority of perpetrators from the security police to apply for amnesty. Many only applied for amnesty when they became aware of an imminent threat of being charged or when they were implicated in a criminal trial concerning former colleagues.[108] Without concomitant criminal trials, the number of amnesty applications for apartheid-state sponsored crimes would, thus, have been significantly lower.

[104] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 191–95.

[105] Ibid., 205. See for an analysis of the judgment: H. Varney and J. Sarkin 'Failing to pierce the hit-squad veil: an analysis of the Malan-trial' (1997) 10 *South African Journal of Criminal Justice* 141–61.

[106] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 328.

[107] Ibid.

[108] For a statistical analysis of this point see V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 30 and 294–319.

Chapter Two

Prosecution of Political Crimes After the TRC

This chapter documents the prosecutions arising out of and/or connected with the TRC that have been initiated since the conclusion of its work. The chapter will also describe the various special units within the prosecutorial service, which were established for this purpose. The analysis will embrace all proceedings concerning crimes that were committed during the time period relevant for the Amnesty Committee's mandate from 1960 to 1994 and which potentially also fall within its legal mandate. Such crimes were, thus, at least politically motivated and connected with the apartheid conflict. The discussion therefore focuses on two types of crimes: those for which amnesty has been applied but was refused or those for which amnesty was not applied at all. Although the issue of post-TRC prosecutions in fact became more salient after the Amnesty Committee finished its work in 2001, the focus will be on all trials that were instituted after the deadline for amnesty applications had lapsed in 1997.

The first four documented cases concern proceedings that were conducted and initiated by the regional prosecution authorities independent of any central or special units in Pretoria. The following four cases, starting with the Terre'Blanche case, contain descriptions of prosecutions that were instituted and conducted by the special Priority Crimes Litigation Unit. Both sets of cases will be presented in chronological order.

1. *Special Units for Post-TRC Prosecutions*

In 1998 the work of the team headed by Jan D'Oliveira came to an end. In the course of that year the prosecution authorities were completely restructured. A new centralised National Prosecution

Authority (hereinafter NPA), headed by a National Director of Public Prosecutions (hereinafter NDPP), was established in Pretoria.[1] The first NDPP was Bulelani Ngcuka who was succeeded in early 2005 by Vusi Pikoli.[2] D'Oliveira became one of the deputy NDPP and was no longer involved with prosecutions related to the apartheid conflict.[3] In September 1999 most of the members of his unit were integrated into the newly established Directorate of Special Operations (hereinafter DSO),[4] the so-called "Scorpions", which was in urgent need of skilled investigators and prosecutors.[5] However, the question remained, what should happen with the TRC-related cases with which the D'Oliveira Unit had been dealing.

1.1 *The Human Rights Investigative Unit*

In early 1999 a working group called the Human Rights Investigative Unit was established within the NPA on the initiative of then Minister of Justice Dullah Omar. The unit's mandate was to review, investigate and possibly prosecute all cases falling within the ambit of the TRC Act for which amnesty had been refused or was not applied,[6] thus, to continue the work of Jan D'Oliveira.

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[1] See for a comprehensive study of the NPA: M. Schönteich *Lawyers for the people* (2001).

[2] Ngcuka resigned as a result of political conflicts over the prosecution of former Deputy President Jacob Zuma. Pikoli was suspended in September 2007 for political reasons and replaced by Mokotedi Mpshe.

[3] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

[4] The DSO was an Investigating Directorate according to section 7 of the National Prosecuting Authority Act 32 of 1998 (hereinafter NPA Act) (for the capacities of the DSO see Chapter 5 of the NPA Act). It was the only prosecutorial entity capable of conducting its own investigations. According to section 7(1A) of the NPA Act the President may appoint two further Investigating Directorates, which as yet has not happened. Meanwhile the DSO has been disbanded on the initiative of the ANC. Most likely this happened for political reasons, since the DSO successfully targeted a number of high profile ANC leaders for corruption. See *End of the road for Scorpions* SAPA, Oct 10, 2008.

[5] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 214.

[6] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

The unit was headed by Vincent Saldanha; and his deputy was former Witwatersrand prosecutor Brink Ferreira.[7] According to Saldanha, four lawyers worked basically on a full or part time basis for the unit.[8] He sensed intense political support for his work, especially from the Department of Justice, led by Dullah Omar. Distinctions were not to be made between perpetrators of the political groups.[9] The composition of the unit further reflected, according to Saldanha, an approach that was extremely human rights- and victims-orientated. He himself comes from the human rights sector and was involved in a number of TRC hearings as an attorney for victims.[10] Some of the other members of the unit had prior work experience with the TRC or with human rights non-governmental organisations (hereinafter NGO).[11] The drafting of personnel from outside the ordinary prosecution structures also guaranteed for a high degree of independence.[12]

In November 1999 all dockets concerning criminal cases were moved from the D'Oliveira Unit to the Human Rights Investigative Unit.[13] Furthermore, some prosecution dockets from the regional NPA offices concerning TRC-related cases as well as all relevant dockets from the TRC were gathered at the latter unit. Although the dockets often concerned ongoing investigations, which in some cases had reached a very advanced stage, there was strangely no consultation or cooperation between D'Oliveira and the Saldanha team.[14]

It was intended that Saldanha would head the unit for a short period. After the conclusion of his secondment from his primary place of work, the Legal Resources Centre in Cape Town, he left the unit, having

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[7] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

[8] According to Nerlich it was initially intended to assign three deputy directors and five senior state advocates to the unit (ibid.).

[9] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

[10] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

[11] Ibid.

[12] Interview with Vincent Saldanha in Cape Town (April 26, 2006). However, the unit had to appoint police to conduct investigations and had to appoint NPA prosecutors once a case was ready for indictment.

[13] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 213.

[14] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).

served for only one year. Until then all investigations were still ongoing and no charges had been laid.[15] Among the cases under scrutiny some were very high profile, such as the case of the torture and killing of Steve Biko.[16] Moreover, a number of persons from the upper echelons of the former security apparatus were among those under the scrutiny of the unit.[17] The rationale behind the fact that nobody was charged lay, according to Saldanha, with the complexities of such high profile cases, which required meticulous preparation and the fact that a great number of cases were still handled by the Amnesty Committee. Once Saldanha's tenure lapsed, the unit's work only continued for a brief time. The setup of the unit was probably not ideal. Saldanha worked only on a part-time basis for the unit and lacked experience as a prosecutor.

However, thereafter the responsibility for TRC cases was again allocated to a working group within the DSO, the so-called Special National Projects Unit headed by Advocate Chris Macadam.[18] It is doubtful whether any significant and/or ongoing work was done on the issues during that time as it was probably only Macadam who worked on post-TRC prosecutions on a part time basis.[19] Again, no court proceedings were instituted. TRC cases apparently did not enjoy high priority at that time. Macadam asserts that, again, it was the ongoing amnesty proceedings that acted as the main barrier to progressing with prosecutions.[20]

Whereas the D'Oliveira Unit had been well-staffed and well-equipped, the resources allocated to post-TRC prosecutions after 1998 were absolutely minimal, which naturally contributed to their slow progress.[21]

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[15] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

[16] See text accompanying *infra* Chapter 4 note 166.

[17] Interview with Vincent Saldanha in Cape Town (April 26, 2006).

[18] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). Macadam had previously also worked for the TRC as head of the Commission's witness protection programme.

[19] Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

[20] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[21] Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

The NPA did not want to commit resources to cases which might eventually collapse due to amnesty applications being granted to those under investigation.[22] Yet it seems probable that there were also a significant number of potential cases for which amnesty had not been applied or that the D'Oliveira team had already prepared, such as the investigations against General Krappies Engelbrecht, the former commander of Eugene de Kock.[23] By 1999 the D'Oliveira Unit had allegedly already prepared about 20 charge sheets.[24]

According to Macadam, the NPA wanted to await the presentation of the last volumes of the TRC Report. This could not, however, have constituted an obstacle in a legal sense, especially considering the clear recommendations the TRC had already made with regards to criminal accountability in 1998. However, the NPA tried to avoid interfering with the President's response to the TRC Report with respect to policy approaches to tackle TRC-related crimes, including the possible pardoning of certain perpetrators.[25] This and the lack of resources could explain why, although the Amnesty Committee's work ended in May 2001, still by 2003, when the last TRC Report volumes were published, criminal proceedings had yet to be instituted. Moreover, the structures put in place for post-TRC prosecutions were not ideal, as was especially the case when matters were placed with the DSO,[26] which was primarily an elite unit for the investigation and prosecution of serious economic crimes, corruption, organised crime and terrorism.[27]

In conclusion it must be stated that the work on post-TRC prosecutions within the central NPA office between 1998 and 2003 was insignificant.

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[22] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[23] See V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 154–55.

[24] Ibid., 154.

[25] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[26] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[27] M. Schönteich *Lawyers for the people* (2001) 64.

1.2 *The Priority Crimes Litigation Unit*

The pace of developments did indeed pick up, however, after the last two volumes of the TRC Report[28] had been tabled in Parliament on 15 April 2003. President Mbeki stated in a speech before Parliament on this occasion that it was in the hands of the NDPP to pursue any cases arising from the TRC that he considered prosecutable as is normal practice in criminal justice.[29] This apparently provided the clarification the NPA had awaited to proceed on TRC cases.

One month prior to this statement the responsibility for TRC prosecutions had been transferred again. On 24 March 2003, three days after the final Report volumes had been presented to the President, Advocate Anton Ackermann was appointed Special Director of Public Prosecution[30] and head of the newly founded Priority Crimes Litigation Unit (hereinafter PCLU).[31] According to the respective presidential proclamation, the PCLU is responsible for managing and directing the investigation and prosecution of crimes dealt with in the Implementation of the Rome Statute of the International Criminal Court Act no 27 of 2002, serious national and international crimes, including acts of terrorism and sabotage, high treason, sedition, mercenary activities and other priority crimes to be determined by the NDPP.[32] No mention is made of post-TRC prosecutions. However, at the inception of the PCLU the NDPP declared all crimes relating to the TRC for which

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[28] *TRC Report*, vols 6 and 7. See also section 44 of the TRC Act.

[29] Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

[30] According to section 13(1)(c) of the NPA Act the President may appoint Directors of Public Prosecutions to exercise certain powers, carry out certain duties and perform certain special functions.

[31] Proclamation by the President of the Republic of South Africa of 24 March 2003 (No. 46 of 2003).

[32] Ibid. The PCLU is also responsible for prosecutions relating to the non-proliferation of weapons of mass destruction (nuclear, chemical and biological) and regulations of conventional military arms (National Prosecuting Authority, *Annual report 2005/2006*).

amnesty had not been granted as priority crimes in the context of the proclamation, which made the PCLU the agency responsible for dealing with such crimes.[33] In fact, TRC matters initially made up the main proportion of the unit's work.

In mid-2006 the PCLU effectively consisted of six prosecutors: its head Anton Ackermann, his deputy Torie Pretorius, Chris Macadam, who was previously responsible for TRC matters in the DSO, Shawn Abrahams, Susan Bukau and the then newly appointed Mtunzi Mhaga, who had previously been involved in two TRC-related trials in the Eastern Cape.[34] The composition of the unit shows a high degree of continuity. Ackermann and Pretorius had worked under D'Oliveira. Prior to that Pretorius had worked for the Goldstone commission.[35] As already stated, Macadam had been involved with TRC cases before 2003 and had gathered experience by working for the TRC.

When Ackermann took over matters, he instituted an audit of all available cases. The result was that some 459 cases[36] could be registered from the material, contained in dockets concerning the cases handed over from the TRC or the D'Oliveira Unit. About 160 cases were immediately deemed not to warrant further proceedings. Only about 16 cases were identified as worthy of pursuing prosecution.[37] At least three were prepared almost immediately for indictment.[38] It would, however, be totally unrealistic to expect all of the hundreds of cases, especially those submitted by the TRC, to warrant criminal proceedings.[39] The list handed over by the TRC does not significantly contribute to the work of the PCLU in general, as most cases had already been known to the D'Oliveira Unit.[40] By the end of 2006 the PCLU was

[33] E-mail from Anton Ackermann (Oct 18, 2005).
[34] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).
[35] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123.
[36] National Prosecution Authority, *Annual report 2002/2003.*
[37] Interview with Anton Ackermann in Pretoria (May 11, 2006).
[38] Ibid.
[39] Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006).
[40] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

working on 16 cases in total, five of which were considered to be of high priority and had been prepared to an advanced stage.[41]

As far as the general approach to post-TRC cases is concerned, the PCLU focuses first on cases in which amnesty has been denied, since it is generally easier to identify a case worthy for prosecution. The PCLU's secondary focus is cases where amnesty was not applied at all.[42] Cases that involve the use of egregious violence and which resulted in the death of more than one person are naturally of higher priority than those which, for instance, were only directed at non-human entities, such as sabotage attacks of the liberation movement.[43] However, according to its senior members, the PCLU attempts to ignore as much as possible political implications and to resist distinguishing between the political groups of liberation movement and apartheid state forces. The approach taken is strictly dependent on the availability of evidence and the egregiousness of the crime, regardless of political affiliation of the perpetrator.[44]

Besides this, there is also a working group within the NPA which works on the exhumation of missing persons who were killed during the struggle against apartheid and secretly buried. The primary aim of the exhumation work is to return the remains to the victims' relatives. It is not driven by criminal investigations but occasionally new information can come to light that is relevant for prosecutions.[45]

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[41] E-mail from Anton Ackermann (June 19, 2006). It is unclear what happened to the above mentioned 20 indictments allegedly prepared already in 1999 or in how far those overlap with the 16 cases.

[42] Interview by Gerhard Werle with Chris Macadam and others in Pretoria (Feb 27, 2004).

[43] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[44] Interview with Torie Pretorius and others in Pretoria (May 2, 2006); Interview with Anton Ackermann in Pretoria (May 11, 2006).

[45] Interview with Madeleine Fullard in Pretoria (May 4, 2006). Valuable information was uncovered in the case concerning the death of Ntombi Khubeka, who was a member of MK. In 1987 she was arrested by the security police in Natal and beaten during her interrogation. The policemen at their amnesty hearing claimed that she had suddenly died of a heart attack. However, when her remains were discovered

The biggest obstacle facing the PCLU is the severe lack of resources.[46] Apart from TRC matters, the unit is responsible for a range of other issues. As such, cases pertaining to the illegal trafficking of nuclear material and knowledge by South Africans took up a particularly large proportion of the unit's resources in recent times. Until the end of 2006, TRC matters took up on average only about 30 to 50 per cent of the unit's work.[47] Considering the already small number of prosecutors in the PCLU, this proportion is rather modest. Furthermore, the minimal resources devoted to the unit's investigative work is a major problem. Some cases had already been fully investigated, others needed more investigation. The D'Oliveira team included about 20 carefully selected, highly skilled and experienced police investigators, who were not suspected of sympathising with their former colleagues accused of political crimes.[48] Whereas this unit could thus conduct investigations independent of the police, the PCLU has to rely on the assignment of investigators and the conduct of investigations by the South African Police Service (hereinafter SAPS) or the meanwhile disbanded DSO.[49] The gathering of evidence concerning TRC cases is especially

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and exhumed, a bullet hole in her temple was detected which, of course, exposed the police testimony presented as false (See *TRC Report*, vol. 6, s. 4, chap. 2).

[46] Interview with Anton Ackermann in Pretoria (May 11, 2006); Interview with Torie Pretorius and others in Pretoria (May 2, 2006). See also N Rousseau 'Prosecutions' in E. Doxtader (ed.) *Provoking questions* (2005) 37 at 47.

[47] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[48] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123; Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

[49] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). Traditionally investigations, which are basically the independent responsibility of the police, and prosecutions are quite strictly separated (M. Schönteich *Lawyers for the people* (2001) 41). Only with the establishment of the NPA was this traditional separation eased since with the DSO investigative powers were permanently introduced to the NPA. Furthermore, with the NPA Act prosecutors were granted greater influence on investigations. According to section 24(4)(c) of the NPA Act, a Director of Public Prosecutions, such as Ackermann, may in some bounds direct the responsible investigator who is according to section 24(7) of the NPA Act obliged to follow requests. It is also interesting to note that the first steps towards a combination of investigation and prosecution capacities occurred at the investigation of apartheid

demanding of investigators. The crimes often happened secretly without independent witnesses and were covered up meticulously. Thus, as was the case with the D'Oliveira team, the PCLU relies to a great extent on state witnesses in order to bring cases before the courts.[50] Again, incriminating evidence has to be compiled in order to urge the conspirators to cooperate.

Such circumstances and the political implications of TRC cases place special demands on the skills, commitment and experience of investigators. In contrast to the abilities of the investigators working for the D'Oliveira team, the PCLU has major problems recruiting such investigators.[51] Although it was intended for the DSO to provide the PCLU with investigators, the DSO declined to cooperate.[52] Thus, the unit has to rely on the police, who are obliged to cooperate. However, a request to the police of early 2004 to assign investigators on an ongoing basis was not followed.[53] The investigators, who were assigned to

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crimes through the D'Oliveira team and the Investigative Task Unit in Natal which was necessitated by the during the 1990s still largely untransformed police service (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 123).

[50] Interview with Anton Ackermann in Pretoria (May 11, 2006). According to section 204 of the Criminal Procedure Act no 51 of 1977 arrangements can be made for participants in a crime to testify on behalf of the state against their accomplices to secure a conviction. If the state witness testifies frankly and honestly in the opinion of the court, he may be discharged from criminal liability for the offence in question. According to Ackermann, Pretorius and D'Oliveira evidence gathered by the TRC in comparison is not helpful and plays no significant part in the work of the PCLU. See also V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 327 and 244.

[51] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[52] Ibid.

[53] Ibid. It has to be borne in mind that the SAPS also suffers from a major lack of resources and availability of skilled investigators. The focus of the SAPS is clearly on tackling the high present-day crime rate. It is thus not willing to assign resources for cases which mostly took place more than 20 years ago. (Interview with Jan D'Oliveira and others in Pretoria (May 2, 2006)). Added to this power struggles between police commissioner Jackie Selebi and the NDPP, which came to a head at the prosecution of former deputy President Jacob Zuma, tainted the relationship between the SAPS and the NPA (Interview with Torie Pretorius and others in Pretoria (May 2, 2006)).

investigate certain matters, often lacked the necessary skill, determination and experience.[54] Compared to this problem, a possible lack of development and change in the police service or the reluctance of certain officers to investigate their former colleagues no longer plays an influential role.[55]

From early 2006 all post-TRC prosecutions were concentrated at the PCLU and the regional prosecutors are obliged to refer such cases to the NPA in Pretoria. A centralised prosecution certainly has the advantage of enabling the achievement of consistent progress. Moreover, it certainly makes sense to concentrate the experience in prosecuting TRC-related cases in one central unit. The advantages of centralised prosecutions were highlighted by the D'Oliveira team and also by the prosecution of systematic crimes committed by the socialist regime in the former German Democratic Republic (hereinafter GDR).[56]

2. *The Wouter Basson Case*

On 4 October 1999 the trial of Dr. Wouter Basson was opened at the High Court of Pretoria.[57] Basson was the leader of South Africa's secret programme on chemical and biological warfare also referred to as "Project Coast".[58] Project Coast was established by the SADF in the early 1980s initially with the intention of providing the country with the defensive capacity to react to chemical and biological warfare attacks.[59] Especially due to the activities of Basson, the project became increasingly involved in criminal activities in relation to the countering of opposition efforts against apartheid in Namibia, South Africa and various other countries.

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[54] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[55] Ibid.

[56] K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 233–34.

[57] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 167.

[58] *TRC Report*, vol. 2, chap. 6 C, paras. 1–2.

[59] Ibid., para. 40.

The trial against Wouter Basson is not a genuine post-TRC case. It is rather connected to the prosecutions of the 1990s since it was conducted by Ackermann and Pretorius, both members of the D'Oliveira Unit at that time. The amnesty hearings were still in full swing when it was started. However, Basson failed to apply for amnesty and the deadline for applications had lapsed by the time charges were laid. Moreover, the Basson case was significant due to its links to other post-TRC cases, such as the attempted murder of Frank Chikane which will be described below, and the scope and seriousness of the charges, which were of great significance. The litigation only came to an end in late 2005. It went through the Supreme Court of Appeal and the Constitutional Court. The ruling of the Constitutional Court potentially has great effects for post-TRC prosecutions in general. The trial court litigation has already partly been analysed by legal scholars and was generally well documented in the public.[60] The following subchapter will thus only outline the charges and give an overview of how the case progressed. The Constitutional Court's judgment will then be analysed in greater detail.

2.1 *The trial and quashed charges*

Basson was initially charged with 64 counts, 24 of which pertained to non-political fraud offences allegedly committed by Basson while managing Project Coast.[61] Further counts pertained to drug offences.[62] Of special importance are 29 counts which concerned murder.[63] According to the prosecutors, the murders in which Basson participated were aimed at killing enemies of the apartheid state. Most of these incidents were distinctly connected to a political objective and were allegedly

[60] See especially V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 167. For a comprehensive overview of the development of the trial see http://ccrweb.ccr.uct.ac.za/archive/cbw/cbw_index.html.

[61] *S. v Wouter Basson* (T) Case no. 32/1999 11 April 2002, unreported, at para. 16. See for a comprehensive summary of the indictment: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 169–74.

[62] *S. v Wouter Basson*, akte van beskuldigung, vol. II, aanklagte 25–30.

[63] Ibid., aanklagte 31–36, 38–43, 45–50, 52–58, 60–63.

committed in the fight against the opposition movement's anti-apartheid struggle.[64]

Targets for such murders were detainees in Namibia, the then South-West Africa, who belonged to the rebel movement South-West African People's Organisation (hereinafter SWAPO), members of the South African state's own forces who were believed to be a security risk, ANC members such as Ronnie Kasrils and Pallo Jordan[65] and various other persons believed to be enemies of the apartheid state.[66] One of the gravest incidents concerned the poisoning of about 200 SWAPO detainees in Namibia.[67] Basson allegedly provided the poison. Apparently many corpses were later dumped from a plane into the sea off the Namibian coast.[68] In another incident Basson allegedly provided cholera bacteria, which were introduced to a drinking water well in a SWAPO refugee camp.[69] The aim was to disturb the first free elections in Namibia.[70] Basson was allegedly involved mostly in organising the murders and especially providing the poison.[71]

After an extensive and very costly trial he was eventually acquitted on all charges by the trial judge, Mr Justice Hartzenberg, on 11 April 2002.[72]

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[64] See for a summary of the wide ranging charges against Basson: *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 192.

[65] Pallo Jordan served the ANC as a senior member in exile in London and Lusaka and later inhibited various posts as a minister in the cabinet (P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 133–35).

[66] *S. v Wouter Basson*, akte van beskuldigung, vol. II, aanklagte 31–36, 38–43, 45–50, 52–58, 60–63.

[67] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 170.

[68] *S. v Wouter Basson*, akte van beskuldigung, vol. II, opsomming van wesentlike feite, aanklag 31, para. 16.

[69] Ibid., aanklag 61.

[70] The bacteria were unexpectedly killed due to a high proportion of chlorine in the water.

[71] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 171–73.

[72] *S. v Wouter Basson* (T) Case no. 32/1999 11 April 2002, unreported. The judgment stretches over more than 1400 pages. The trial was one of the most extensive ones in South African history. 140 witnesses were heard. The costs for the state totalled several million Rand. The state also had to cover the costs of Basson's defence team, since he was still a state employee.

The failure to secure a conviction can be attributed mainly to the fact that Hartzenberg rejected most of the evidence and witnesses testifying on behalf of the State as unconvincing and untrustworthy.[73] The judge was criticised for being biased and generally hostile towards the prosecutors but also for erring on several legal issues.[74]

However, three issues emerged during the trial which were of central relevance in the Appeal Court and Constitutional Court litigations. The first of the three issues emerged about three months after the start of the trial. The prosecutors applied for the recusal of Judge Hartzenberg. They claimed that Hartzenberg was biased and could not rule on the case objectively.[75] The judge, however, refused to recuse himself.[76] The second issue pertains to the prosecutors' intention to introduce records of a bail hearing regarding the fraud charges to the trial. Hartzenberg ruled that the bail records were inadmissible in the trial.[77]

The third and most important issue for the purposes of the present discussion, concerns the objection made by Basson's defence team to certain charges before the trial had commenced.[78] The attorneys applied for nine of the charges to be quashed on the grounds that they would not concern criminal offences.[79] The judge granted the application with respect to seven charges.[80] Six of these quashed charges, counts 31, 46, 54, 55, 58 and 61, concern acts of conspiracy to commit murder in terms of section 18(2) of the Riotous Assemblies Act no 17 of 1956.[81] The

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[73] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[74] Ibid.; M. Fullard and N. Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al. (eds) *State of the nation* (2003) 78 at 92; V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 179–82.

[75] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 3.

[76] *S. v Basson* [2000] 3 All SA 59 (T).

[77] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 4.

[78] See for a summary of this issue: *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 13–18. See for a legal evaluation: V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 174–83.

[79] The application was based on section 85(1)(c) of the Criminal Procedure Act.

[80] *S. v Basson* [2000] 1 All SA 430 (T).

[81] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 5. The provision reads as follows:

charges contained the most serious of the accusations against Basson. Count 31 concerned the poisoning of the SWAPO detainees. Count 46 concerned the conspiracy to murder a high-ranking administrative official in northern Namibia. Count 54 related to the unsuccessful conspiracy to murder the later ANC ministers Pallo Jordan and Ronnie Kasrils in London. Counts 55 and 58 concerned a conspiracy to murder ANC members in Mozambique and Swaziland. Count 61 concerned the conspiracy to murder the SWAPO refugees with cholera bacteria.

As is evident, these charges concern cases of murder or attempted murder that took place beyond South Africa's borders. Since South African courts have no jurisdiction to try crimes which were committed abroad,[82] prosecutors were relegated to pursuing convictions for Basson's participation in the conspiracy that took place in South Africa.[83] However, Basson's defence argued that the conspiracy to commit crimes abroad would according to the definition of the crime itself not constitute a criminal offence, even if this conspiracy took place in South Africa.[84] Hartzenberg accepted the defence's arguments and held that conspiracies to commit crimes abroad were not covered by section 18(2) of the Riotous Assemblies Act.[85] Should this legal opinion prevail it would have serious consequences for all cases in which a similar indictment is intended. The litigation proceedings concerning this point will now be examined.

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(2) Any person who

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

[82] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 223.

[83] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 175. Nerlich points out that the prosecutors in the trial of Eugene de Kock successfully exercised this approach in respect of certain charges.

[84] Ibid., 175.

[85] *S. v Basson* [2000] 1 All SA 430 (T) at 444g.

2.2 *The appeal litigation*

Immediately after the judgment had been handed down, the State applied for judgment to be reserved on certain questions of law[86] for resolution by the Supreme Court of Appeal.[87] The application concerned the three issues outlined above. Subject to certain conditions, Hartzenberg reserved the recusal and bail record issues for consideration by the Supreme Court of Appeal. However, he refused to reserve the question of whether he erred in law concerning his ruling to quash the aforementioned charges.[88] The NPA in June 2002 appealed against the judgment concerning the questions of law reserved by the trial judge and simultaneously applied to the Supreme Court of Appeal to reserve the issue of the quashing of the charges for consideration.[89] However, this specific application was seriously defective in various procedural aspects.[90] The prosecutors then applied for condonation regarding the non-compliance with the procedural requirements.[91] Due to the appeal application's clear and serious violations with respect to the Supreme Court of Appeal rules, the Court refused condonation, and, thus, did not even consider the merits of the legal question of whether the charges were correctly quashed, nor did it answer the other questions in favour of the State.[92]

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[86] See section 319(1) of the Criminal Procedure Act.

[87] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 8. For a comprehensive summary of the litigation up to the Constitutional Court see *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 paras. 1–14 and *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 paras. 1–18.

[88] *S. v Basson* [2002] JOL 9680 (T) at 19–20.

[89] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 10.

[90] *S. v Basson* 2003 (2) SACR 373 (SCA) at 379. See on defects of the application also: *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 paras. 157–160.

[91] *S. v Basson* 2003 (2) SACR 373 (SCA) at para. 379; *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 11.

[92] *S. v Basson* 2003 (2) SACR 373 (SCA) at para. 118. The Supreme Court of Appeal held that the bail record and recusal issues concerned questions of fact and not of law as required for an appeal litigation.

2.3 *The Constitutional Court litigation*

After the appeal had failed, the prosecutors applied for special leave to appeal against the judgment of the Supreme Court of Appeal in mid-2003 and for leave to appeal the judgment of the High Court directly at the Constitutional Court.[93] The application again concerned the three central issues: bias of the trial judge; admissibility of the bail records; and the quashing of six charges, which had already been before the Supreme Court of Appeal.[94] The focus here will be on the quashing of the charges.

In a preliminary judgment the Constitutional Court ruled that even though the conduct in question had taken place before the Constitution had come into force, the issues concerned constitutional matters within the jurisdiction of the Court.[95] Apart from various complex procedural issues,[96] the crucial issue to be considered by the Constitutional Court was whether the Supreme Court of Appeal exercised its discretion wrongly in not considering the respective question and whether it was in the interest of justice to grant leave to appeal on this question.[97] The Court therefore found it crucial to consider the seriousness of the charges in light of South Africa's international obligations regarding the maintenance of fundamental principles of international humanitarian law.[98] Since the crimes in question were very grave and had been committed abroad, the question arose whether South Africa had an obligation to prosecute under international law. In its preliminary judgment, the Court had stated, without dealing exhaustively with the issue, that international law obliged South Africa to prosecute crimes against humanity and war crimes.[99] In its final judgment, however, it

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[93] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 1. The application was unique in that it was the first time that a state organ, the NPA, appealed to the Constitutional Court against a judicial decision.

[94] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 1.

[95] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 79.

[96] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 128–187.

[97] Ibid., at paras. 185–186.

[98] Ibid., at para. 171.

[99] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 37.

confined itself to evaluating the importance of the charges in general terms with regard to South Africa's obligations under international humanitarian and human rights law.

The Court was of the opinion that no country ought to allow the planning of cross-border criminal activities.[100] The Court then elaborated in general terms on the great significance of international humanitarian law, thereby quoting the decision of the International Court of Justice on the legality of the threat or use of nuclear weapons,[101] which highlighted humanitarian law as a fundamental and intransgressible aspect of international law.[102] The Court further made it clear, with reference to the decision of the International Criminal Tribunal for the former Yugoslavia in the *Dusko Tadic* case, that the distinction in international law between internal and international conflict had become increasingly blurred.[103] Thus, since the minimum standards for internal and international conflicts were identical, the Court neglected to determine how the conflict between SWAPO and the SADF in Namibia should be classified.[104] Due to the growing overlap of international human rights and humanitarian law the precise characterisation of the participants' legal status was also left open.[105] However the Court pointed out that South Africa, as a party to the Geneva Conventions, was bound to respect the principles outlined therein and was bound to respect fundamental principles of customary humanitarian law.[106] Such rules had also to be obeyed in the Namibian conflict. The subjection of captives to asphyxiation through poison under the guise of medical care and the insertion of cholera bacteria in the water supply of hundreds

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[100] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 170. The Court pointed out that this factor has neither been considered by the Supreme Court of Appeal in any regard, nor had it been brought to the attention of the Supreme Court of Appeal.

[101] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

[102] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 174.

[103] Ibid., at para. 175.

[104] Ibid., at para. 178.

[105] Ibid., at para. 179.

[106] Ibid., at para. 177.

suspected opponents of the regime grossly transgressed even the most minimal standards of international humanitarian law.[107] According to the Constitutional Court, the Supreme Court of Appeal had failed to consider these grave breaches and the, what it termed 'international consensus on the normative desirability to prosecute war criminals'.[108] The application of the State thus succeeded.

The Court went even further and examined whether the quashing of the six charges was based on a proper interpretation of section 18(2) of the Riotous Assemblies Act. The Court initially referred to the main arguments of counsel for the State[109] that the Military Discipline Code[110] criminalised certain conduct of SADF members even if the acts were committed beyond the borders of South Africa, that section 19A of the Riotous Assemblies Act provided that the Riotous Assemblies Act was also applicable in South-West Africa and most importantly, that South African Courts generally had jurisdiction to try crimes committed abroad when there was a sufficient connection between the crime and South Africa.[111]

According to the Court, section 47 of the Military Discipline Code[112] determines that any SADF member who commits a civil offence, meaning an offence not criminalised by military law but by common South African law, is criminally liable in terms of the code even if the crime was

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[107] Ibid., at paras. 179–182.

[108] Ibid., at paras. 184–185.

[109] Counsel for the state were Wim Trengrove, A. Cockrell and N. Fourie.

[110] The code is part of the Defence Act (Act no. 44 of 1957).

[111] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 210.

[112] The section provides that:

> 'Any person who beyond the borders of the Union commits or omits to do any act in circumstances under which he would, if he had committed or omitted to do that act in the Union, have been guilty of a civil offence, shall be guilty of an offence under this Code and liable on conviction to such penalty applicable in respect of that civil offence as could be imposed under section ninety-one of this Code.' The Code was in force during the time in that the offences were allegedly committed and during the time of the trial. According to section 104(5) of the Defence Act, the Code applies to all members of the Permanent Force of the Defence Force.

committed abroad.[113] Any member of the army who commits murder beyond South Africa's borders is liable to prosecution in a military as well as an ordinary court in South Africa.[114] Thus, provided the murders were to be carried out by members of the SADF, South Africa has jurisdiction to try the conspiracy.[115] This was especially relevant for counts 55, 54 and 58 that pertained to murders in Mozambique, London and Swaziland.[116] In terms of the Defence Act and the Military Discipline Code, Namibia was in any case considered part of South Africa, which had certain specific implications for the matter.[117]

In any event, the Court did not take this further and turned to a general rule concerning the jurisdiction over crimes committed abroad. It basically stated that the rule that South African courts have no jurisdiction over crimes that are committed abroad, based on the principle of international comity, is not absolute.[118] The Constitutional Court then approved and followed the ruling of the Canadian Supreme Court on the same legal issue.[119] The Canadian Supreme Court had ruled that Canadian courts have jurisdiction to try conspiracies concerning crimes to be committed abroad when a significant portion of the activities constituting the offence took place in Canada or when there is a real and substantial link between the conspiracy to commit the crime and the country itself.[120] The Constitutional Court confirmed the existence of such a real and substantial link in the Basson case[121] and based this opinion on the following grounds, which can be partitioned in two groups.

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[113] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 214.

[114] Ibid., at para. 216.

[115] Ibid., at para. 219.

[116] Ibid.

[117] Ibid., at paras. 220–222. See section 1(xxii) of the Defence Act.

[118] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 223 and 225. International comity in this sense means the respect for another country's sovereignty in terms of exclusively exercising jurisdiction over crimes committed on its territory.

[119] *Libman v The Queen* [1985] 2 SCR 178.

[120] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 226.

[121] Ibid., at para. 228.

The first group encompasses factors pertaining to the special situation of Namibia at the time. A number of findings show that there was a real and substantial link between the conspiracy to commit the crime and South Africa, including the following: Namibia was administered by South Africa; the Riotous Assemblies Act was applicable in Namibia; at all material times, the SADF was deployed in Namibia in terms of the Defence Act, which deems Namibia part of South Africa; certain charges pertain to the murder of detainees who were held captive by the SADF; and that the Defence Act generally criminalises acts of SADF members even if committed abroad.[122]

The other set of factors indicating the real and substantial link to South Africa are broader in nature and are not confined to the Namibian situation. They include: the mere fact that the conspiracy was entered into in South Africa; that it was organised and directed by members of the South African military; that the means for the implementation of the killings were provided and prepared in South Africa; and that the respective instructions were issued from there.[123]

The Court rejected the arguments of Basson's legal counsel.[124] Accordingly the Constitutional Court unanimously held on 9 September 2005 that South African courts have jurisdiction to try the crimes in question

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[122] Ibid., at 227.

[123] Ibid.

[124] The main argument was based on the hypothetical situation that if section 18(2) of the Riotous Assemblies Act was construed in the way desired by the State, the conspiracy to smoke cannabis in the Netherlands, which is not criminal there, would be criminal in South Africa as well as the situation where the conspiracy to consume alcohol in a Muslim country, in some countries a criminal offence, would be criminal in South Africa. This argument was rejected on the basis that there anyways is not a sufficient connection between South Africa and the acts to warrant jurisdiction and that they are by no means comparable to the murder of detainees by SADF personnel held captive in a country administered by South Africa. The second argument, namely that the acts were covered by an amnesty proclaimed in Namibia in 1989, was rejected on the basis that the proclamation has no application for South African courts. See *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 237 and 244.

and ordered that the quashing of the charges be set aside.[125] The judgement thereby clarified to a certain degree the question concerning section 18(2) of the Riotous Assemblies Act.

The Court obviously viewed international law, more precisely the international law obligation to prosecute this case, as a decisive factor in coming to the conclusion that the Supreme Court of Appeal should have granted the State leave to appeal against the trial court's judgment. Nevertheless, in this regard the Court's elaborations remained of a rather broad and general nature. It did not analyse in any detailed way whether there is a strict obligation to prosecute such crimes under international law. Although this issue is relevant for the decision on whether South African courts have jurisdiction to try crimes of the gravity and international relevance such as in the Basson case, or the concomitant conspiracy, it did not analyse whether the crimes and conspiracies could also have been prosecuted on the basis of the international law principle of universality.[126] According to the principle of universality, any state's courts have jurisdiction to try a person accused of an international crime, regardless of the place where the crime was committed or the nationality of the victim or alleged perpetrator.[127] This principle is accepted under international customary law for war crimes, crimes against humanity, genocide and also with regard to crimes committed in civil wars.[128] The Constitutional Court had pointed out that the crimes of which Basson was accused would violate even the most minimal standards of international humanitarian law and would

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[125] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 265. The applications regarding the recusal and the admissibility of the bail record were dismissed.

[126] See on the issue of universal jurisdiction and generally international law in the Basson case: M. Swart 'The Wouter Basson prosecution: the closest South Africa came to Nuremberg?' (2008) 68/1 *Heidelberg Journal of International Law* 209–26. The Court expressly states that it does not consider it necessary to examine these issues in detail (*S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 172). It apparently sufficed for the Court to approach the topic on the basis of South African law.

[127] A. Cassese *International criminal law* (2003) 284.

[128] G. Werle *Principles of international criminal law* (2005) para. 174.

thus constitute horrendous war crimes.[129] Against this background, it is incomprehensible why the Court did not elaborate on the principle of universality, which would clearly have provided for the jurisdiction of South African courts and would have rendered as incorrect the quashing of the charges.

2.4 *A new trial?*

With respect to the six quashed charges, the NPA won its case. The Constitutional Court had stated that the previously quashed indictment stands and that it was up to the State to charge Basson anew.[130] The way seemed clear for a new trial on the basis of the six charges. Yet rather surprisingly, especially considering the time and effort required to reach this result, the NPA announced in October 2005 that it would not recharge Wouter Basson on the six counts.[131] The reason provided for this decision was that a new trial on the basis of the six charges would violate the double jeopardy rule, which in this case would be an inescapable procedural obstacle for a new indictment.[132]

The principle of double jeopardy is laid out in section 35(3)(m) of the Constitution. Its roots lie in the basic principle common to most legal systems that no one shall be punished for the same offence more than once.[133] In criminal procedure, the rule is embodied in the pleas of *autrefoi acqui*, if the accused has previously been acquitted, or *autrefoi convict*, if the accused has previously been convicted for the offence in question in terms of section 106(c) and (d) of the Criminal Procedure Act. However, the rules on these pleas provide that the accused must

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[129] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 179–180.

[130] Ibid., at para. 260.

[131] W. Menges *'Dr Death' is off the hook in South Africa* The Namibian, Oct 24, 2005.

[132] NPA, press statement *NPA decides not to re-charge Wouter Basson* (Oct 19, 2005).

[133] P.M. Bekker et al *Criminal procedure handbook* 7ed (2005) 220; *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 61. See generally on the double jeopardy rule M.L. Friedland *Double jeopardy* (1969); Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991).

have been in danger of conviction in the first trial[134] which was never the case with Basson, since the specific charges were not admitted.[135] The NPA's decision must therefore have been based on a different aspect of the double jeopardy rule, which is the plea of *res judicata*.[136] The doctrine of *res judicata*, known in England and Canada as issue estopple, in the United States as collateral estoppel,[137] is part of the double jeopardy rule in criminal procedures of common law countries.[138] It holds that if issues of ultimate fact, including those concerning evidence such as the credibility of witnesses and the like, have already been determined by a valid and final judgment of a trial court, these issues cannot be made the subject of another criminal litigation between the parties.[139]

In the present case, the six charges, which had been set aside, were all materially also covered by an umbrella charge (count 63), which encompassed virtually all conspiracy charges, those relating to crimes to be committed abroad and those relating to crimes to be committed in South Africa.[140] According to Pretorius, who mainly led the evidence in question at the trial, the evidence supporting the quashed charges

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[134] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 254. See on the preconditions of the pleas *autrefoi acqui* and *autrefoi convict*: P.M. Bekker et al. *Criminal procedure handbook* 7ed (2005) 220–25; E. Du Toit et al. *Commentary on the Criminal Procedure Act* service 36 (2006) 15–28 to 15–34.

[135] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 256.

[136] The Constitutional Court only briefly touched upon this issue when it stated that the question could arise whether the quashed charges, were they subject of a new indictment, could be rendered susceptible to a plea of *res judicata* (ibid. at para. 257).

[137] Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991) 13.

[138] See generally M.L. Friedland *Double jeopardy* (1969) 117–60; Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991) 13–14; C.F. Stuckenberg *Double jeopardy* (2001) 26–28.

[139] Law Reform Commission of Canada *Double jeopardy, pleas and verdicts* (1991) 13; C.F. Stuckenberg *Double jeopardy* (2001) 26. The principle is accepted in most English speaking countries (M.L. Friedland *Double jeopardy* (1969) 117), obviously including South Africa.

[140] NPA, press statement *NPA decides not to re-charge Wouter Basson* (Oct 19, 2005). Count 63 basically concerned all charges where Basson had to provide the poison (Interview with Torie Pretorius and others in Pretoria (May 2, 2006)).

equally supported the relevant parts of the umbrella charge.[141] Thus, for the purpose of count 63, the State led all the evidence, including especially witness statements, on which also the six quashed charges were almost entirely based.[142] Judge Hartzenberg refers to this situation in the final judgment when he states that:

> Although I initially ruled that conspiracies to commit crimes abroad are not justiciable in this court and a number of charges had therefore been quashed, it made no difference to the evidence the State has led, because the State has led evidence to support the charges, as it was required of the State, to prove the wider conspiracy (charge 63) the accused allegedly had committed.[143]

The trial judge considered the evidence and rejected it as being not credible enough to support the guilt of the accused with respect to count 63.[144] The Court, therefore, had ruled on issues of ultimate fact. Thus, there was the peculiar situation that, although the six charges had not been admitted to the trial, the Court apparently nevertheless heard virtually all evidence in respect thereof. Before the trial, Basson's defence had also applied for the quashing of count 63, which was refused by Hartzenberg since it also concerned conspiracies regarding crimes to be committed in South Africa.[145] Nevertheless, Hartzenberg ruled that the defence had the right to object to all evidence, which was led in connection with count 63, that is only aimed at proving conspiracies to commit crimes abroad, which according to the judge

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[141] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). See also *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 para. 257.

[142] Pretorius estimates that only about 5 per cent of the evidence concerning the six charges has not been led in the trial.

[143] *S. v Wouter Basson* (T) Case no. 32/1999 11 April 2002, unreported, at para. 1610 (abstract translated from Afrikaans).

[144] Interview with Torie Pretorius and others in Pretoria (May 2, 2006). The dismissal of the evidence was made on factual not legal grounds and could thus only be taken on review not on appeal. However, a review of the judges rulings on the evidence would have provided a gross irregularity which was not given (Interview with Susan Bukau and others in Pretoria (May 2, 2006)).

[145] *S. v Basson* [2000] 1 All SA 430 (T) at 436h.

do not disclose criminal offences.[146] Apparently either the defence did not object to the leading of evidence in this regard or the evidence that was actually led in the trial always concerned both justiciable and non-justiciable conspiracies. Thus, since the judge at the trial had ruled over all relevant evidence and no fresh evidence was available to sufficiently sustain the charges,[147] further charges would be vulnerable of a plea of *res judicata*.

It is difficult to comprehend, why the NPA applied for leave to appeal in respect of the six charges at the Constitutional Court at all, when a new indictment would be exposed to a double jeopardy plea anyway. The specific issue had already been raised during the Supreme Court litigation. The NPA must have been aware of such implications. Furthermore, the Constitutional Court did not state that these circumstances completely precluded a new prosecution. Instead, the Court appeared much more encouraging stating that it would be up to the judge in a newly convened trial to determine in the light of the new charges and the record of the previous criminal proceedings whether the mass of evidence led previously indeed particularly covers the new charges.[148] However, the Court also left it up to the NPA to decide on a fresh charge.[149] Although the prosecutors are naturally well able to consider this question, a ruling by a new trial court, after careful consideration of the criminal records, would have had greater authority, which would probably have made it easier for many victims concerned to find closure on the issue.

The reason for the decision not to proceed with the trial after the NPA had succeeded on the issue of the six quashed charges probably lies in the fact that this issue was only one of three that were taken to the Constitutional Court. The NPA had also applied at the Constitu-

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[146] Ibid. at 443e and 444h.

[147] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[148] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 169, 258 and 260. The court expressly refrained from tackling this complex task in the proceedings before it since it had no effect on its decision to grant leave to appeal (*S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 258).

[149] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 260.

tional Court for a ruling on the refused recusal of Judge Hartzenberg and his alleged bias, which did not succeed. A successful ruling in this regard might have led to the setting aside of the judgment and would have enabled the NPA to proceed with a new trial regardless of the double jeopardy rule. However, it is not possible to conclude with certainty what the considerations of the NPA were in this regard. The independent decision of the NPA has not been accepted by many victims.[150] Basson continued to work as a member of the South African National Defence Force (hereinafter SANDF) and as a cardiologist in various hospitals.[151]

2.5 *Conclusion*

In the view of many apartheid victims, the trial against Wouter Basson was very promising. That it did not succeed was equally disappointing for many. The case had the potential to become one of the most significant prosecutions of apartheid era crimes. It offered the possibility of focussing more closely on the secret activities of the military, which had thus far not received the same attention as the security police.[152] The acquittal prevented the achievement of definite clarity on such criminal activities. It also had a negative impact on further post-TRC prosecutions. Since the costs of millions of Rand were not "balanced" by a conviction, the government might become increasingly reluctant to push for other trials. Also, a number of state witnesses who had testified extensively against Basson were nevertheless not granted immunity by Hartzenberg in terms of section 204 of the Criminal Procedure Act, which might generally impact negatively on the willingness of co-perpetrators to cooperate with the prosecutors.[153]

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[150] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[151] *Defence confirms Basson's suspension payments* SAPA, Sep 13, 2006; *Wouter Basson to defend himself against complaints* SAPA, Feb 26, 2007.

[152] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 174.

[153] M. Fullard and N Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al. (eds) *State of the nation* (2003) 78 at 93.

However, one positive aspect is that the Constitutional Court dealt with the matter and made a number of statements with regards to the relevance of international human rights law for the prosecution of apartheid era crimes. It is also of great importance for other post-TRC trials regarding the conspiracy issue. It concerns all similar situations in which crimes were organised in South Africa but were carried out abroad. These include the numerous cross border raids of the security police during which opposition members and other civilians were killed in neighbouring countries. The judgment is also generally relevant for all crimes committed by SADF members abroad.

The Court outlined that South African courts have jurisdiction over conspiracies in terms of section 18(2) of the Riotous Assemblies Act to commit crimes abroad when there is a real and substantial link between the conspiracy and South Africa. However, it did not formulate general criteria to determine the existence of a real and substantial link. One can nevertheless conclude from the factors applied by the Court with respect to the Basson case, the general criteria that are relevant should such factors mutually occur. Accordingly, apart from the factors that pertained to the special situation in Namibia, a real and substantial link exists when the conspiracy was entered into in South Africa, when it was organised and directed by members of the South African state forces, when the relevant orders emanated from South Africa and when the means for the implementation of the crime were provided from within South Africa. Such circumstances probably existed in most criminal cross-border activities of the security police. The conspiracy to commit such acts would thus be prosecutable.

Additionally it is implicit from the judgment that South African courts have jurisdiction to try all crimes committed by former SADF members covered by the Military Discipline Code. Conspiracies to commit crimes in Namibia generally fall under the jurisdiction of South African courts due to the Court's strong emphasis on the close connection between Namibia and South Africa at the time.

3. *The Bisho-Massacre*

In October 2001 a criminal trial commenced at the High Court of Bisho in the Eastern Cape that dealt with the Bisho-massacre, one of the most serious and tragic political killings in the South African transition period.

3.1 *The massacre*

The events commonly referred to as the Bisho-massacre occurred on 7 September 1992 in the immediate vicinity of Bisho, capital of the then homeland Ciskei.[154] The ANC had organised a protest march from the Eastern Cape city of King Williams Town towards the adjacent town of Bisho. The rally, in which about 70,000 to 80,000 people participated, was intended to proceed into Bisho in order to press for the resignation of then Ciskei leader, Oupa Gqozo.[155] However, the marchers only received permission to enter a stadium right behind the Ciskei border.[156] The organisers of the march, among them prominent ANC members such as Chris Hani, Ronnie Kasrils[157] and Cyril Ramaphosa, nevertheless were adamant that they would proceed into Bisho.[158] The assigned route to the stadium was marked off by razor wire fencing and approximately 200 Ciskei Defence Force (hereinafter CDF) soldiers were lined up in the surroundings.[159] The situation was, due to recent intense violent clashes between ANC supporters and Ciskei authorities, very tense.[160]

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[154] *TRC Report*, vol. 3, chap. 2, paras. 368–69.

[155] Ibid., para. 369.

[156] Ibid., para. 374.

[157] Kasrils became deputy Minister of Defence in the new government in 1994 (P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 139). In 1999 he was appointed Minister of Water Affairs and Forestry.

[158] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 74.

[159] *TRC Report*, vol. 3, chap. 2, paras. 369 and 374.

[160] Numerous warnings that the march is in danger of ending in a bloodshed were made by prominent politicians from all sides and reported in the media (*S. v Mkosana and Gonya*, indictment, summary of substantial facts, pages 20–22).

However the marchers were clearly unarmed and the rally proceeded peacefully.[161]

Events took a turn when a group of marchers, headed by Ronnie Kasrils, noticed a gap in the fence and decided to break through.[162] Some hundred marchers then ran towards a CDF battalion that was lined up at a distance. Commander Vakelele Archibald Mkosana gave the order to fire.[163] What ensued was uncontrolled and indiscriminate shooting.[164] Without warning of the order to fire the shooting was joined by most of the other soldiers employed around the march.[165] 29 protestors and one CDF soldier died, dozens others were injured.[166] Many were shot either when running away or while already lying on the ground.[167]

The massacre was subject to various investigations and TRC hearings.[168] The TRC found that Gqozo and the CDF were accountable for the massacre but also criticised the ANC leadership for having lacked prudence in the volatile situation.[169] Indictments were drafted shortly after the massacre concerning CDF soldiers and even Ronnie Kasrils.[170] However due to political circumstances, charges were not instituted and it was only in 1996 that a new police investigation docket was submitted to the Attorney-General.[171] The proceedings were pending the outcome of amnesty applications, received from Vakele Archiebald

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[161] Decision no. AC/2000/122; *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 74.

[162] *TRC Report*, vol. 2, chap. 7, para. 180.

[163] Ibid., para. 182.

[164] Over 400 shots and four rifle grenades were fired.

[165] *TRC Report*, vol. 3, chap. 2, para. 375.

[166] Ibid. para. 369. The prosecutors of the case list 67 injured (*S. v Mkosana and Gonya*, indictment, annexure D, page 17). Other sources refer to about 300 injured (J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 377).

[167] *TRC Report*, vol. 2, chap. 7, para. 184.

[168] The TRC had held two extensive public hearings on the Bisho-massacre in September and November 1996, during which about 60 witnesses testified (See especially *TRC Report*, vol. 3, chap. 2, paras. 368–99).

[169] *TRC Report*, vol. 3, chap. 2, para. 399.

[170] Ibid., para. 397.

[171] Ibid., para. 398.

Mkosana and Mzamile Thomas Gonya, who were both concerned by the investigations.[172] Both applications were refused in 2000.[173] In 2001 the newly appointed Director of Public Prosecutions of the area, Johan Bezuidenhout, took the matter up again.[174]

3.2 *The indictment*

In October 2001, Mkosana and Gonya were both charged with one count of murder and two counts of attempted murder. Mkosana was also charged with culpable homicide.[175]

Mkosana was the field commander of the CDF soldiers employed in the operation on the particular day in question and was stationed directly behind the CDF line facing the approaching protestors who had broken through the gap.[176] He allegedly radioed his superiors for instructions and reported, as he later admitted, that shots were fired by the approaching protestors. He then received permission to fire single shots in return to turn back the crowd.[177] Following this, Mkosana allegedly ordered the line in front of him to open fire on the approaching group.[178] The State based the charges against him on the claim that he lied when he reported the shots.[179] He had supposedly known that the situation did not pose such a compelling threat as to justify the shooting and he had failed to ensure that only single shots were fired, knowing that his conduct would result in many deaths.[180] Due to the chaotic nature of the events it was not possible to determine exactly who was shot by which group of soldiers.[181] At least one victim from

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[172] Applications no. AM/4458/96 and AM/7882/97.
[173] Decision no. AC/2000/122.
[174] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH).
[175] *S. v Mkosana and Gonya*, indictment.
[176] Ibid., preamble, at page 5.
[177] Ibid. at page 6.
[178] Ibid.
[179] Ibid. at page 7.
[180] Ibid. at pages 8–9.
[181] Ibid. at page 7.

the group of protestors, which had run through the fence, was allegedly killed by the CDF line in front of Mkosana.[182] Accordingly, he would be guilty of murder of this one protestor and also of attempted murder of an undeterminable number of other demonstrators.[183] Furthermore, Mkosana would be guilty of having negligently caused the death of all other victims shot dead at other places around the stadium (culpable homicide count), since he had failed to ensure that the other soldiers would not join in the shooting without specific orders.[184]

Gonya was a soldier armed with a rifle grenade launcher, employed in the CDF line facing the approaching protestors.[185] He allegedly fired two grenades, without orders to do so, into the approaching group or in the direction thereof with the intention to kill members of the group.[186] He was accordingly charged with murder of one victim who died through grenade shrapnel and with the attempted murder of an undeterminable number of persons.[187]

The prosecutor was initially not convinced that the case against the accused would be strong. The indictment was rather the result of the great significance of the massacre and the expectations among victims and the public since amnesty had been denied to the accused. An inquest was not conducted since it was feared that public expectations would rise even more should the inquest result in a recommendation to charge the suspects.[188]

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[182] Ibid. at page 10.

[183] Ibid. at page 11.

[184] Ibid. at page 9. Allegedly Mkosana's order was transmitted by radio and was also audible to at least some of the other lines engaged in the shootings, who then mistook it as being directed at them (Telephone interview with Johan Bezuidenhout in June 2006).

[185] *S. v Mkosana and Gonya*, indictment, page 10.

[186] Ibid.

[187] Ibid. at page 11. It appears contradictory that on the one hand Mkosana was charged with murder by having ordered the line to shoot and on the other hand Gonya, who allegedly killed the only one protestor in the group charged with murder for acting without any order to shoot.

[188] Telephone interview with Johan Bezuidenhout in June 2006.

3.3 *The judgment*

Exploring the Bisho-massacre confronted the Court with a major task. After 43 court days during which the events were dealt with thoroughly, Judge White delivered his ruling on 13 March 2002.[189] Both accused were found not guilty and were acquitted on all charges.[190]

The crucial issues were whether the accused were entitled to act in self-defence and whether the limits of self-defence had been observed.[191] The Court confirmed both issues. The ruling took into account that all soldiers were very anxious of possible attacks due to the row of violent clashes[192] and had beforehand been advised that the marchers could be armed.[193] With respect to the examination of whether a situation of self-defence existed, the Court found no evidence of shots being fired from the protestors.[194] Mkosana had suggested that he might have mistaken the rotor sound of a helicopter, flying above the march, for shots.[195] After examining closely the evidence and testimony on this question, the Court found it reasonably possible, especially considering the tense and agitated conditions, that the sounds were indeed mistaken for shots.[196] On this basis the Court was of the opinion that a situation justifying actions taken in self-defence existed.[197] With regard to the question of whether the limits of self-defence had been exceeded, the Court found that to order shots immediately was indeed appropriate.

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[189] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 66. The state had submitted an extensive list of 134 state witnesses (*S. v Mkosana and Gonya*, indictment, list of state witnesses).

[190] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 95.

[191] Ibid. at page 87.

[192] Ibid. at page 67.

[193] Ibid. at page 1.

[194] Ibid. at page 63.

[195] This possibility had already been raised at the TRC (*TRC Report*, vol. 3, chap. 2, para. 383).

[196] A special *in loco* inspection was undertaken by the Court after which it found that there was considerable similarity between the sounds (*S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 88). A number of protestors also mistook the rotor sounds for shots during the march.

[197] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 90.

Less stringent measures, such as warning shots etc., could not have been considered since the crowd was running towards the soldiers and was already relatively close.[198] The Court thereby also took into account that senior commanders had expressly prohibited the use of warning shots.[199] The charge of culpable homicide was rejected since the Court could not find proof that Mkosana had submitted his order to shoot to the line in front of him via radio, which could, thus, not have been mistaken by other CDF groups as being directed at them.[200] With regard to Gonya the Court could not find proof that it was exactly the grenade fired by Gonya that killed the one specific victim.[201] It appeared possible that the death was caused by grenades that might have been fired by other soldiers.[202]

3.4 *Conclusion*

The Bisho massacre is an example of the clashes that occurred at the mass rallies during the early 1990s. It is not representative of the secret state activities against political activists. It had already been examined extensively due to its scope, the great public attention and the investigations of the TRC. It was doubtful whether the trial could contribute further to the findings already made by the TRC. However, the call for retributive justice from victims and from many in the public was still strong.[203]

There is a strong impression from the judgment that the judge was of the opinion that the events were merely a tragic coincidence of various unfortunate factors rather than a crime for which a specific person could be held accountable. This becomes clear when the Court refers to the events as an inevitable 'clash between an irresistible force and an immovable object'.[204] Moreover, the judge apparently found it

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[198] Ibid. at page 91.
[199] Ibid. at page 92.
[200] Ibid. at page 93.
[201] Ibid.
[202] Ibid. at page 94.
[203] Telephone interview with Johan Bezuidenhout in June 2006.
[204] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 68.

inappropriate to blame only the two accused, although he presumably found others equally or even more responsible. The Court for instance heavily criticised the leadership of the ANC for taking the irresponsible decision to break through the gap in the fence and run towards Bisho.[205] It also made it clear that the prosecution should have rather focussed on CDF soldiers in other positions surrounding the march, who had shot in a totally defenceless and harmless crowd, which had caused the vast majority of deaths and injuries on that day.[206] Such action was described as 'a wanton and brutal slaying of innocent people'.[207] According to the prosecutor,[208] the willingness of the Court to punish the accused diminished further when Ronnie Kasrils made statements during the trial in which he once again called strongly for closing the books on the massacre and indicated his lack of vindictiveness.[209]

Against this background, it appears that the Court accepted too easily that Mkosana acted in self-defence when he ordered the line in front of him to open fire. The Court simply accepted that warning shots had not been appropriate since they had been forbidden for whatever reason by the CDF leadership. Warning shots would generally have been insufficient to stop the crowd. The judge went further to state that even if Mkosana had not thought the protestors were firing he would have been exonerated by the defence of self-defence by the plain fact that some hundred marchers running towards them in a distance of about 150 meters constituted a real danger.[210] Furthermore, he stated that it would be 'churlish for a Court to blame an accused who has, through no fault of his own, been placed on the horns of a dilemma as to the exact steps he must take to protect himself and those in his care'.[211]

It is hard to accept this. Mkosana was a senior officer of the CDF who was in command on the ground on that day. One requires a high degree

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[205] Ibid. at page 77. Indeed Kasrils had already expressed a deep sense of moral responsibility for the events before the TRC (*TRC Report*, vol. 2, chap. 7, para. 181).

[206] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 81.

[207] Ibid. at page 80.

[208] Telephone interview with Johan Bezuidenhout in June 2006.

[209] *S. v Mkosana and another* 2003 (2) SACR 63 (BCH) at 74.

[210] Ibid. at page 91.

[211] Ibid. at page 93.

of prudence and responsibility of an officer in such a high position of the army. Furthermore, a distance of 150 meters seems far enough to fire warning shots or single shots. Kasrils had stated that they would have stopped right away if there had been warning shots.[212] The Court's findings on self-defence are in stark contrast to the findings of the TRC and especially to the findings of the Amnesty Committee. The Amnesty Committee refused amnesty to Mkosana and Gonya on the grounds that their actions were totally disproportionate to the dangers they faced.[213] The committee had described the firing under the circumstances as totally irrational and unjustified.[214] However, in the end, the acquittal is consequent as it is clear from the judgment that the judge had to acquit the accused due to the principle of *in dubio pro reo*.

4. *The Trial of Michael Luff*

In November 2001 the policeman Michael Phillip Luff was charged with murder in the Regional Court of Worcester in the Western Cape. He was accused of having shot the 17-year-old William Dyasi in Zwelethemba township in 1985. At the time, Luff was a young member of the so-called Unrest Unit of the Worcester police, a riot squad that was dealing primarily with containing unrest in the townships of the region.[215]

According to the prosecutor, events unfolded as follows.[216] In early November 1985, Luff and a colleague were called while on duty in the

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[212] *TRC Report*, vol. 2, chap. 7, paras. 180–81.

[213] Decision no. AC/2000/122. According to section 19(3)(f) of the TRC Act the proportionality of the act *inter alia* determines the political character of the offence. The offences were on this basis not considered to be political.

[214] Decision no. AC/2000/122.

[215] MMM Mackay *Outrage as amnesty reject gets off in court* Cape Argus, May 7, 2002.

[216] The following information derives from an interview with prosecutor Themba Velem on 21 June 2006 in Paarl, if otherwise is not stated. The judgment and the charge sheet concerning the trial have been destroyed after the lapse of two years since Luff had been acquitted. Velem's account, often differs from information

township to deal with a rioting group of protestors who were stoning a local beer hall.[217] When confronting the protestors, the policemen fired shots and Dyasi, who was among the crowd, was seriously injured by a lead gun-shot in his chest. Dyasi managed to escape. Two women gave him shelter in a nearby house. Later that evening, Luff and his colleague were informed that he was hiding in the house. Dyasi was found by the two policemen, who wanted to arrest him. Luff took the heavily bleeding youth outside while his colleague was still inside the house with the two women. Luff then shot Dyasi outside of the house. The prosecutor claimed that Luff intentionally shot Dyasi without justification.

Already in early 1986, an inquest was conducted by the Worcester Magistrate's Court in order to establish whether an indictment of Luff was worthwhile. It was found that Luff was criminally liable for Dyasi's death and that the Attorney-General should institute a prosecution.[218] However, the Attorney-General declined to charge Luff, most likely for political reasons. Only in December 1996 was the decision reversed and a trial set to begin. This was due to intervention by the TRC. Dyasi's death and the subsequent events had been the subject of a TRC Human Rights Violations Committee hearing, in which his parents told their story.[219] Luff, however, immediately applied for amnesty.[220] The criminal proceeding was pending at that time. At the amnesty hearings, Luff testified that Dyasi had tried to escape when they had gone outside. He admitted to having shot him in the back only in order to effect an arrest.[221] Amnesty was refused in 2000 mainly because the offence lacked a political objective.[222] However, the Amnesty Committee also raised serious doubts regarding Luff's version of events. It found it especially

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deriving from TRC proceedings. An exact account of the events is thus under the circumstances impossible.

[217] Beer halls in townships were perceived by political activists as an apartheid instrument to keep Africans quiet.

[218] Decision no. AC/2000/005.

[219] *TRC Report*, vol. 3, chap. 5, para. 144.

[220] Application no. AM/3814/96.

[221] Decision no. AC/2000/005.

[222] Ibid.

improbable that Dyasi was able to run away at all considering his severe injuries caused by the first shots at the beer hall. These doubts were not further explored since the criminal proceedings were still pending.

After the refusal of amnesty, the case was resumed and went to trial in November 2001. The prosecution was conducted without any involvement by the unit for TRC prosecutions in Pretoria. The prosecutor, Themba Velem, intended to base the charges mainly on the evidence provided by the two women of the shack in which Dyasi was hiding, one of whom could be traced, and most importantly on the testimony of a doctor who had conducted the post-mortem examination of the corpse in 1986. He had also testified at the inquest in 1986. This testimony contradicted Luff's version of events. For example, the doctor there had stated that Dyasi's injuries would probably not have allowed him to walk or run away at all. In a meeting with the doctor right before the trial, Velem convinced himself that the evidence given at the inquest in 1986 would be repeated. When testifying at the trial, however, the witness made a complete about turn, according to Velem, and his new recount of events was no longer consistent with his previous testimony.

Luff was eventually acquitted by Magistrate van Rensburg in May 2002. According to Velem, the Court could not find sufficient proof that Dyasi was shot by Luff at all. Velem stated that Luff had testified at the inquest that he had accidentally shot Dyasi in the back while stumbling outside the shack. Strangely, however, Luff never had to testify at the trial. The main reason for a lack of proof was that the doctor testified differently. A number of other important witnesses also could not be traced. Furthermore, Velem sensed a strong reluctance on the part of the police to investigate the case thoroughly. Initially only a junior officer, who had even attended shooting lessons led by Luff, was assigned to investigate the case. A senior, more independent officer later replaced him. Certain witnesses were only traced after Velem intervened personally. He also had the impression that the Magistrate van Rensburg was very reluctant to conduct the trial. For example, on many occasions the judge strangely did not grant applications for adjournments by Velem in order to trace other witnesses. The judge

also apparently made certain derogative statements about the fact that Luff was prosecuted at all.

The case was certainly loaded with political implications and emotions. After the acquittal, the judge was accused of racism by Dyasi's relatives and representatives of the black population in the area.[223] The victim's relatives found it especially difficult to accept that there was insufficient proof that Luff killed Dyasi since they had attended the amnesty hearings in which Luff admitted to having killed Dyasi.[224] The trial raised much racial tension and emotion in the area. The exact circumstances of Dyasi's death were not established. There were indications that there was a politically motivated reluctance on the side of the police and the Court to convict Luff, who continues to work as an inspector at the Ceres police. However, even the prosecutor admitted that under the circumstances the evidence was probably not sufficient to secure a conviction.

5. *The Case of Tyani and Gumengu*

In 2004 two former members of the Transkei homeland security police, Aron Mtobeli Tyani and Pumelele Gumengu, were each charged in the Butterworth Circuit Court[225] with one count of attempted murder and one count of murder. The two were charged with having murdered Sithembele Zokwe on 8 August 1987.[226] Zokwe was a political activist and member of MK. He had undergone military training abroad. The indictment alleged that the accused and other members of the local security police arrested Zokwe in Umtata in August 1987 and took him to a remote quarry where they shot him in the neck and head.

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[223] M.M.M. Mackay *Outrage as amnesty reject gets off in court* Cape Argus, May 7, 2002.

[224] Such self-incriminating evidence is according to section 31(3) of the TRC Act inadmissible in a criminal trial.

[225] Umtata High Court.

[226] *S. v Tyani and Gumengu*, indictment. The charges were conducted by M. Mhaga, who later shifted to the PCLU in Pretoria.

Zokwe, who was severely injured, miraculously survived the attack. He later managed to call for help and was brought to a hospital.[227] After his release from hospital, he was again arrested by the security police in January 1988. Gumengu and Tyani took Zokwe to a house where he was allegedly asked to point out where he was hiding hand grenades. On this occasion, he was shot by Tyani inside the house. The accused then allegedly placed the dead body on a hand grenade, which was activated in the house to create the impression that Zokwe had tried to throw the grenade at them so that they had to shoot him in self-defence.[228]

After they had already previously been charged for the murder both applied for amnesty in relation to it in 1996.[229] Gumengu simultaneously applied for amnesty regarding the previous murder attempt. The prosecution was then pending the amnesty decision and only continued after amnesty had been denied in March 2000.[230] The Amnesty Committee found that the applicants had presented highly improbable and contradictory versions of the events and accordingly denied amnesty for a lack of full disclosure.[231] At trial, the accused nevertheless presented the same account of events. They claimed that when they had brought Zokwe to the quarry he attempted to escape which they tried to prevent by shooting in the air and in his direction without intending to kill him.[232] With regard to the actual murder they claimed that Tyani shot at Zokwe since he had tried to attack them with a hand grenade. Both pleaded not guilty.[233] The versions were again rejected as obviously false and highly improbable considering the various pieces of evidence and the post-mortem examination.[234] The judge was certain that Zokwe was

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[227] *S. v Tyani and Gumengu*, indictment, summary of substantial facts.

[228] Ibid.

[229] Applications no. AM/3786/96 and AM/3610/96.

[230] Decision no. AC/2000/042.

[231] Ibid.

[232] *S. v Tyani and Gumengu* (Transkei division) Case no. 76/2004, unreported, at para. 55.

[233] Ibid. at para. 4.

[234] Ibid. at para. 76.

not killed in self-defence[235] and that both acted with a common purpose when Zokwe was shot.[236] Gumengu and Tyani were found guilty of murder.[237] Only Gumengu was found guilty of attempted murder whereas Tyani was discharged on that count for a lack of evidence.[238] Both were sentenced to 25 years imprisonment.[239]

Although a conviction was secured, it is rather disconcerting that the judgment did not clarify the truth regarding the facts of the case. There is no proper examination of why exactly Zokwe was murdered. While the amnesty decision clearly stated that Gumengu had been ordered by his superiors to eliminate Zokwe, there is no mention of such implications and the intentions behind the deed in the judgment. The political background is only touched upon in the trial judge's judgment when he mentions that Zokwe was indeed a very active member of MK and that it was the common goal of Gumengu and Tyani to subdue him since he was considered a dangerous terrorist.[240] The judgment is also largely confined to rejecting the accused' versions of events. It does not clarify in detail how Zokwe's murder took place. It also fails to clarify whether Zokwe was brought to the quarry with the sole purpose of killing him there. However, it is most likely that the judge did not consider it necessary to elaborate on these questions since he was convinced that the case against the accused was strong and clear.[241] Moreover, it is not the purpose of a criminal trial to deal with the political background of a crime, if this does not contribute to establishing the guilt of the accused. The case nevertheless provides evidence that the security forces also engaged in the practice of murdering opposition members in the officially independent homelands.

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[235] Ibid. at para. 79.

[236] Ibid. at para. 81.

[237] Ibid. at para. 83.

[238] Ibid.

[239] Telephone interview with Advocate Quitsi in June 2006.

[240] *S. v Tyani and Gumengu* (Transkei division) Case no. 76/2004, unreported, at paras. 42 and 79.

[241] Ibid. at para. 83.

6. *Eugene Terre'Blanche*

The first TRC-related trial conducted by the PCLU concerned the right wing organisation *Afrikaner Weerstandsbeweging* leader, Eugene Terre'Blanche. Terre'Blanche was accused of various terrorist attacks aimed at thwarting the negotiations during the early 1990s which potentially fell in the TRC amnesty mandate but for which he had failed to apply for amnesty. He had entered into a plea agreement with the PCLU in terms of section 105A of the Criminal Procedure Act. On 12 November 2003 he pleaded guilty to five counts of terrorism in contravention of section 54(1)(i) of the Internal Security Act[242] in the Regional Court of Potchefstroom and was sentenced to six years imprisonment, which was wholly suspended.[243] The case did not demand extensive investigations. Since it concerned isolated acts of right-wing terrorist violence and not the violence of the liberation movement and the security forces during the apartheid conflict, it is only of minor relevance for the present research. Thus it is not examined in detail.

7. *The PEBCO-Three Case*

Soon after the PCLU was established, Ackermann decided to press charges in early 2004 in the first major TRC case, the murder of the so-called PEBCO-Three. In May 1985 Sipho Hashe, Champion Galela and Qaqawuli Godolozi were abducted, tortured and killed by the security police.[244]

During the mid-1980s the Eastern Cape was heavily disrupted by political unrest. After a visit to the region in 1985, a high-ranking delegation of security force officials expressed concern, which signalled to the local security police branch, based at Port Elizabeth, that they

[242] Act no. 74 of 1982.

[243] E-mails from Shaun Abrahams of 30 May 2007 and 6 June 2007.

[244] Unless otherwise is stated the following information derives from the amnesty decision no. AC/99/0223 and from *TRC Report*, vol. 2, chap. 3, paras. 240–44.

should drastically intensify their efforts. The three victims were leading members of the Port Elizabeth Black Civic Organisation[245] (hereinafter PEBCO), an important regional political organisation with close ties to the UDF and ANC. The security forces considered PEBCO to be a mere extension of the ANC and a major author of the political unrest and anti-apartheid movement in the region. The Port Elizabeth security branch, thus, decided to eliminate Hashe, Godolozi and Galela in a concerted effort with a Vlakplaas unit that was operating in the area at that time in order to break the opposition in the region.[246] On 8 May 1985, the three were lured to Port Elizabeth airport, from which they were abducted to a defunct police station in Post Chalmers, close to the town of Cradock. There they were interrogated. During the interrogation they were continuously and severely tortured. Eventually, on the 9 or 10 May they were shot dead.

In 1996 the Amnesty Committee received amnesty applications of Gideon Nieuwoudt, Harold Snyman, Hermanus Barend Du Plessis, Johannes Martin van Zyl and Gerhardus Johannes Lotz of the Port Elizabeth security branch[247] as well as of Johannes Koole[248] and some other members of the Vlakplaas group[249] for their involvement in the events.[250] In the amnesty hearings contradictory testimony was given. The applicants of the Port Elizabeth security police stated that no torture had taken place during the interrogation, which had been conducted by van Zyl, Lotz and Nieuwoudt. They further claimed that the Vlakplaas members only took part in the abduction, not in the interrogation and murder. This evidence was contradicted by the Vlakplaas *askaris*,

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[245] Godolozi was the President, Galela the General Secretary and Hashe the Secretary of PEBCO (*S. v Nieuwoudt and others*, konsep akte van beskuldiging).

[246] The operation was commanded by the Port Elizabeth security branch.

[247] Applications no. AM/3920/96; AM/3918/96; AM/4384/96; AM/5637/97; AM/3921/96.

[248] Application no. AM/3748/96.

[249] The group consisted of Roelf Venter, Gerhardus Beeslaar, Kimani Peter Mogoai, Joseph Mamasela and Johannes Koole.

[250] Snyman and Du Plessis had not been physically involved in the deed but were the ones who had ordered the actions.

Mogoai, Koole and Mamasela, who claimed to have been present in the interrogation during which the three victims, allegedly, were severely assaulted. The Amnesty Committee found their versions reasonably true. Since other contradictions also emerged, in 1999 amnesty was refused to Nieuwoudt, van Zyl and Lotz for the abduction and killing of the PEBCO-Three for lack of full disclosure.[251] Amnesty was also refused to du Plessis, for conspiring and ordering the abduction and murder, to Beeslaar, for his role in the abduction and assault, and to Koole for the abduction and assault.[252] Later, amnesty was also refused to Venter.[253] Snyman was granted amnesty and has since died. Mogoai was also granted amnesty for his role in the abduction and assault.[254]

7.1 *The indictment and further development*

In February 2004 Anton Ackermann informed the attorney of Gideon Nieuwoudt[255] that he intended to charge his client in connection with the PEBCO-Three murder.[256] Nieuwoudt, who since passed away in August 2005, then appeared for his bail hearing in the Magistrate Court on 11 February 2004. He was released on 3000 Rand bail. The case was postponed to 3 June 2004. Shortly thereafter an arrest warrant was also issued for van Zyl,[257] who, at the time, was working for a company in Cambodia, clearing landmines. Van Zyl then also became a client of Wagener, who arranged for his return to South Africa. He appeared in court in early March 2004 and was released on bail. At the same time

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[251] Decision no. AC/99/0223.

[252] Ibid.

[253] Decision no. AC/2001/064.

[254] Decision no. AC/99/0223.

[255] Gideon Nieuwoudt came to prominence through his involvement in a range of other cases for which he applied for amnesty and which were interrogated by the TRC such as the torture and killing of Steve Biko, which also involved Snyman, and the murder of the so-called Motherwell-Four.

[256] Unless otherwise is cited, all information contained in this subchapter derives from an interview with the attorney of Nieuwoudt and van Zyl, Jan Wagener, on 8 May 2006 in Pretoria.

[257] *Nieuwoudt charged with murder* SAPA, Feb 11, 2004.

the PCLU had tried to convince Johannes Koole to serve as a state witness in terms of section 204 of the Criminal Procedure Act.[258] However, Koole refused to cooperate and the PCLU decided to charge him as well.[259] In the PEBCO case the PCLU again relies heavily on state witnesses to sustain their case. Roelf Venter, Gert Beeslaar, Joe Mamasela and Peter Mogoai were approached for this purpose and thus for the time being were not included in the charges.[260]

Nieuwoudt, van Zyl and Koole were each to be charged with three counts of abduction, assault and murder respectively.[261] The charges accuse them of the deeds the Amnesty Committee determined they had committed: that they abducted the three deceased at the airport and then took them to Post Chalmers. The indictment further alleges that throughout the night and the following day the PEBCO-Three were severely assaulted. On 10 May 1985 the accused allegedly killed the PEBCO-Three under circumstances that, as the indictment asserts, are unknown to the State.[262] However, after the bail hearings of early 2004 until mid 2007, the Court proceedings made no progress at all. The trial was pending. The delay was caused mainly by an application of van Zyl and Nieuwoudt to review the refusal of amnesty. The circumstances of this application will be outlined in the following subchapter. Adding to this NDPP Bulelani Ngcuka imposed a moratorium in November 2004 on all TRC-related cases.[263] All TRC-related investigations and prosecutions were put on hold, which also affected proceedings in the PEBCO case.[264] The case is since pending. Only in July 2007 did the NPA again make statements on the matter when it was announced that the PCLU

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[258] Act 51 of 1977. See *supra* Chapter 2 note 50.

[259] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[260] Ibid.

[261] *S. v Nieuwoudt and others*, konsep akte van beskuldiging. Counts one to three relate to the abduction, counts four to six to the murder and counts seven to nine to the assault of the three deceased.

[262] *S. v Nieuwoudt and others*, konsep akte van beskuldiging, opsomming van wesentlike feite, pages 3–5.

[263] The causes and circumstances of the moratorium will be discussed below (Chapter 3(3.1)).

[264] E-Mail from Anton Ackermann (Oct 10, 2005).

also intended to charge Herman du Plessis, Gerhardus Lotz, Gerhardus Beeslaar and Peter Mogoai if they did not cooperate.[265] Mogoai, who had been granted amnesty for the abduction and assault, could only be charged for a possible participation in the murder.

In mid-July 2007 an NPA investigation team found remains of corpses on the farm in Post Chalmers near Cradock in the Eastern Cape where the PEBCO-Three had been kept.[266] These remains are believed to be those of the PEBCO-Three, which would contradict the testimony of van Zyl and other amnesty applicants from the Port Elizabeth security police that the corpses had been burned and thrown into the Fish River.[267] At the date of completing this book it remained to be seen how the case would proceed.

7.2 *The review application*

The decision to apply for a review of Nieuwoudt's and van Zyl's refusal of amnesty was taken shortly after their bail hearings.[268] As will become apparent, this has major implications for the PEBCO-Three prosecution. The review application, which now only concerns van Zyl since Nieuwoudt has passed away, was tendered at the High Court of Pretoria[269] by the attorney Jan Wagener in September 2004.

Considering that the amnesty decisions were already handed down in 1999, the tendering of the review application appears to have been

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[265] T. Mtshali *Pebco Three: old cops face charges* The Sunday Times, July 17, 2007.

[266] L. Oelofse *NPA may have found bodies of Pebco Three* SAPA, July 16, 2007.

[267] Decision no. AC/99/0223.

[268] Decisions of the Amnesty Committee can be taken on review at the High Courts by applicants, victims or other parties with a substantial interest in the matter (*TRC Report*, vol. 6, s. 1, chap. 2, para. 68; J. de Lange 'The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission' in W. Verwoerd and C. Villa-Vicencio (eds) *Looking back reaching forward* (2000) 14 at 26). See further J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 86–88; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 139–41,.

[269] The legal successor of the TRC is the Minister of Justice and Constitutional Development (see section 46(7)(b)(ii) of the TRC Act), seated in Pretoria.

delayed. According to section 7(1) of the Promotion of Administrative Justice Act[270] (hereinafter PAJA), an application for judicial review of an administrative action must be brought no later than 180 days after the person was informed of the administrative action. The High Courts ruled that the Amnesty Committee is part of the executive power and that amnesty decisions are administrative actions.[271] Thus, according to this provision the deadline for applying for review already lapsed six months after the decision was handed down. Section 9(1)(b) PAJA, however, provides that the period of 180 days may be extended by agreement between the parties. This is what happened in the PEBCO-Three amnesty proceedings. Shortly after the applications in question had been refused, some of the applicants approached Wagener for advice on the possibility of reviewing the decision.[272] Wagener then negotiated an agreement with the Justice Department according to which the time limit for instituting judicial review proceedings in the PEBCO amnesty process was extended to the date on which the authorities charge the applicants. While Johannes Koole has never been a client of Wagener and, accordingly, the agreement does not cover him, the criminal proceedings against Koole are also affected since the charges will be tried jointly. The agreement does cover van Zyl and covered Nieuwoudt. Moreover, it not only affects the PEBCO matter, but another eight applications of clients of Wagener in which amnesty has been refused.[273] In the following, the legal and factual effects on the criminal litigation will, therefore, be outlined.

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[270] Act 3 of 2000. It merely repeats the common law rule which already existed in 1999.

[271] *Nieuwoudt, du Toit and Ras v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission* 2002 (1) SACR 299 (C) at 311; *Derby-Lewis and another v The Chairman of the Committee on Amnesty and Truth and the Reconciliation Commission and others* 2001 (3) BCLR 215 (C). Whether the Amnesty Committee is an administrative body was rarely discussed in legal literature (see F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 113 and 141).

[272] Most of them had not been Wagener's clients during the amnesty proceedings but became his clients thereafter.

[273] E-mail from Jan Wagener (Feb 12, 2007).

The amnesty proceedings and criminal litigation generally run parallel to each other.[274] However, once an application has been lodged the Amnesty Committee may request the appropriate authority to postpone the proceedings pursuant to section 19(7) of the TRC Act[275] pending the consideration and disposal of the amnesty application. In practice the applicant always tenders a request at the criminal court himself[276] and the courts have always granted such requests.[277] However, in this case, an amnesty hearing is not pending and the Amnesty Committee no longer exists. Nevertheless, the review application stays the criminal proceedings. This conclusion derives from a similar case, the Motherwell-Four case. As has been outlined above, Nieuwoudt and two other policemen were convicted of murder in the Motherwell case in 1996.[278] The conviction was immediately appealed to the Supreme Court of Appeal. The three had applied for amnesty simultaneously in relation to their conviction for the Motherwell-Four incident.[279] The appeal proceeding was then postponed pending a final decision on the question of amnesty.[280] After amnesty was eventually denied to all applicants in December 1999,[281] Wagener applied at the High Court in Cape Town for a review of the decision to refuse amnesty.[282] In the still pending appeal of the criminal conviction, the Supreme Court of

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[274] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 201.

[275] The section reads: 'If the person who submitted an application under section 18 is charged with any offence constituted by the act or omission to which the application relates, or is standing trial upon a charge of having committed such an offence, the Committee in consultation with the attorney-general concerned, may request the appropriate authority to postpone the proceedings pending the consideration and disposal of the application.'

[276] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 201.

[277] Ibid., 202.

[278] See *supra* Chapter 1(4.).

[279] Applications no AM/3920/96; AM/3381/96; AM/5183/96.

[280] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 67.

[281] Decision no. AC/99/0345. Thereafter du Toit and Nieuwoudt became clients of Jan Wagener.

[282] Interview with Jan Wagener in Pretoria (May 8, 2006).

Appeal then ruled that this appeal litigation will remain pending until the review litigation concerning the refused amnesty applications has been concluded, since only when such review proceedings are concluded would an amnesty application be disposed of in terms of section 19(7) of the TRC Act.[283] The same applies to the PEBCO-Three case. The prosecution, which was initiated in early 2004, is now pending the final outcome of the review application concerning the rejected amnesty application of van Zyl.

The practical effects of a review application on the PEBCO prosecution, in terms of delay, are again illustrated by the Motherwell-Four case. There, the review application to have the amnesty decision set aside was granted on 23 November 2001.[284] It was ordered that the amnesty decision be set aside and, quite interestingly, that the Minister of Justice had to reconvene a new amnesty committee to hear and consider the amnesty applications afresh, since the Amnesty Committee had meanwhile been disbanded.[285] It took until March 2004 for a new amnesty committee to be constituted in Port Elizabeth.[286] The ad hoc committee consisted of the attorney F Bosman and High Court judges R Pillay and N Motata. The hearing was concluded in September 2004 but the decision on whether to grant amnesty was reserved.[287] Only on 29 August 2005, did the majority of the committee decide that amnesty should be granted to du Toit and Ras but again refused

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[283] E-mail from Jan Wagener (Feb 12, 2007).

[284] *Nieuwoudt, du Toit and Ras v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission* 2002 (1) SACR 299 (C). The court found that the decision of the Amnesty Committee was unstructured, that the evidence had largely been disregarded or only considered on a selective basis. Moreover the amnesty decision did not make it sufficiently clear how the decision had been reached at all.

[285] *Nieuwoudt and others v Chairman, Sub-Committee on Amnesty for the Truth & Reconciliation Commission* 2002 (1) SACR 299 (C) at page 304.

[286] J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 88. The Promotion of National Unity and Reconciliation Amendment Act (Act no 23 of 2003) was specially enacted to make provisions for the setting up of a new amnesty committee in case applications need to be dealt with afresh.

[287] Interview with Jan Wagener in Pretoria (May 8, 2006).

to Nieuwoudt.[288] Nieuwoudt did not hear of the decision since he died shortly before it was handed down. The proceedings illustrate that a review application can lead to drastic delays in the pursuit of criminal justice. Six years have passed from the time the first amnesty decisions were handed down to the time of the final decision on amnesty in 2005. If Nieuwoudt had still been alive, the second refusal would have again been taken on review, if possible.[289] Although the delay in the Motherwell-Four case is also due to the fact that special legislation had to be enacted, providing for the establishment of ad hoc amnesty committees, which only happened in 2003, the example, nevertheless, illustrates that the PEBCO-Three prosecution will be delayed significantly by the judicial review hearings.

At the time of writing, no decision had been reached in the PEBCO-Three review proceedings since 2004. The start of the review litigation is held up by the Department of Justice, which takes an inexplicably long time to file the necessary papers to the court in order to initiate the proceedings. By the end of 2007, years after the review application had been tendered, the Department had yet to file the documents and the criminal matter remained postponed until August 2008.[290] Should the review application succeed, an amnesty committee would need to be reconvened. Should van Zyl's amnesty application eventually succeed, he would be freed of criminal and civil liability in terms of section 20(8) of the TRC Act.

7.3 *Conclusion*

The charges in the PEBCO-Three case aroused strong reactions in the South African public, both welcoming and critical.[291] The PEBCO-Three

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[288] The new amnesty hearing also concerned former police general Jacobus Janse Nicolaas ("Nic") van Rensburg, who was also granted amnesty. He has since died. Information on the decision was only provided to the public in December 2005. The decision has not been published yet. It was provided to the author by the Justice Ministry.

[289] Interview with Jan Wagener in Pretoria (May 8, 2006).

[290] E-mail from Jan Wagener (Sep 13, 2007).

[291] See *infra* Chapter 3 (1.2.3).

case is a well-known, high profile case, exemplifying the use of egregious violence by the security police and the cold-blooded murder of political opponents. It was heralded by many as the starting point of a larger body of prosecutions. Indeed, it marked the first major sign of progress on the subject of post-TRC prosecutions after the establishment of the PCLU in 2003. However, as will be pointed out later in this book, it was not the starting point of a larger process. Though it started promisingly, the case quickly stagnated and the review application will prevent it from proceeding. It is probable that it will take years before the criminal trial can continue, if at all.[292]

The interruption of the criminal proceedings through the amnesty review applications was, as described above, unavoidable in procedural terms. However, the Department of Justice can easily avoid long delays until the start of the review litigation. It is inexplicable why the Department of Justice is not filing its affidavits and papers to the High Court and is not taking the steps necessary for the review litigation to start. It thereby deliberately hinders the criminal trial from resuming.

8. *The Blani Case*

In October 2004, Buyile Ronnie Blani, at that time a 40 year-old member of the SANDF, was tried for his involvement in the killing of two people in the Eastern Cape in 1985.[293] Blani had been a member of the Addo Youth Congress during the 1980s, an organisation loosely affiliated to the ANC and UDF.[294] Blani's involvement with the liberation movement was, however, of a basic and minimal nature. He came from a poor and uneducated background and was one of many militant youths who were mobilised and politicised by the wave of mass movement activities during the 1980s.[295] However, in response to a call of

[292] Interview with Jan Wagener in Pretoria (May 8, 2006).

[293] *ANC member charged with murder of farm couple* Cape Times, July 7, 2004.

[294] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 42.

[295] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

the UDF in the mid-1980s to render the country ungovernable, Blani and other members of the youth congress raided a local farm and killed the elderly farmer couple.[296] Various items were stolen.

In 1985 the case was prosecuted. Blani managed to escape to exile in Angola. Most members of the group were tried and either sentenced to death or to long jail terms. Two death penalties were executed and two were later commuted to live imprisonment. During the negotiation period in the early 1990s, all remaining convicts in the case received either presidential pardons in 1993 or indemnity under the laws of 1990 and 1992.[297] One of Blani's accomplices who had also fled to exile successfully applied for amnesty for his participation in the killings after his return.[298] Blani, however, neither seemed to have recognised the indemnity laws of 1990 and 1992 nor of the TRC as he failed to apply for amnesty after his return from exile in 1992.[299]

When auditing the TRC dockets, Ackermann came across the docket of the Blani case. The case against Blani had already been investigated fully and the evidence was clear and compelling.[300] It was obvious that the case would not require a great effort for the prosecution. Blani was arrested in June 2004 and granted bail. On 12 October 2004 he was charged at the High Court of Grahamstown with two counts of murder and one count of housebreaking with intent to commit robbery and robbery with aggravating circumstances for his part in the conspiracy and execution of the raid and killings.[301] The case was not affected by the said moratorium on all TRC-related prosecutions of November 2004. Whereas the PEBCO-Three case was still in the pre-trial stage, the Blani trial had to continue because by November it was too advanced

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[296] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 42.

[297] See for the indemnity laws of the early 1990s: J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 37–49.

[298] Application no. AM/2707/96; Decision no. AC/99/0264.

[299] *Feud builds up over Kirkwood murders* The Herald, available at http://www.theherald.co.za/herald/2004/07/08/news/n06_08072004.htm.

[300] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[301] *S. v Buyile Ronnie Blani*, indictment.

to be stopped.[302] The prosecution was conducted by M. Mhaga and directed by the PCLU.

The parties agreed on a relatively lenient sentence. On 25 April 2005 Blani was convicted on all charges and sentenced to five years imprisonment, four of which were suspended for five years.[303] The judge took into account the fact that, in contrast to all of his accomplices, Blani neither benefited from the indemnity laws of the early 1990s nor the TRC amnesty legislation. This was due to a lack of legal advice, for which Blani clearly lacked the resources to obtain. Upon returning from exile he basically assumed that the 1992 Further Indemnity Act[304] automatically indemnified him from criminal liability. Had he understood the provisions correctly, he would not have had to face charges at all. He obviously did not have proper access to legal counsel. Even at his trial in 2004, he only obtained legal representation through the legal aid scheme shortly before the trial was to start.[305] Against the background of these mitigating circumstances, the Court considered it to be inappropriate to sentence Blani to a long jail term.[306] The Court further acknowledged the political implications of the matter and took into account the fact that a number of co-perpetrators only benefited from indemnity and amnesty regulations since the crimes in question were associated with a political objective.[307] The prosecutors concurred with this consideration and pleaded for a mild sentence.[308]

There were many critical reactions to the Blani trial.[309] However, the trial shows that the PCLU is intent on prosecuting across the political spectrum by focusing mainly on the availability of evidence and the

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[302] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[303] *S. v Buyile Ronnie Blani* (Eastern Cape division) Case no. CC 81/2004 25 April 2005, unreported.

[304] Act 151 of 1992.

[305] D. Bruinders *Postponement granted in 1985 Kirkwood murder case* The Herald, available at http://www.epherald.co.za/herald/2004/10/13/news/n05_13102004.htm.

[306] *S. v Buyile Ronnie Blani* (Eastern Cape division) Case no. CC 81/2004 25 April 2005, unreported.

[307] Ibid.

[308] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[309] See *infra* Chapter 3(1.2.3).

strength of the case. As stated above, the evidence in the case was very strong and the crimes in question, murder and robbery, were serious. Blani's trial was not, however, without political consequences, as it contributed to a debate on priorities and also to the above mentioned moratorium.

9. *The Attempted Murder of Frank Chikane*

In early November 2004, the PCLU was ready to carry out the arrests of three former officers of the South African security police on charges relating to the attempted murder of Frank Chikane in 1989.[310] Frank Chikane, who is now the Director-General of the President's Office, had been the Director-General of the South African Council of Churches, which was the leading organisation in the Protestant opposition to apartheid.[311] He was also a leading member of the UDF and generally a very vocal and popular opponent of the apartheid government.[312] The security forces perceived him to be a considerable threat to the regime.[313] It is believed that there were several attempts to kill him.[314] At his trial in 1995, former Vlakplaas commander Eugene de Kock alleged that the SADF and police had attempted to kill Chikane in a planned and premeditated operation.[315]

The three former policemen, former Major-General Christoffel Smith, Gert Otto and Johannes "Manie" van Staden, were to appear in Pretoria High Court on charges of attempted murder led by the PCLU.[316] They were also to face an umbrella charge of conspiracy to kill a number of unknown opponents of the apartheid state.[317] The accused persons had

[310] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).
[311] P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 33.
[312] Ibid.
[313] *S. v Wouter Basson*, akte van beskuldiging, vol. II, aanklag 57, para. 2.
[314] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.
[315] P. van Niekerk and B. Ludman (eds) *A–Z of South African politics 1999* (1999) 34.
[316] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.
[317] Interview with Jan Wagener in Pretoria (May 8, 2006).

not applied for amnesty in relation to the charges. The facts concerning the involvement of the three accused in the attempted murder in 1989 emerged during the investigations against Wouter Basson,[318] who himself had been charged in 1999 for his alleged involvement in the murder attempt.[319] The case against the policemen had been almost completely investigated in the course of the Basson investigations.[320] The three had allegedly managed to get access to Chikane's luggage at the airport of Johannesburg in April 1989, when he was about to go on a trip to Namibia. On this occasion Chikane's clothing was apparently saturated with Paraoxon, a lethal nerve poison. The poison had been produced under the supervision of Basson in military laboratories and had been provided to the three accused under his instruction. After putting on his cloths, Chikane experienced severe health disturbances but survived the attack. His condition only improved once he had received hospital treatment and had taken off his clothing. Directly afterwards he went on a scheduled trip to the USA where he again experienced severe health problems after wearing his clothes. When he was treated in hospital the chemicals were eventually detected in his body and it was clear that an attempt on his life had been made.[321]

However the accused never appeared in court in November 2004 and the planned prosecution took a remarkable turn.

9.1 *The arrest suspension*

After the accused persons were informed by the PCLU of their imminent arrest the arrest warrants were suddenly withdrawn and the bail hearing, which was scheduled for the following day, was suspended.[322] The decision was reportedly taken by senior members of the NPA.[323]

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[318] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[319] *S. v Wouter Basson*, akte van beskuldiging, vol. II, aanklag 57.

[320] T. Pretorius *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[321] See *S. v Wouter Basson*, akte van beskuldiging, vol. II, aanklag 57, paras. 3–10.

[322] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[323] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

The most likely scenario is that the NDPP Bulelani Ngcuka directed the PCLU to stop the proceedings.[324]

The NPA's official reason given for the sudden reversal of the PCLU's decision to prosecute was that the NPA realised that there was not a clear strategic plan on how to deal with TRC prosecutions and, thus, specific guidelines for these kinds of cases were needed.[325] The events in the case contributed to and are closely linked to the imposition of the said moratorium on all TRC-related investigations and prosecutions in late November 2004.[326] The exact implications of this will be outlined below.[327] However, there is more to the reasons for why the step was taken than what has been officially presented by the NPA. Although the NPA tried to argue that the reasons for the suspension of the arrests were not political,[328] the suspension of the arrests was mainly the result of a political settlement behind the scenes.[329] After the PCLU informed the accused persons of their arrest, their attorney Jan Wagener took immediate steps to prevent this from happening. Wagener intervened at the Office of the President and pressed for a suspension of the arrests.[330] According to Wagener it was President Mbeki who then decided that the proceedings be put on hold. Ngcuka was apparently directed to take the necessary steps. However, there must obviously have been convincing political arguments to influence the decision.[331]

Chikane, who holds a central position in the President's Office, played an active role in the events. In 2003, Chikane wrote letters to the alleged

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[324] The NDPP has great influence on all prosecutorial decisions. According to section 22(1) of the NPA Act, the NDPP exercises directive control over all duties, functions and powers assigned to the prosecuting authorities. According to section 22(2)(c) of the NPA Act, he can review any decision taken by a Director of Public Prosecutions to lay charges.

[325] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[326] E-mail from Anton Ackermann (Oct 18, 2005).

[327] *Infra* Chapter 3(3.1).

[328] *Chikane poison case not closed, say Scorpions* SAPA, Nov 11, 2004.

[329] Interview with Jan Wagener in Pretoria (May 8, 2006).

[330] Ibid.

[331] The political influences and considerations of the government will be analysed in Chapter 3(4.).

perpetrators, urging them to come and disclose to him their deeds in order to be liberated from their guilt.[332] Then in late 2006, he announced that they were ready to meet with him and ask for forgiveness.[333] He was convinced that it was more important that the perpetrators tell their story rather than be prosecuted.[334]

The NPA assured at the time that once the question of strategy had been settled, the prosecution would definitely continue[335] and later confirmed that the case was still being considered.[336]

9.2 *The indictment and plea bargain*

It took until early 2007 for new developments on the case to occur. The said moratorium came to an end by January 2006 since the question of strategy had apparently been settled. From then on, the prosecution was subject to a consultation process between the attorney of the accused and the NPA.[337] The NPA and government had meanwhile drafted new prosecution policy guidelines for the exercise of prosecutorial discretion concerning the decision of whether to prosecute TRC-related cases, which will later be analysed in greater detail.[338] The policy document outlines criteria according to which a procedure can be implemented that requires the alleged perpetrator to make full disclosure on the criminal acts in question, which then can lead to a decision of the NDPP not to institute criminal proceedings. Although the NPA made no public announcements whatsoever, it is clear that the three accused in the Chikane case were subject to the new procedure apparently mainly in September 2006.[339]

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[332] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[333] *I know who tried to kill me—Chikane* SAPA, Oct 2, 2006.

[334] E. Naidoo *No general amnesty for apartheid crimes* The Sunday Independent, July 3, 2005.

[335] *Chikane poison case not closed, say Scorpions* SAPA, Nov 11, 2004.

[336] *Chikane's would-be assassins on NPA's list* SAPA, Jan 24, 2005.

[337] Interview with Jan Wagener in Pretoria (May 8, 2006).

[338] See *infra* Chapter 3(3.).

[339] See for the implications of the prosecution guidelines for the Chikane case: *infra* Chapter 3(3.4).

It later emerged that the case would also concern two formerly high-ranking officials of the security forces and government. In mid-2007 the NPA announced that Adriaan Vlok, who had been Minister of Law and Order in the apartheid government from 1986 to 1991, and Johan van der Merwe, who had been head of the SAP security branch from 1986 to 1988, deputy National Commissioner of the Police from 1988 to 1990 and National Commissioner of the Police from 1990 to 1995, would be indicted.[340] Vlok and van der Merwe had been linked to a number of criminal activities of the security police due to their previous positions. Vlok had apparently already admitted earlier to having played a central role in the crime and had in 2006 apologised to Chikane.[341]

Although no official announcements were made concerning the aforementioned, it is clear that during 2006 Vlok and van der Merwe had joined the three former security police officers, who were initially to be charged, in terms of the guideline's disclosure procedure in order to make representations on their involvement in the case.[342] The fact that they came forward, however, was allegedly not prompted by imminent charges or the discovery of implicating evidence against them, but was done entirely voluntarily.[343] Their motives for this move will be outlined below. However, in January 2007 the NPA eventually informed the three alleged perpetrators that their prosecution would go ahead and apparently intended to also focus on Vlok and van der Merwe,[344] which obviously means that the guidelines procedure did not result in a decision of the NPA against prosecution. In August 2007, van der Merwe, Vlok, Otto, van Staden and Smith were charged with one count of attempted murder of Frank Chikane, alternatively with the conspiracy to murder Chikane in contravention of section 18(2)(a)

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340 *Court date for Vlok expected Tuesday: NPA* SAPA, June 25, 2007.

341 *Vlok apologises for atrocities* SAPA, Aug 26, 2006; *I know who tried to kill me—Chikane* SAPA, Oct 2, 2006.

342 E-mail from Jan Wagener (Sep 13, 2007).

343 Ibid.

344 W.J. da Costa and T. Mtshali *Prosecuting apartheid's soldiers 'divisive'* Pretoria News, Feb 8, 2007.

of the Riotous Assemblies Act, and with one count of conspiracy to murder various unknown persons.[345] Both acts of conspiracy allegedly also concerned Wouter Basson and his accomplice André Immelmann from Project Coast. The indictment is based on the facts that emerged during the Basson prosecution. It was allegedly together with Basson and Immelmann from Project Coast conspired to murder Chikane. Otto, van Staden and Smith allegedly carried out the poisoning at Johannesburg airport. Vlok and van der Merwe are claimed to have been involved in the command level underlying the actual implementation of the attempted murder.[346]

It was soon seen as likely that the accused would agree on a plea and sentence agreement, a so-called plea bargain, with the PCLU.[347] Indeed in June 2007 a plea bargain was agreed upon. On the scheduled trial date on 17 August 2007, the Court only had to decide on the validity of a plea and sentence agreement concerning the charges in terms of section 105A of the Criminal Procedure Act. According to section 105A(1)(a) of the Criminal Procedure Act a plea bargain contains an agreement between the State and the accused on a plea of guilty and a just sentence. Plea-bargaining is therefore a procedure under which the accused forgoes his right to a full trial in exchange for a reduced sentence.[348] There is extensive room to negotiate the exact terms and details of the agreement.[349] However, judicial approval of the plea and sentence agreement is required and the terms must be documented and presented in court.[350] According to section 105A(8) of the Criminal Procedure Act, the court has to adjudicate on whether the agreement is just and thereafter convicts and sentences the accused in terms of the sentence agreement.

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[345] *S v Johannes Velde van der Merwe en andere*, akte van beskuldiging.

[346] Ibid., opsomming van wesentlike feite.

[347] E. Momberg and C. Terreblanche *Alleged NPA deal may let Vlok off the hook* The Sunday Independent, Feb 25, 2007.

[348] E. Du Toit et al. *Commentary on the Criminal Procedure Act* service 35 (2006) § 105A 15–5.

[349] Ibid., 15–6.

[350] Ibid., 15–7.

The Court approved the plea and sentence agreement. In terms of the agreement, the five accused persons pleaded guilty to the charge of attempted murder. The charge of conspiracy to murder various other opponents of apartheid, whose identities are unknown to the State, was withdrawn by the PCLU. Vlok and van der Merwe were, according to the sentence agreement, sentenced by the Court to ten years imprisonment, wholly suspended for five years on the condition that they are not convicted of a similar crime. Otto, Smith and van Staden were sentenced to five years imprisonment, wholly suspended for five years on the same condition.[351]

9.3 *Terms of the plea bargain*

The plea and sentence agreement contains various admissions regarding the crime and lists aggravating and mitigating circumstances. Initially reference is made to the political backgrounds of the crime and the implication with the SADF project led by Basson, which allegedly had been engaged in developing toxic substances to be supplied to the various security branches.[352] It then turns to an account of the events constituting the crime of attempted murder, which confirms what had been alleged in the charges:[353] At a meeting in 1987 that had been arranged by the SADF, Johan van der Merwe 'took cognisance of an order to act against high profile members of the anti-apartheid liberation struggle in order to neutralise their influence. He also took note that, in extreme cases and only as a last resort, consideration could be given to killing them.'[354] Van der Merwe and other senior security force officials were given a list containing names of such high profile activists, among them Frank Chikane. Van der Merwe and Vlok discussed the implementation of the order and decided to set up a group of security policemen for this purpose.

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[351] *S. v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms, 15 August 2007.

[352] Ibid. at paras. 14–35.

[353] Ibid. at paras. 35–49.

[354] Ibid. at para. 36.

Otto and van Staden became members of this special unit and Smith later served as the unit's commander. On the orders of General Sebastiaan Smit, who had meanwhile been appointed head of the security police branch, Christoffel Smith contacted Wouter Basson for the supply of substances for the special unit's purposes 'that could be applied against the enemy'.[355] Thereafter Smith, Otto and van Staden met with André Immelmann, a scientist working for Basson's project, who had been ordered by Basson to instruct the policemen in the use of chemicals against enemies of the state. For Chikane a lethal substance was requested. Immelmann provided the three with the nerve poison Paraoxon and instructed them in how to apply it to Chikane's clothing.[356] The order to kill Frank Chikane was eventually issued by security branch head General Smit to Smith 'in terms of an order of' van der Merwe and Vlok.[357] Smith and Otto on 23 April 1989 intercepted Chikane's luggage at the airport and applied the poison to his underwear and clothing.

The plea bargain then points out various aggravating circumstances. The following are the most important:[358]

- Both van der Merwe and Vlok held high positions in the police and government.
- The only motive to kill Chikane was to prevent him from further political activities.
- None of the five accused applied for amnesty at the TRC with regard to the attempted murder of Frank Chikane.
- On 10 July 1997, van der Merwe testified before the TRC that he was not aware of a list containing names of opposition members to be targeted, which was obviously not true considering the facts of the Chikane case.
- Vlok only approached Chikane to apologise and attempt a reconciliation after it had emerged in November 2004 that the PCLU had a *prima facie* case against Smith, van Staden and Otto.

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[355] Ibid. at para. 42.

[356] Ibid. at para. 43.

[357] Ibid. at para. 49.

[358] Ibid. at paras. 50–62.

- In the trial against Wouter Basson Smith, van Staden and Otto were approached on many occasions by the prosecutors to cooperate as state witnesses in terms of section 204 of the Criminal Procedure Act. They persistently refused to do so, gave false accounts on the events and chose instead to cooperate with Basson's legal team.
- Chikane had written to Smith, van Staden and Otto after the Basson trial, asking them to tell the full truth and to reconcile with him, which persistently was ignored by them.

However, also a number of mitigating circumstances are identified, which are apart from certain personal circumstances mainly the following:[359]

- The accused all pleaded guilty. With respect to Vlok and van der Merwe, otherwise a conviction would not have been possible, since no sufficient evidence against them was available.
- The original project to neutralise specific apartheid opposition members was not initiated by the accused but by the SADF.
- Van der Merwe and Vlok allegedly had no knowledge of the specific plan and operation to kill Chikane. Vlok was not informed, although he had given instruction to be informed should the killing of anyone on the list be considered.
- Smith and Otto were only subordinates. They later came forward to disclose their roles in the incident and have since shown remorse.
- Van der Merwe encouraged members of the security forces to apply for amnesty during the TRC process. Regarding the attempted murder of Chikane, he allegedly tried to persuade the responsible officials of the SADF to apply for amnesty together with him in this incident.
- As part of the plea bargain, the accused have undertaken to cooperate with the PCLU as witnesses in a possible prosecution of General Sebastiaan Smit.

[359] *S. v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms, 15 August 2007, at paras. 63–80.

The official positions of the accused, which generally obliged them to protect the state, were obviously seen as mitigating. As such, it was emphasised that the three accused officers acted in their professional positions in defence of a 'lawfully elected government' to which they had sworn an 'oath of allegiance'.[360] It was further pointed out that the offence was committed during a period of intense political conflict in which violent acts by the liberation movement to overthrow the government were prevalent. The plea and sentence agreement took into account that the security police played a vital role in warding off the onslaught and that the distinction between lawful and unlawful means became increasingly blurred. It was further pointed out that due to his position of leadership, Chikane played a key role in causing unrest and mobilising resistance to apartheid.

9.4 *Conclusion*

The prosecution in the Chikane case is high profile and of great significance due to the rank and political position of Vlok and van der Merwe but also due to the political position of the victim, Frank Chikane, who was at the forefront of apartheid opposition and is now an influential political figure within the government. After the suspension of the arrests in 2004 it appeared as if no further progress on the matter would be made. However, after a lapse of almost three years, caused by the moratorium and various political developments,[361] the proceedings were concluded.

The eventual convictions in the case concern not only the three security police agents who were initially to be charged, but also van der Merwe, who was the highest ranking security policeman at that time and later the leading policeman of the country, and Vlok, a former minister of the apartheid government, who during the years of the most intense struggle had, by virtue of his portfolio, been politically responsible for the police's efforts to counter the apartheid opposition.

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[360] Ibid. at para. 71.

[361] See *infra* Chapter 3(3.).

Only once before, with the former Minister of Defence Magnus Malan, had a minister of the apartheid government been charged with an apartheid crime. Vlok was the first political leader to be held accountable for the criminal practices of the apartheid state. Van der Merwe was the first high-ranking general of the security police to face charges in a court of law. Previously, charges predominantly concerned the rank and file operatives of the security police. This was the case during the 1990s and, as has been shown above, was the case after the TRC. For the first time, sentences were handed down to people who gave orders and who forged the policies under which the security forces acted. Two of the highest ranked protagonists of the apartheid state or its security forces were publicly put on trial and admitted to criminal acts, which obviously originated from specific orders given at the highest levels of the state and government. This unprecedented event alone is a very significant achievement.

Nevertheless, the plea bargain in the case was strongly criticised by victims organisations. It was rejected as being a merely symbolic public relations event, which did not reveal any substantial new information.[362] The sentences were considered to be far too mild and there has been criticism that they were agreed on behind the scenes. This practice fails to uphold the principle of restorative justice and diminishes victims' trust in a fair legal system. The critique indicates that the trial, especially regarding Vlok and van der Merwe, was seen as a broader and general reckoning with apartheid crimes. This fails to take into account that the prosecution only concerned one specific case, that of Frank Chikane, who himself was very satisfied with the plea agreement.[363]

However, the suspended sentences indeed appear lenient since the aggravating circumstances are strong. This is particularly true since Smith, Otto and van Staden, who actually carried out the poisoning, in terms of the plea bargain did not show proper remorse and rejected Chikane's requests to come forward. Another grave and aggravating

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[362] Khulumani Support Group, press statement *Khulumani Support Group rejects the finding of the Pretoria High Court today* (Aug 17, 2007).

[363] *S. v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms, 15 August 2007, at para. 6.

fact is that they refused to take up the offer of indemnity by cooperating with the NPA in the prosecution of Basson. Instead they chose to support the defence of Basson, who had also been implicated in the murder attempt of Chikane. Neither of them applied for amnesty. The fact that they eventually came forward to disclose the particulars of their involvement to the PCLU can certainly be attributed to their imminent prosecution. However, consideration must be given to the fact that the three operatives were only the ones who carried out orders. Those behind the crime bear greater responsibility for it. In this regard, it is an achievement that the prosecutors managed to secure convictions of members of the higher echelons of power.

The suspended sentences of Vlok and van der Merwe can probably be attributed to the nature of their involvement and the PCLU's inability to present a strong case against them. It must be borne in mind that a plea bargain essentially depends on the State's assessment of the probable outcome of the case.[364] It has been pointed out that without the admissions of Vlok and van der Merwe, it would have been impossible to prosecute them. It has also been pointed out that their involvement was allegedly confined to passing on the order in its broadest sense to act against the listed apartheid opponents and setting up a group for this purpose. The murder attempt, however, only happened years later in 1989. Allegedly, van der Merwe and Vlok did not have knowledge of the actual operation against Chikane.[365] Furthermore, the PCLU was allegedly not even aware of their involvement. Likewise, the police officers Smit, van Staden and Otto could not have had knowledge of Vlok's and van der Merwe's involvement as commanders in the background in 1987, and, thus, could not have implicated them.[366] The PCLU, thus, had two choices: first, they could pursue charges against the three officers with uncertain prospects for securing a conviction in court and without charges being brought against Vlok and van der Merwe; second, they could go with the plea and sentence agreement

[364] E. Du Toit et al. *Commentary on the Criminal Procedure Act* service 35 (2006) § 105A 15–8.

[365] E-mail from Jan Wagener (Sep 13, 2007).

[366] Ibid.

including all five. Obviously, the second choice seemed more promising. The suspended sentences of Otto, van Staden and Smith, thus, have to be seen as part of this overall agreement that included Vlok and van der Merwe. The whole plea bargain must further be seen in conjunction with the disclosure procedure in terms of the prosecution policy including all five concerned persons and the voluntary admissions of Vlok and van der Merwe.[367] Thus, on the one hand, the plea bargain was a by-product of this disclosure process and on the other hand it was a compromise since sufficient evidence was not available to sustain charges against Vlok and van der Merwe in a criminal trial.

Furthermore, there is not a compelling reason why suspended sentences should be detrimental to the principle of restorative and transitional justice. With regard to the three operatives, the prosecution of killings at the inner German border carried out by wall guards of the GDR proves that in terms of dealing with the systematic crimes of a past regime, it can be perfectly appropriate to hand down suspended sentences. 88.8% of custodial sentences that were handed down with regard to human rights violations at the border, such as manslaughter of persons illegally trying to cross the border, were covered by suspended sentences.[368] Specifically, in many manslaughter convictions, the sentence was suspended.[369] Suspended sentences were commonplace in cases where a low ranking officer was convicted. Sentences of high-ranking officers from the political and military spheres, however, were generally not suspended.[370] However, as has been pointed out, Vlok's and van der Merwe's inclusion to the plea agreement must be seen in the context of its own special circumstances.

The facts brought to bear raise the following questions: why did Vlok and van der Merwe admit to their involvement at all and why did they agree to plead guilty if there was not any solid evidence against them available to the NPA. According to their lawyer Jan Wagener, the two

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[367] See further on the connections with the guidelines procedure *infra* Chapter 3(3.4).

[368] K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 212.

[369] Ibid. 214.

[370] Ibid. 24.

took this step voluntarily and out of a moral urge to do so.[371] The police investigation only concentrated on the events of 1989. Allegedly Vlok and van der Merwe did not want to leave the three police officers to face charges alone as if there had not been any involvement in the background at the leadership level. Since they knew that there had been indications that there was involvement from those at a very high level before the murder attempt, they apparently felt it was the just thing to disclose the information, at least to a certain degree. In this regard, it is also important to note that at least van der Merwe and two of the accused former police officers are engaged together in an organisation acting on behalf of former security police members, which was also occasionally supported by Vlok.[372] This underlines the fact that it was their desire to help each other. The motivation was not to be included in a plea bargain but to support the three officers facing charges in their disclosure effort so that they would all be covered by a decision of the NDPP not to institute a prosecution as is permitted under the prosecution policy. The details of which will be dealt with below. It is difficult to see why there was not a decision against prosecution in the end since the NPA did not make any public announcements, which could have clarified the backgrounds of the proceeding. Van der Merwe and Vlok apparently had also intended and hoped for other former apartheid era security force authorities to follow their example and disclose their roles.[373] It should also be pointed out that the two were likely candidates for cooperation with the State since they were two of the very few apartheid era officials who had already cooperated during the TRC to a comparably high degree.[374] In a press statement Vlok and van der Merwe, accordingly, also announced that they had actually intended to apply for amnesty in this regard. However, since they only had limited knowledge of the incident and the main

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[371] E-mail from Jan Wagener (Sep 13, 2007).

[372] See *infra* Chapter 3(1.1.2).

[373] E-mail from Jan Wagener (Sep 13, 2007).

[374] Vlok was the only apartheid minister to apply for amnesty. He applied for amnesty for the bombing of the South African Council of Churches, Khotso house and the COSATU trade unions headquarters (decisions no. AC/99/0349 and AC/99/0349).

authors of the order, authorities from the SADF, strongly refused to cooperate with the TRC, an application was not considered possible in this regard.[375]

Nevertheless, the benefits of the plea bargain are very limited with respect to its potential to reveal more information about the background of criminal activities at the governmental and military command level. The plea bargain states that an order was issued to van der Merwe to act against apartheid opponents, possibly by killing them, which emanated from the SADF, acting on higher authority. The exact terms of the order were not disclosed. Also, the specific background is in no way clarified. There is no clarification about which authorities concretely issued the order concerning the hit list or on whose higher authority the SADF officials acted. Thus, the specific political background concerning the targeting of certain prominent opposition members is only dealt with peripherally, but is not fully clarified at all and the information contained in the document, in this regard, is absolutely minimal. Furthermore, regarding Vlok's and van der Merwe's involvement, all that is stated is that the implementation of the order was discussed and a special unit was set up. There is not any mention of the exact brief of the unit and the terms for the implementation of the order, which possibly might have entailed the systematic killing and/or intimidation of those contained in the list.

In a press release issued on the day the plea agreement was presented in court, Vlok and van der Merwe indicated that they had not known who exactly worked out and issued the order to act against certain opposition members and that their limited knowledge was fully disclosed to the PCLU and completely included in the plea agreement.[376] Nevertheless, one would expect that more details could certainly have been presented in the plea bargain document since there are no particulars at all on, for instance, those who participated in the meeting of 1987. It appears strange that Vlok, who was a minister and not someone simply obeying orders, did not have further information on the real

[375] A. Vlok, J. van der Merwe, C. Smith, G. Otto and M. van Staden, press statement (Aug 17, 2007).

[376] Ibid.

authors of the plan. It remains unclear whether another recognisable authority transmitted it to them. All that is stated is that the initial instructions were presumably issued by the then President PW Botha. It is also claimed that no other person except Chikane was injured or killed on the basis of this order.[377]

The fact that so little information has reached the public domain certainly leaves a bitter aftertaste. It is also rather disconcerting that none of the information seems to have been tested in court. Many questions remain unanswered. The proceeding only sheds marginal light on the basic fact that systematic criminal acts were based on concrete policies and orders at the highest state levels. Since the plea bargain nevertheless clearly indicates that other people with more authority were involved in this specific matter, one must expect the PCLU to conduct further proceedings in order to deal with the case in its entirety. However, for the reasons presented above and under the circumstances, the case is at least a positive step forward in terms of establishing accountability for crimes committed during apartheid.

10. *Conclusion*

The prosecution of apartheid era political crimes after the conclusion of the TRC is characterised by delay. During the roughly eleven years that have passed from the end of the TRC in 1998 up to the time of publishing, prosecutions have been sporadic and few in number. Only seven criminal proceedings have as yet been concluded, four of which resulted in a conviction, three in an acquittal of the accused. The PEBCO case is currently pending. Its prospects for a swift continuation are bleak due to the review litigation. Considering the number of cases arising from the TRC that could potentially have been pursued in the interim period of almost a decade, the results have been minimal.[378] A

[377] Ibid.

[378] Although the circumstances are certainly not easily comparable it is nevertheless interesting to note that the process of dealing with systematic crimes after the fall of the east German GDR has led to 420 judgments, including 289 convictions and 131 acquittals. A large proportion of the convictions, at least 98 concerning the

concentrated process of prosecutions to dispose of the matter within a restricted timeframe has not taken place.

As far as the central units are concerned, structural problems and minimal funding and resources accounted for the complete lack of progress on prosecutions between 1998 and 2003. While the D'Oliveira Unit of the 1990s constituted a well equipped team of experienced prosecutors and investigators with strong political support, support for TRC-related prosecutions after 1998 declined drastically. There was also a clear lack of continuity as none of the prosecutors of the Human Rights Investigative Unit had been involved with TRC cases before and there was not any interaction with the predecessor unit. Thereafter, as outlined above, the responsibility for TRC cases was assigned to inappropriate structures in the DSO.

It was also put forward by NPA officials that the many still running amnesty proceedings prevented the prosecutors from moving ahead. This, however, does not appear compelling, since there must also have been a number of cases, which were not the subject of amnesty proceedings, such as the Basson matter. Also, as the Amnesty Committee had finished its work in 2001, there still were no trials initiated for over two years. NPA officials then maintained that they would have to wait for the political response from the President to the TRC Report of 2003. However, there was no discernable legal obligation to halt criminal proceedings pending a political announcement, especially considering that as far back as 1998, both the TRC and President Mandela had clearly recommended prosecutions to take place.

After 2003 and with the inception of the PCLU the situation indeed improved. The senior members of the unit are very experienced in prosecuting political crimes committed during apartheid and were determined to push ahead with trials. Nevertheless, investigative resources and funding remain a major obstacle. Furthermore, the promising advances made by the PCLU were halted by political interventions in

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crimes at the inner German border, concerned gross human rights violations of state organs (See K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 210).

late 2004. Thus, between its inception in 2003 and early 2008 only three cases were concluded, two of which, the Blani and Terre'Blanche cases, required very little effort.

Generally, two types of prosecutions can be identified. The first concerns those that were initiated independently by the regional prosecution offices, i.e. the Basson, Bisho-massacre, Luff and Tyani and Gumengu cases. Apart from the Basson matter, which emanated from an investigation that had been conducted by the D'Oliveira team in the 1990s, all of these trials resulted from criminal proceedings, which had already been initiated before or during the TRC and then suspended pending the disposal of amnesty applications. The proceedings were simply resumed by the regional prosecution offices at a later stage, without the involvement and sometimes even without the knowledge of the central units in Pretoria. The other set of cases was prosecuted by the PCLU. The unit initiated proceedings in the Terre'Blanche, PEBCO-Three, Blani and Chikane cases.

In fact, as far as a centralised effort to tackle post-TRC prosecutions is concerned, there have only been these four proceedings initiated by the PCLU. Thus, the assessment of prosecutions that resulted from a political or governmental effort to cope with post-TRC prosecutions through the centrally established units, is especially negative. During the interim period of almost one decade since the end of the TRC in 1998, such efforts only lead to those four proceedings being initiated, only three of which have been concluded thus far. It must also be pointed out that two of those were concluded as part of a plea and sentence agreement and a third, the Blani case, required very little effort. The achievements of the central units on post-TRC prosecutions, and thus, the achievements of the centralised approach, are therefore hardly noteworthy.

In four cases, the accused parties had not applied for amnesty for the crime in question. In all other cases amnesty had been applied for but denied. The prosecutions in the Basson, PEBCO-Three, Tyani/ Gumengu and Chikane cases are of specific significance since they concern cases of systematic state violence against opposition members.

Due to the small number of proceedings and the even smaller number of convictions, it cannot be said that accountability for apartheid era

political crimes has been furthered to any significant degree. In contrast to the trials before 1998, however, proceedings overwhelmingly concerned politically motivated criminal conduct. Nevertheless, no substantial amounts of new information on systematic crimes during the apartheid era were discovered.

The Basson case was of special importance since it dealt with a wide range of exceptionally egregious, politically motivated, gross human rights violations, which emanated from a systematic SADF programme. Victims range from hundreds of SWAPO captives and Mozambican citizens to high profile ANC members in exile. From the mere scope of the charges the proceedings had the potential to mark a very significant step forward in revealing facts on systematic apartheid crimes. However, the prosecution did not secure a conviction. The validity of the accusations was not confirmed. Definite conclusions, therefore, cannot be drawn from the trial. Moreover the case certainly had a deterrent effect on the general willingness to approach more cases, since the huge amount of resources and money, which was invested, eventually proved to be futile. Nevertheless, the case was dealt with by the Constitutional Court, which, to a certain degree, set out guidelines for the prosecution of TRC-related cases and at least tentatively analysed the matter in the context of international human rights and humanitarian law.[379]

The PEBCO-Three case concerned acts of torture, abduction and murder, in many instances committed by the security police. A number of similar cases had been investigated by the TRC. Most of the facts in this case had already been revealed during amnesty hearings. The

[379] M. Swart 'The Wouter Basson prosecution: the closest South Africa came to Nuremberg?' (2008) 68/1 *Heidelberg Journal of International Law* 225–26, however, points out that the importance of international law in the judgment of the Constitutional Court should not be overestimated, since the legal substance of international law was still largely very foreign to the Court and to the prosecution, was in fact introduced to the litigation in a "last minute" move and handled rather awkwardly generally. Accordingly the Court has been criticised for missing a perfect opportunity to acknowledge the status of international law in South Africa and to apply it completely.

potential for new information to emerge in a trial is rather limited, should the case continue.

Although the judgment concerning the Bisho-massacre trial also resulted in an acquittal, it nevertheless dealt extensively with the facts concerning the events and made statements regarding where responsibility lay for the crimes. However, the TRC also analysed the matter intensively. The findings of the TRC and of the Court conflict strongly, especially regarding the responsibility for the massacre. Thus, although additional analysis of the events has been made in the trial, it is now even more difficult to evaluate the events and the authority of both findings is, to a certain degree, rendered compromised.

The convictions in the Chikane case, however, were highly relevant to the political backgrounds and policies formed by high-ranking state and government officials concerning the practice of combating the liberation movement by criminal means. Concrete findings on the chain of command, linking government organs to criminal acts, were hardly established by the TRC. Unfortunately, the plea bargain in the Chikane case stops short of shedding light on the exact political responsibilities concerning the order to act against liberation movement leaders. It only indicates that the command stated that consideration should also be given to killing opponents. Nevertheless, the case indicates that criminal proceedings can generally contribute to clarifying the specific chain of command behind apartheid crimes. It remains to be seen if this development is taken further in other cases in order to clarify the responsibility of those at the command level.

Chapter Three

The Politics of Prosecutions

The question of how to deal with the legacy of the TRC in terms of criminal accountability is part of the overall process of transitional justice in South Africa. The issue is, as is generally the case with matters of transitional justice, to a great extent driven by and charged with political considerations. A former minister in the ANC government even demanded that the matter should be dealt with solely through political channels and not left to the courts.[1] Obviously, the success or failure of prosecutions in the wake of the TRC depends to a large degree on the political support for such proceedings. Moreover, prosecutions have an impact on society, are perceived totally differently politically and have consequences for reconciliation. As the political factors clearly have consequences for the overall process of criminal trials, any assessment of post-TRC prosecutions has to take account of the political context within which such trials find themselves. The following chapter will do just this by touching on the discussions and players, but mainly by focussing on consultations of the government with certain groups of perpetrators and the government's decisions and general policy on the issue.

1. *Overview*

The following subchapter will describe the main political and social interest groups engaged in advocacy for or against prosecutions. Also, a cursory overview of the political discussions and public debates along

[1] *Apartheid crimes a political issue—Maharaj* SAPA, Aug 1, 2007.

with a collection of government's most important statements on the subject will be given.

1.1 *Interest groups*

During the operation of the TRC a wide range of NGOs, especially from the human rights sector, actively took part in the process. The number of organisations engaged with the issue of post-TRC prosecutions after 1998 is minimal compared to this. However, especially groups and networks acting on behalf of former members of the state security forces continue to exist and remain influential. The most important organisations will be described briefly to provide a background to their involvement of different forms, which will be focussed on at a later stage.

1.1.1 *Human rights organisations*

Most NGOs, which are engaged in promoting human rights in South Africa and which supported the TRC and the transition to democracy, deal only occasionally with issues of criminal accountability in the wake of the TRC.

The Khulumani Support Group[2] is the NGO most actively engaged in advocacy efforts on post-TRC prosecutions. The Khulumani group, which was founded in 1995, represents about 54,000 victims of apartheid era violence. During the work of the TRC its efforts were aimed at helping victims to take part in and benefit from the TRC process. Nowadays, the organisation seeks the implementation of proper reparations[3] for apartheid victims, the full-scale prosecution of apartheid operatives and generally the recognition of victim interests in the wake of the TRC. Khulumani calls for apartheid criminals to be held accountable since only then can victims attain justice for their endurance of gross human

[2] See http://www.khulumani.net.

[3] See on the reparations for apartheid victims as envisaged by the TRC scheme: K. Koppe *Wiedergutmachung für die Opfer von Menschenrechtsverletzungen in Südafrika* (2005).

rights violations.[4] Generally, the amnesty process was perceived as a very generous offer to perpetrators and they suggest that it is now time for victims to demand their share of justice. Khulumani presses for more trials and gathers affidavits of victims including accounts of the human rights violations they had to endure and information on the respective perpetrators.[5] Such affidavits are intended for possible use in criminal trials. Moreover, these efforts are aimed at conserving the records on human rights violations which have yet to be accounted for.[6]

Another significant organisation involved in advocacy on post-TRC prosecutions is the Foundation for Human Rights.[7] The Foundation for Human Rights is a grant-supplying organisation, distributing funds to various human rights and social work projects in South Africa. It is involved in funding legal actions aimed at effecting the implementation of proper trials. The executive director of the Foundation for Human Rights, former TRC commissioner Yasmin Sooka, is one of the most vocal and active advocates for the implementation of post-TRC trials.

Apart from this, there are few human rights NGOs actively involved in advocacy efforts on post-TRC prosecutions. As such, the Centre for the Study of Violence and Reconciliation in Johannesburg[8] (hereinafter CSVR) and the Cape Town-based Institute for Justice and Reconciliation[9] are worth mentioning.

1.1.2 *Security forces side*

There are two organisations or structures representing former members of the security forces. Neither group has been represented often in the media or public. However, their influence on and involvement in consultations with the government is or was significant. One organisation was an alliance engaged in support for former members of the SADF. The other organisation is acting on behalf of former members of the

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[4] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[5] Ibid.

[6] Ibid.

[7] See http://www.fhr.org.za.

[8] See http://www.csvr.org.za.

[9] See http://www.ijr.org.za.

security police. Both groups were founded between the completion of the negotiations on the transition to democracy and the beginning of the TRC process. It was sensed that in the period of transitional justice it would be vital to form organised structures to react to prosecutions and TRC inquiries.

a. Kontak Buro

With regard to the SADF, an elite group of formerly high-ranking generals was formed to support former members of the military.[10] The group consisted of at least five to seven SADF generals, among them the former Chief of the SADF, General Jan Geldenhuys,[11] in a leading position and other prominent generals such as "Kat" Liebenberg and Georg Meiring. Also, the former Minister of Defence, General Magnus Malan and the former Chief of the SADF, General Constand Viljoen, occasionally took part in meetings of the group, apart from other former officers.

The group developed a structure to provide support for former soldiers of the SADF who, in connection with their occupation in the army, became involved with the TRC either because they were the subjects of investigations, implicated through amnesty applications, wished to apply for amnesty themselves, or were, directly or indirectly, affected by criminal investigations. The facility was called the *Kontak Buro* (Afrikaans for contact office). The *Kontak Buro* was basically a staffed office that could provide access to a certain support network, organise legal advice or counsel, provide financial support and advice SADF soldiers whether or not to apply for amnesty.[12]

The generals perceived the inquiries of the TRC into the activities of the SADF merely as a one-sided attack on the integrity of the SADF and

[10] Unless otherwise stated, the following information concerning the SADF group is taken from an interview with Jan Geldenhuys in Pretoria on 10 May 2006.

[11] General Geldenhuys was Chief of the South African army from 1980 to 1985 and of the SADF from 1985 to 1990.

[12] The organisation was criticised by the TRC of having urged SADF members not to cooperate with the TRC, thus contributing to the general lack of cooperation with the TRC on the side of the SADF (See *TRC Report*, vol. 6, s. 3, chap. 1, paras. 22–23).

its former members. The TRC was considered to be biased, unjust and untrustworthy.[13] Instead of cooperating with the process, the former SADF leadership felt responsible to defend themselves and their former colleagues against the perceived attack. Thus, apart from the initial focus on providing support to former SADF members, after the completion of the TRC in 1998 the group became involved in consultations with the government on the implementation of a further amnesty scheme in the wake of the TRC.

b. Foundation for Equality before the Law

For former members of the apartheid security police and generally for members of the police who had been involved in political conflicts, an organisation called the Foundation for Equality before the Law is actively engaged in support and advocacy efforts concerning prosecutions.[14] As the transition to democracy in South Africa was underway, and the decision had been reached to examine the atrocities of the apartheid past at the TRC, a support network was founded to react to the anticipated challenges for security force members. It contributed to this development, that the security police strongly felt that their former political superiors in the apartheid government had turned away from them and support was largely absent. Van der Merwe points out that F.W. de Klerk and Adriaan Vlok were exceptions in that they continued to support the interests of former security police operatives.

The members of the Foundation for Equality before the Law consist largely of former security police operatives.[15] It has reduced in membership size from considerably higher numbers during the TRC to about 30. Gideon Nieuwoudt, who was a main suspect in the PEBCO-Three case, was also a member of the Foundation for Equality before the Law. The management board consists mostly of formerly high-ranking

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[13] See also *TRC Report*, vol. 6, s. 1, chap. 4, paras. 31–32.

[14] Unless otherwise stated, the following information on the organisation acting for former police members is taken from an interview with Johan van der Merwe in Pretoria on 5 May 2006.

[15] Yet the organisation is open to every state security force member who participated during the apartheid years in fighting the liberation struggle.

officers of the SAP, among them apparently with van Staden, Otto and van der Merwe, three of the accused in the Chikane matter.[16]

As the organisation's name suggests, according to its mission declaration, the Foundation for Equality before the Law wants to ensure equality before the law for its members.[17] More precisely, according to the constituting mission declaration, the organisation's aim is to ensure for security force members and anyone who had been involved in the counter-revolutionary struggle comprehensive protection and fair treatment in the face of the TRC and criminal trials.[18] In practical terms, this means that the organisation, similar to the *Kontak Buro*, is aimed at providing legal and financial facilities to security police members who were concerned by amnesty applications or who have to face charges for their activities in the police. Thus the Foundation for Equality before the Law was most active during the operation of the TRC, when it advised and assisted former security police members with amnesty applications. Thereafter, its activities were increasingly directed at helping those avoid prosecution who had been denied amnesty or had not applied for amnesty. Since the TRC processes, the Pretoria-based advocate and former state attorney of the apartheid government Jan Wagener has been an important supporter and advisor, both legally and politically, on the organisation's purposes.[19] The political advocacy efforts of the Foundation for Equality before the Law are directed at pressing for the permanent cessation of any TRC-related prosecutions

[16] However, the Foundation's chairperson Johan Botha comes from the civil sector. His deputy is General Johan van der Merwe. The Foundation's secretary is Major-General J.A. Steyn, formerly a high-ranking security police official in Natal. Other members of the management committee are J.H. le Roux, C. Colyn, H.D. Stadler, P.D. Uys, J.H. van Staden, D. Davidson, I.P. Minnaar, G. Otto and W.D. Pelser.

[17] That principle was unfortunately not pursued by the Foundation's members with equal vigour during the days of apartheid.

[18] Constitution and Mission Declaration of the Foundation for Equality before the Law.

[19] Jan Wagener very successfully acted as lawyer for many security police members seeking amnesty before the TRC. He continues to be the lawyer of a number of police who are in danger of being charged or who have already been charged and is politically involved to a significant extent.

and for finding a solution as to how to avoid further trials. To this end, as will later be shown, after 1998 it engaged in discussions with the government.

The motivation to avoid prosecutions also derives from the deep-rooted conviction that the crimes, which were obviously committed by the police, occurred in warlike circumstances during which it was a just obligation to defend the state against the 'terrorist onslaught' of the liberation movement. Although it is often accepted that in many instances boundaries of legality were overstepped, there is little recognition that the security forces' measures could not be justified, since their very purpose, the maintenance of a system and state based on the racist suppression of millions of people, was deeply unjust and unlawful.[20] Against this background, many aligned to the Foundation for Equality before the Law perceive the TRC and prosecutions as biased and unfair and a simple case of victor's justice.

Obviously, the viewpoints and activities of the two organisations are largely similar. Yet there was never any attempt to coordinate their efforts, although the Foundation for Equality before the Law's doors are open to former SADF members. This separation was intended by the military generals, who maintained it on the basis that different legal circumstances applied for the operations of SADF members, who mostly operated abroad in situations where rules of international conflicts and war applied, whereas the security police mostly operated under secret circumstances in South Africa and were bound by South African laws.[21] Furthermore, the military felt less vulnerable to prosecutions and accordingly did not want to side with the police.[22]

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[20] This conclusion derives from interviews with Jan Wagener in Pretoria on 8 May 2006 and Johan van der Merwe on 5 May 2006 in Pretoria as well as from H.D. Stadler *The other side of the story* (1997).

[21] Interview with Jan Geldenhuys in Pretoria (May 10, 2006). Compare also the question whether South African courts have jurisdiction to try crimes abroad (see *supra* Chapter 2(2.3)).

[22] Interview with Jan Geldenhuys in Pretoria (May 10, 2006). This is also reflected by the fact, that far lesser SADF members applied for amnesty at the TRC than members

1.2 *Public debate*

The public discussion in the aftermath of the TRC on accountability for politically motivated human rights violations has generally been very muted and was largely confined to a few interested and concerned NGOs.[23] Public awareness of issues concerning transitional justice in South Africa has markedly declined. Some commentators suggested that after the end of the TRC, the Commission's recommendations and the tasks arising out of its work, such as prosecutions and reparations, were almost completely disregarded and largely disappeared from the political agenda.[24] In public discussions on the matter, it is necessary to distinguish generally between the conservative faction, which is opposed to prosecutions, and the human rights faction, which is calling for more trials. However, specific debate often erupted on occasions of specific prosecution events. The two factions will be discussed in turn below.

1.2.1 *The conservative spectrum and the call for even-handedness*

The conservative political spectrum and parties representing a mainly white constituency assume a generally dismissive position towards prosecutions. Many, like the right wing Afrikaner party Freedom Front Plus, reject prosecutions completely.[25] Importantly, many organisations, such as the Democratic Alliance, the conservative F.W. de Klerk Foundation or the Freedom Front Plus constantly demand that prosecutions, should they take place, be 'even-handed' and equal.[26] Prosecutions as such must not only focus on former security force members but must also include

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of the security police, who were far more often concerned by prosecutions (V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 312–14).

[23] Interview with Piers Pigou in Johannesburg (May 6, 2006); N. Rousseau 'Prosecutions' in E. Doxtader (ed.) *Provoking questions* (2005) 37 at 46.

[24] M. Fullard and N. Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al., (eds.) *State of the nation* (2003) 78 at 86.

[25] Freedom Front Plus, press statement *FF Plus says NPA must prosecute Mbeki and other ANC* (Jan 25, 2006).

[26] Interview with Sheila Camerer in Cape Town (March 30, 2006); Freedom Front Plus, press statement *FF Plus says NPA must prosecute Mbeki and other ANC* (Jan 25, 2006); D. Stewart *Panel presentation at the Institute for Justice and Reconciliation*

ANC and other liberation movement members, maybe even President Mbeki himself. Even-handed prosecutions and applying equal standards is allegedly demanded by the constitution's principle of equality before the law.[27] The fact that between 1984 and 1994, thousands of people were killed as a result of liberation movement activities would have to be taken into account.[28] If prosecutions are one-sided, post-TRC trials could be perceived by the white population as an act of vengeance and as being political trials. This, thus, could lead to further alienation between the ethnic groups and impact negatively on reconciliation and nation-building.[29] The NPA's list of priority cases is cited as foundation for the suspicion that prosecutions will remain one-sided, as it allegedly does not contain members of the ANC and hardly any of the liberation movement.[30]

The request to halt TRC-related prosecutions is further substantiated with the negotiations and indemnity laws in the early 1990s.[31] There, the NP representatives were convinced that legislation for a general amnesty was possible. A conditional amnesty allegedly came unexpectedly and was found to be in conflict with the Interim Constitution. Furthermore, the former NP government had conceded to far-reaching indemnity laws on the basis of which thousands of ANC members had been released from prison or were indemnified for often very serious crimes. It is argued that this should also be used as a precedent for former security force personnel. However, against this background it would now be totally unjust to prosecute former apartheid security force members on a broad basis.[32] It was also suggested that trials

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conference 'The TRC: ten years on' (April 20, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[27] D. Stewart *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[28] Ibid.

[29] Ibid.; *Nieuwoudt case will drive home a message* Cape Times, Feb 13, 2004.

[30] E-mail from Sheila Camerer (June 13, 2006).

[31] F.W. de Klerk *Amnesty rules for all* Financial Mail, July 27, 2007 and D. Stewart *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[32] Ibid.

could impact negatively on the national project of reconciliation since it might be perceived by the white population as a one-sided process and would certainly revive the conflicts of the past.[33]

1.2.2 *Human rights and victim sector*

After 1998, a very prominent member of the human rights sector made a very controversial comment on post-TRC prosecutions. In 1999, the former chair of the South African Human Rights Commission, Reverend Barney Pityana, called for all TRC-related prosecutions to be abandoned and for legislation to be enacted to impose a moratorium on all trials.[34] He suggested that trials would be likely to fail, thus be futile, such as the Malan trial. Trials would only open up old wounds of the past and would accordingly not serve the purposes of reconciliation and nation-building and would only consume time and resources far more urgently needed to tackle the high current crime rate. Although such statements are rather rare, it is likely, nevertheless, that they express typical and widespread concerns regarding prosecutions, especially of those in political circles.

However, after 1998 the former chairperson of the TRC, Archbishop Desmond Tutu, called strongly for the institution of criminal trials. He has continuously emphasised his view that the TRC legislation requires prosecutions to go ahead and that justice must be served concerning the rights of victims, who, in accepting the amnesty scheme, accepted a significant concession and are now entitled to demand accountability.[35] He is of the opinion that failure to prosecute those who had been denied amnesty subsequently would foster a culture of impunity and undermine the rule of law.[36] In 2004, Tutu also warned against the introduction

[33] Interview with Jan Wagener in Pretoria (May 8, 2006).

[34] Comments cited in D.B. Ntsebeza 'The uses of truth commissions' in R.I. Rotberg and D. Thompson *Truth v. justice* (2000) 158 at 166 and J. Battersby *Call to stop apartheid prosecutions* The Sunday Independent, July 24, 1999.

[35] Interview with Desmond Tutu in Cape Town (March 22, 2006).

[36] Ibid.

of any kind of further indemnity or amnesty mechanism.[37] He accordingly welcomed the arrests in the PEBCO-Three case in early 2004 but, however, was critical in saying that generally, much more needed to be done on prosecutions.[38] The TRC's former deputy chairperson, Alex Boraine, in late 2006 also lamented the slow progress stating that the NPA and the government are far too slow and undedicated in their approach to post-TRC prosecutions.[39]

Generally, most organisations and people working in the human rights sector strongly call for prosecutions to take place and argue that more needs to be done to properly achieve accountability after the TRC. They are very aware of the slow and minimal progress of prosecutions and are extremely critical of the government's approach.[40] The government is often accused of being too hesitant, reluctant and unwilling to initiate prosecutions. The victim support organisation Khulumani has strongly criticised the government for utterly ignoring victims' interests in its approach to prosecutions.[41] It argues that far more criminal trials needed to be instituted[42] and that prosecutions are generally delayed too much and are taken haphazardly.[43] The Foundation for Human Right's executive director, former TRC commissioner Yasmin Sooka, has also criticised the government heavily for the delay in pushing ahead with

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[37] C. Terreblanche *Tutu warns against blanket amnesty* The Sunday Independent, April 18, 2004.

[38] *Tutu slates SA's lack of apartheid prosecutions* SAPA, Dec 15, 2005.

[39] *SA 'should try apartheid-era torturers'* SAPA, Nov 25, 2006.

[40] A great number of the unanimous and wide-ranging points of criticism were voiced at a conference in 2006 commemorating the 10th anniversary of the first Human Rights Violations Committee hearing of the TRC (*The TRC: ten years on*, conference organised by the Institute for Justice and Reconciliation in Cape Town from 20 to 21 April 2006. See Institute for Justice and Reconciliation, *Statement: the IJR conference on the TRC: ten years on* (2006)). See for criticism of human rights organisations also: *infra* Chapter 3(3.5).

[41] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[42] M. Jobson *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[43] Interview with Marjorie Jobson in Pretoria (May 9, 2006).

prosecutions.[44] She has argued that the lack of prosecutions is contributing to a culture of impunity.[45] Moreover, both organisations demand that prosecutions focus to a greater extent on higher echelons of the apartheid regime, i.e. politicians and generals of the old regime, rather than ordinary rank and file activists, such as Ronnie Blani.[46] As such, the former President FW de Klerk should also be held accountable for his presumed knowledge and involvement in apartheid crimes.[47] Criticism of the government's supposedly lame response to the TRC recommendations was even voiced by international organisations, such as Amnesty International and Human Rights Watch.[48]

The request for even-handed prosecutions and the proposition that it would amount to a gross injustice should the NPA focus primarily on prosecuting former security forces and apartheid government representatives is strongly rejected by organisations and people from the human rights sector.[49] It would be totally disingenuous to lament one-sided prosecutions since liberation movement activists were prosecuted extensively during apartheid. Thousands were tried and imprisoned because they fought for their liberation, over 100 were even executed for politically motivated offences.[50] In contrast, criminal accountability for the atrocities of the apartheid state has, as yet, been absolutely

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[44] Y. Sooka *Letter to the minister of justice and constitutional development* (Sep 8, 2005) (on file with author).

[45] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[46] Ibid.; Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[47] Ibid.

[48] Amnesty International and Human Rights Watch, briefing paper *Truth and justice: unfinished business in South Africa* (Feb 2003).

[49] Interview with Madeleine Fullard in Pretoria (May 4, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Piers Pigou in Johannesburg (May 6, 2006). See also C. Villa-Vicencio *The TRC still has lessons for our future* The Sunday Times, April 23, 2006.

[50] See M. Coleman (ed.) *A crime against humanity* (1998) 81–84 and *TRC Report*, vol. 2, chap. 3, paras. 21–37 on death penalty; M. Coleman (ed.) *A crime against humanity* (1998) 77–80 on political imprisonment and M. Coleman (ed.) *A crime against humanity* (1998) 43–53 on detention without trial.

minimal.[51] Against this background the priority of prosecuting crimes of the apartheid state needed to be far higher than for ANC and liberation movement members. It is also important to consider that Ronnie Blani, one of the first convictions in a post-TRC trial, was a former liberation movement member.

1.2.3 *Debate erupting on the occasion of specific prosecutions*

Public debate on the issue of post-TRC prosecutions in the media and political sphere always intensified around significant events, such as the presentation of the last TRC Report volumes in 2003 or the start of specific prosecutions. Tensions and debate at the time of prosecutions on a regional level were commonplace. For example, during the proceeding in the Luff case,[52] debates between the ethnic groups on ethnic and apartheid-related issues in the specific area were prevalent.

During the first proceedings in the PEBCO-Three case against former security police officers in 2004, some political representatives of the Afrikaner population criticised the arrests, claiming they were vindictive and could harm reconciliation.[53] Others from the victim and human rights sector welcomed them as the first major step towards post-TRC accountability.[54] However, the former head of the TRC research department and executive director of the NGO Institute for Justice and Reconciliation, Charles Villa-Vicencio, on the occasion of the PEBCO-Three prosecution also warned of certain dangers connected to prosecutions. In this regard, he was quoted as stating that the PEBCO-Three prosecution could cause unrest and could have serious implications for the process of nation-building and reconciliation.[55] As the accused persons in that case were ordinary rank and file officers, logically, the whole chain of command up to those who actually gave the orders, thus, those truly responsible, needed to be pursued in order

[51] See also *supra* Chapter 1(4.).

[52] See also *supra* Chapter 2(4.).

[53] *'Nieuwoudt case will drive home a message'* Cape Times, Feb 13, 2004.

[54] Ibid.

[55] J.J. Joubert and A. Muller *Versoening in gedrang* Beeld, Feb 12, 2004.

to do justice.[56] He substantiated these concerns by stating that although prosecutions were right in principle, if they failed to focus on all possible perpetrator groups and ranks, they could be regarded as one-sided and unbalanced, which could have implications for reconciliation between the ethnic groups.[57]

Ronnie Blani's trial and the judgment of April 2005 were criticised from various sides. Ackermann was heavily criticised by the relatives of the deceased for having agreed to a soft sentence.[58] The PCLU was also criticised by the ANC, former liberation movement activists and members of the human rights sector for having prosecuted Blani at all.[59] Such critics consider that Blani's prosecution should not have been a high priority. Considering his personal circumstances laid out above[60] and the fact that he was probably on the lowest tier of the liberation movement command structure, critics claim that the PCLU should make other cases a much higher priority, especially if they involve persons from the upper echelons of the security forces with far greater responsibility and individual guilt who in many cases are still not sentenced.[61]

There was also intense public scrutiny at the beginning of the court proceedings in the Chikane case in 2007. The Khulumani support group and many apartheid victims protested against the decision as being too weak and called for extended criminal trials for those responsible for the crimes committed by the apartheid security forces.[62] On the other hand, victims of ANC attacks and/or their relatives and other mem-

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[56] C. Villa-Vicencio *Let apartheid-era perpetrators be heard* The Sunday Independent, Jan 29, 2006.

[57] E-mail from Charles Villa-Vicencio (May 31, 2006).

[58] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[59] C. Terreblanche and A. Quintal *NPA feels the heat on amnesty* The Sunday Independent, Nov 28, 2004; Interview with Madeleine Fullard in Pretoria (May 4, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[60] See *supra* Chapter 2(8.).

[61] N. Rousseau 'Prosecutions' in E. Doxtader (ed.) *Provoking questions* (2005) 37 at 44–45. Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[62] *Vlok trial: different conclusions drawn* SAPA, Aug 20, 2007; *Theatre of differences outside Vlok trial* SAPA, Aug 16, 2007.

bers of organisations supporting the interests of the white population protested against the trial and demanded that ANC leaders should also be held accountable.[63]

1.3 *Government and ANC statements*

The South African government and the ANC have only rarely made public statements on the issue of post-TRC prosecutions. When the TRC's operation had come to an end in 1998, President Mandela strongly emphasised that criminal trials must start within a fixed time frame[64] which

> …needs to be realistic, taking into account how long it takes for evidence to be secured and preparations made for successful prosecution. Yet a time frame for this process is necessary; for we cannot afford as a nation and as government, to be saddled with unending judicial processes which can easily bog down our current efforts to resolve problems of the present.[65]

Mandela added that:

> These matters will of course be handled by the Office of the National Director of Prosecutions. And we believe that in discharging this responsibility the Director will take into account not only the critical need to establish accountability and the rule of law, but also to advance reconciliation and the long-term interests of our country.[66]

He further pointed out that:

> …[W]e are not contemplating a general amnesty under any guise. Such an approach would go against the grain of the very process that we all

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[63] Ibid.

[64] See text accompanying *supra* Chapter 1 note 58.

[65] Opening address by President Nelson Mandela in the special debate on the report of the Truth and Reconciliation Commission (National Houses of Parliament) (Feb 25, 1999).

[66] Ibid.

> agreed upon; it would undermine the culture of accountability that we seek to engender.[67]

Thereafter government politicians were rather reticent on the subject. However, the then Deputy President, Thabo Mbeki, had already indicated in early 1999 that a new amnesty could nevertheless be considered as he stated in an address to parliament his dismissive view towards prosecutions that:

> Quite a lot of people in KwaZulu-Natal did not apply [for amnesty] and with the level of violence that took place in that province, if you dig and dig and dig, you are going to have to arrest a lot of people. That can't be right. A number of generals in the SA Defence Force are very keen that this matter be dealt with, because their own sense, too, is that there may very well be significant numbers of people in the former SADF who didn't apply, and again, with regards to them, it would not be right week after week to charge people with something that happened in 1987.[68]

Moreover in May 2002, Mbeki, who had meanwhile become president, pardoned 33 prisoners who were aligned to the ANC and PAC.[69] Most of them had been sentenced for politically related offences, two-thirds had either been denied amnesty or not applied for amnesty.[70] At the ANC's national conference in December 2002[71] the discussion of guidelines for a broad national amnesty, possibly in the form of presidential pardons, was scheduled.[72] According to the head of the ANC presidency, Smuts Ngonyama, the ANC generally supported the idea to introduce a new amnesty law.[73] However the proposals on the ANC's national conference were strongly motivated by the volatile situation in KwaZulu-Natal and

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[67] Ibid.

[68] Cited in J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 265.

[69] S. Ngesi 'The presidential pardons and the media' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 294 at 294.

[70] Ibid.

[71] The ANC's 51st national conference took place from 16 to 20 December 2002 in Stellenbosch.

[72] P. Dickson *ANC to seek broad national amnesty* Cape Times, Dec 11, 2002.

[73] Ibid.

the fact that many IFP members did not receive amnesty.[74] Ngonyama nevertheless subsequently declared that his party was generally against running trials in the style of the Nuremberg trials, since this would occur at the cost of nation-building.[75]

Such developments and statements triggered speculation in the public that the government intended to enact another amnesty law in the wake of the TRC.[76] Some even claimed a general amnesty for the crimes relating to the apartheid conflict was considered.[77] However, in his speech at the tabling of the TRC Report in April 2003, Mbeki eventually ruled out the possibility that a general amnesty would be introduced and took up a strong and seemingly unequivocal stance for prosecutions as he stated that

> …there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past, but also in the creation of a new ethos within our society.[78]

He went further to stress that 'Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were the receiving end of gross human right violations.'[79] He stated that it is 'in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it

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[74] Ibid.

[75] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 71.

[76] J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 265; J. Steinberg *Amnesty quandary looms for judges* Business Day, June 8, 1999.

[77] P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002; *Victim's to fight amnesty* Mail & Guardian, June 7, 2002.

[78] Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

[79] Ibid.

believes deserve prosecution and can be prosecuted.'[80] However, he also made rather vague remarks, which indicate that other political factors will have to be considered in any approach to post-TRC prosecutions, stating that the government

> …should continue to establish the truth about networks that operated against the people. This is an obligation that attaches to the nation's security today; for, some of these networks still pose a real or latent danger against our democracy. In some instances, caches of arms have been retained which lend themselves to employment in criminal activity.[81]

The President concluded that the NPA

> …will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.[82]

He further stated that 'in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining

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[80] Ibid.

[81] Ibid.

[82] Ibid. This announcement has led to considerable confusion. In its wake various media reports referred to a new deal on indemnity provisions for apartheid era perpetrators and a new mechanism of disclosure (See e.g. C. Terreblanche *New deal for apartheid abuse perpetrators* The Sunday Independent, April 20, 2003). In fact no specific arrangement had been made. Van der Merwe shortly after the speech contacted the NPA in order to find out what new process could be meant. The NPA was totally unaware of any new arrangements and what the President was actually referring to (Interview with Johan van der Merwe in Pretoria (May 5, 2006)). The NPA obviously had not been advised on the intentions behind the announcement. The arrangements Mbeki was referring to probably concern the normal instruments of plea-bargaining and state witness arrangements (see sections 105A and 204 of the Criminal Procedure Act). As such it is noteworthy that, only years later, with the Chikane case for the first time a plea bargain arrangement was entered into, which also included that the accused disclose information and cooperate in further trials (see *supra* Chapter 2(9.)).

the appropriate course of action.'[83] Such statements will later be put into context with regard to the governmental perspective concerning its actual approach towards prosecutions.

In 2007, there were announcements made regarding yet another pardon process concerning liberation movement members convicted of political crimes related to the apartheid conflict.[84]

2. *Bargaining Over the TRC's Legacy*

In 2002, rumours on secret consultations between former generals of the SADF and the government were highlighted in the media.[85] The South African government and the ANC did indeed engage in secret talks and consultations with representatives of the SADF and the security police over a long period from the end of the TRC in 1998 until about early 2004. Two separate processes of consultations concerning the two factions of the former security establishment took place.[86] Details of the secret meetings were never disclosed to the public.[87] As will later be outlined, the common denominator of the talks was that a legislative solution should be reached on how to avoid prosecutions in the wake of the TRC. The consultations are indicative of the real motivations and political considerations of the government during the years after the end of the TRC in 1998 and also provide valuable background information for the evaluation of later developments.

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[83] Statement by President Mbeki to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (April 15, 2003).

[84] *Presidential pardons in the spotlight* SAPA, Nov 15, 2007.

[85] M. Fullard and N. Rousseau 'An imperfect past: the Truth and Reconciliation Commission in transition' in J. Daniel et al. (eds) *State of the nation* (2003) 78 at 93; P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002.

[86] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[87] P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002.

2.1 *Consultations with the security police*

During and after the operation of the TRC, the Foundation for Equality before the Law occasionally conducted talks with the government concerning the amnesty proceedings and general questions of accountability.[88] Especially after the main work of the TRC was completed in 1998, consultations concerning post-TRC accountability were conducted, which mostly involved high-ranking members of the government. On behalf of the former apartheid state employees and the Foundation for Equality before the Law, former President F.W. de Klerk assumed a central role in the consultations. De Klerk often consulted with President Mbeki directly or with other high-ranking members of the government. Apart from that the organisation was in contact with various other government officials and submitted proposals.

The Foundation for Equality before the Law's aim in the consultations was to find a solution to avoid the prosecution of former members of the security police who had not received amnesty. Allegedly, legislation for a general amnesty was never requested. A general amnesty would certainly have served the organisation's purposes in avoiding trials. However, it was clear that a general amnesty was not an option since it would have seriously damaged the TRC process and its scheme of conditional amnesties and would thus not have been feasible politically. Accordingly other legislative options had to be explored. After 1998, the Foundation for Equality before the Law initially advocated a procedure, which envisaged that indemnity from prosecution could be granted, if all details regarding the crime in question were disclosed. This would therefore have reproduced the TRC's precondition of amnesty subject to a full disclosure. The proposal was later altered so that the granting of indemnity would be dependent only on the crime in question falling within the legal ambit of section 20(1) of the TRC Act. This would mean that the act was associated with a political objec-

[88] Unless otherwise stated, the information laid out in this subchapter comes from an interview with Johan van der Merwe in Pretoria on 5 May 2006. The consultations were conducted in strict confidentiality. Apart from the broad framework, details concerning negotiations with security police members could thus not be provided.

tive and was committed in the course of the conflicts of the past.[89] The proposal was quite similar to the indemnity laws of the early 1990s.[90] It was proposed that a full disclosure in terms of the TRC Act should not be required since the amnesty proceedings had shown that there were still many uncertainties as to when a full disclosure was in fact made.[91] According to the proposal, such indemnity proceedings should be conducted before a judge.[92]

Although among members of the Foundation for Equality before the Law the government had raised expectations that a solution according to the proposals was desirable, no agreement was reached. The talks continued until about 2004. The consultations had allegedly highlighted the government's lack of political will to adequately react to the TRC's recommendations on prosecutions, which also explains the huge delay in initiating trials.[93]

2.2 *Consultations with the generals*

More or less concurrently with the consultations with the police representatives, starting in 1998, the government conducted talks with a group of high-ranking former generals of the SADF.[94] Initially, the former chief of the SADF, General Constand Viljoen[95] was approached by one of the leading members of the ANC and government at that time, Jacob Zuma,[96] with the aim of consulting over questions of criminal

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[89] E-mail from Johan van der Merwe (May 31, 2006).

[90] See *supra* Chapter 2 note 297.

[91] E-mail from Johan van der Merwe (May 31, 2006).

[92] Ibid.

[93] Interview with Jan Wagener in Pretoria (May 16, 2006).

[94] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[95] After his career in the SADF, Viljoen went into politics as the co-founder and leader of the right-wing Afrikaner party *Vryheitsfront* (the predecessor of the Freedom Front Plus) and was a member of parliament (See P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 83–84 and 302–3).

[96] The later deputy President of South Africa was at the time mainly involved in regional politics of his home province KwaZulu-Natal (See P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 317–18).

accountability in the wake of the TRC.[97] Viljoen, however, considered that such matters were better discussed with the group of former SADF generals who had established the support network for former soldiers and the *Kontak Buro*,[98] who were, thus, already working intensely on amnesty issues and prosecutions. He immediately referred Zuma to the network group of generals around Geldenhuys.[99]

2.2.1 *The process of meetings*

General Geldenhuys agreed to meet with Zuma. A series of frequent meetings, negotiations and consultations ensued from 1998. The main process of consultations was conducted over four years until early 2003.[100] A small number of meetings, however, infrequently continued until 2004.[101] The consultations were, like the security police consultations, generally aimed at finding a mutual solution as to how to avoid trials after the TRC through new indemnity mechanisms.[102] The talks were mediated and facilitated by Johannesburg businessman Jürgen Kögl, who is closely connected to leading ANC members, especially to Jacob Zuma. All meetings took place strictly separated from the meetings with the police, which was in the interest of the generals.[103]

Zuma was asked to conduct the talks on behalf of the government or ANC.[104] Apart from him, various other high-ranking members of the ANC, such as the then Minister of Justice Penuell Maduna or Mathew Sposa, Sidney Mufamadi and Charles Nqakula also participated occasionally. On various occasions Thabo Mbeki was also present, as Vice

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[97] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[98] See *supra* Chapter 3(1.1.2).

[99] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[100] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[101] Ibid.

[102] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[103] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[104] Interview with Jürgen Kögl in Johannesburg (May 12, 2006). Since in practice the distinction between ANC and government concerning the negotiations was often blurred, the two expressions will be used synonymously.

President and later in his capacity as the President.[105] On the side of the generals, Jan Geldenhuys assumed a leading role. He participated along with two to four other generals belonging to their support group. Both sides were accompanied by legal advisors. The main process of consultations came to an end in or about early 2003. Only as a matter of courtesy did a few meetings continue to take place until 2004.[106]

2.2.2 *Motivation of the government*

The main catalyst for Zuma's approach to the generals was the still very volatile political situation in KwaZulu-Natal, which was due to prolonged political tensions between supporters of the ANC and IFP during the late 1990s.[107] Zuma was at that time successfully conducting mediation and appeasement efforts between the two political factions of the ANC and IFP in order to contain possible fresh occurrences of violence.[108] The question of accountability for political crimes in the wake of the TRC was considered to be a critical issue in this regard.[109] As a great amount of politically motivated human rights violations had occurred in the conflict between IFP and ANC, especially during the negotiation period between 1990 and 1994, and considering that many IFP members accused of such crimes had not applied for amnesty, it was feared that the release of the TRC Report and prosecutions in its wake could stir up conflict again and be a constant source of unrest in the region.[110] On top of that, the second democratic elections were imminent and it was crucial to avoid new conflicts flaring up.[111] The initial intention was, thus, to create an amnesty scheme which would specifically cover the political crimes that happened between ANC and

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[105] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[106] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[107] Ibid.

[108] P. van Niekerk and B. Ludman (eds) *A-Z of South African politics 1999* (1999) 317. See also *supra* Chapter 1(2.).

[109] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[110] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[111] Telephone interview with Jürgen Kögl (June 14, 2006).

IFP supporters in KwaZulu-Natal.[112] Yet it was clear that, regarding the constitutional framework and the political implications for the TRC amnesty scheme, a purely local solution would be almost impossible to implement. The generals also categorically refused to support a regionally confined amnesty process.[113]

They were contacted on this specific issue for various reasons. According to Kögl, the government intended to ensure support of other influential groups and important role-players of the apartheid regime, such as the generals, in order to put any possible solution, even if initially mainly focussing on KwaZulu-Natal, on a wider national basis.[114] The generals were already dealing with amnesty issues, had legal expertise, and as such, were relevant candidates to be canvassed for such support.

There was also a range of other specific reasons why the generals were contacted. According to Kögl, one reason for the government's initiative was the SADF's, and therefore the general's alleged involvement in the KwaZulu-Natal conflicts between the IFP and ANC.[115] During the TRC process the former top command of the SADF was accused of having fuelled the conflict between the ANC and IFP during and before the negotiations towards a transition to democracy, in order to weaken the position of the ANC. Allegations were made that weapons and expertise had been supplied to Zulu fighters. There were strong signs that a so-called "third force", established and steered by the security forces, had fuelled the atrocities committed by IFP supporters against ANC supporters, not only in Natal but also to a great extent in the Transvaal areas.[116] There were strong indications of SADF involvement in such activities, such as had been thxe case when weapons were supplied to

[112] Interview with Jan Geldenhuys in Pretoria (May 10, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[113] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[114] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[115] Telephone interview with Jürgen Kögl (June 14, 2006).

[116] See *TRC Report*, vol. 6, s. 4, appendix, paras. 1–43; *TRC Report*, vol. 2, chap. 7, paras. 497–551; *TRC Report*, vol. 5, chap. 6, paras. 126–29.

the Inkatha Caprivi trainees.[117] Geldenhuys and other generals had been charged in 1995 for their alleged involvement in these Caprivi activities and the KwaMakutha massacre.[118] The government, when approaching the generals, was mindful of the fact that the SADF had supplied the Zulu fighters with weapons on a large scale and that the locations of a number of the hidden weapons caches, which had been established in the region during the last apartheid years, remain as yet unknown.[119] Government officials were wary that the generals could still possess knowledge of such still hidden and unknown weapons caches, established during the late 1980s and early 1990s, that they could, thus, still exercise negative influence on the peace process between IFP and ANC and that they could generally, through the possible third force networks, in some way thwart appeasement attempts or contribute to a re-ignition of the conflict.[120] These factors were allegedly a major reason for integrating the generals in any future approach to post-TRC accountability, to contain their potentially negative influence.[121] Such considerations are also clearly indicated in the aforementioned speech by President Mbeki.[122]

It was also considered that the TRC process suffered from a lack of sufficient findings on SADF activities, especially concerning those that took place in South Africa.[123] Very few SADF members had applied for amnesty, despite the fact that the SADF was involved in many gross human rights violations.[124] The SADF leadership practically refused

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[117] *TRC Report*, vol. 6, s. 4, appendix, para. 18.

[118] See *supra* Chapter 1(4.).

[119] Telephone interview with Jürgen Kögl (June 14, 2006).

[120] Ibid.; Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[121] Ibid. Whether the generals really had any potential to thwart the appeasement attempts in KZN remains unclear. Geldenhuys insists that the generals neither would engage in any kind of violent activity nor would they have any special knowledge of weapons caches or have the resources to exercise negative influence on mediation efforts in KwaZulu-Natal.

[122] See text accompanying *supra* Chapter 3 note 81.

[123] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Telephone interview with Jürgen Kögl (June 14, 2006).

[124] *TRC Report*, vol. 6, s. 3, chap. 1, para. 4.

completely to cooperate with the TRC. There were no disclosures made on the involvement in violence during the negotiation period.[125] In this regard the TRC also referred to certain networks with access to weapons and resources.[126] As it was unable to establish the extent of such networks, the TRC stated that it would be essential to investigate the involvement of the police and military in third force activities more closely.[127] The government had this in mind when it approached the generals. The aim was also to work out proposals to satisfy the generals' desire to avoid prosecutions of SADF members and to create mechanisms for cooperation and disclosures on still uncovered secret SADF activities, in order to compensate for the lack of TRC findings in this regard.[128]

Another factor was the government's fear that South Africa could be exposed to claims for reparation and damages by countries, which had been attacked by the apartheid state.[129] The territorial integrity of various neighbouring countries had frequently been violated by illegal invasions of the SADF.[130] Angola, for instance, suffered enormous damages due to the war that was waged by South Africa and due to the massive support the apartheid government provided to the rebel movement UNITA.[131] Apparently, during the late 1990s neighbouring governments had discussed the issue of reparation claims against South Africa concerning the activities of the SADF. The government, thus, tried not to fuel such discussions by prosecuting SADF members for

[125] Ibid., s. 4, appendix, para. 7.

[126] Ibid., para. 33.

[127] Ibid., paras. 42–43.

[128] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[129] The TRC found that the military strategy of South Africa during the times of Apartheid was guided by the principles of pre-emptive interventionism and counter-revolutionary warfare (*TRC Report*, vol. 2, chap. 2, para. 6). It further for instance found that the SADF committed a great amount of gross human rights violations e.g. in its war against Angola (*TRC Report*, vol. 2, chap. 2, para. 72).

[130] *TRC Report*, vol. 2, chap. 2, para. 48.

[131] Ibid., paras. 70–72.

the atrocities caused in other countries.[132] In this regard, the aim was to make sure that full-scale criminal trials did not go ahead.

Yet another aspect was that the government tried to avoid a drain of military competence and intelligence from South Africa to other African countries.[133] In the process of establishing an effective army for the new democratic South Africa, it was absolutely vital to ensure the support and expertise of former officers and generals of the apartheid state's SADF. Moreover, a number of other African countries were apparently very keen to engage officials of the SADF as advisors on improving their respective armies.[134] The South African government thus wished to avoid former SADF generals and military experts being driven away from South Africa, should SADF activities be investigated and tried on a large scale.[135]

Furthermore, the intention was to avoid setting precedents concerning criminal liability for military operations.[136] The army of the new democratic South Africa, the SANDF, at that time had increasingly become involved in peace keeping and military operations throughout Africa. The government was concerned that trials concerning military operations of the former apartheid-state's defence force, the SADF, could negatively impact on SANDF operations, in that they might lead to legal uncertainty concerning the legality of certain measures.[137] Precedents in terms of what actions by soldiers engaged in conflict situations can lead to criminal liability were to be avoided.[138] The government wanted to ensure that the effectiveness of the South African army and its capacity to act was not tainted by any kind of legal uncertainty.[139] Thus, military operations were to be generally kept out of criminal trials. However, the notion that the SADF generals would in any way be

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[132] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] Telephone interview with Jürgen Kögl (June 14, 2006).
[138] Ibid.
[139] Ibid.

willing and capable of instigating any kind of violent uprising against the new South African state is, allegedly, completely unfounded.[140]

The consultations generally have shown that the government is not at all keen to promote post-TRC prosecutions. Rather it has indicated its desire to leave the apartheid past behind as quickly as possible, in order to move forward towards a stable and reconciled nation and to avoid thwarting the project of nation-building by costly and extensive trials, which constantly bring up the atrocities and injustices of the past.[141] According to Geldenhuys, Zuma underlined this quite clearly when during one of the meetings he emphasised that prosecutions were not in the interest of the government as this could destroy some of the good effects the TRC had on nation-building and reconciliation. The issue needed to be dealt with in a political manner, rather than by the NPA.[142]

In summary, the government tried to work out some kind of legal mechanism, by which to generally avoid convictions, specifically concerning crimes committed in the conflict between IFP and ANC and concerning the SADF and simultaneously to create a mechanism by which to uncover more information that was not uncovered by the TRC.

2.2.3 *Interest of the generals*

Regarding the interest of the generals in the negotiations, it has often been claimed that, considering the many atrocities and criminal offences of the SADF which have not yet been dealt with properly, a general amnesty or convenient deal had been requested.[143] Yet a general amnesty was allegedly neither proposed nor discussed, especially not one that

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[140] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[141] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); E-mail from Jürgen Kögl (June 26, 2006).

[142] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[143] Interview with Yasmin Sooka in Pretoria (May 3, 2006); *Victims to fight amnesty* Mail & Guardian, June 7, 2002; P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002; C. Carter *No truth for the thousands of apartheid dead* Cape Argus, April 8, 2006.

would only cover the generals.[144] From the outset it was rather clear that a general amnesty would not square with the TRC scheme on amnesty. A less overt and again, somehow conditional indemnity scheme was also in the generals' interest.[145] However, the generals were obviously interested in securing a convenient agreement in the interest of their former subordinates and in their own interest, which would diminish the chances that former SADF members would be charged for their involvement in SADF operations.[146] As most SADF members had been very suspicious of the TRC process, which was perceived to be biased, the generals sensed they could now take part in working out a, in their eyes, fairer procedure.[147] Furthermore, after the TRC, the general attitude towards the activities of the SADF was perceived to be unreasonably negative and hostile. The TRC's findings in its report were perceived to be an unjustified attack on the SADF's integrity.[148] When entering into consultations with the government the generals were motivated by the opportunity to correct the perceived wrong image of their activities in another forum.[149]

2.2.4 *Results*

The aim of the government was to take the amnesty legislation of the TRC as a reference point and try to establish a new mechanism adapted to the previous amnesty legislation.[150] The mechanism had to apply to the whole of the country and could not be limited to the province of

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[144] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[145] Telephone interview with Jürgen Kögl (June 14, 2006).

[146] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[147] Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[148] Interview with Jan Geldenhuys in Pretoria (May 10, 2006). The top commanders never made an effort to acknowledge the brutal atrocities which had been caused by the SADF. It also never properly participated in TRC hearings which would have given the SADF command an occasion to defend against perceived unjustified allegations.

[149] Interview with Jan Geldenhuys in Pretoria (May 15, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[150] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

KwaZulu-Natal. By the end of 2002, the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism practically amounting to a new amnesty law.[151] It envisaged a legal concept according to which a special plea on amnesty would be introduced as an amendment to the Criminal Procedures Act.[152] The solution on how to deal with criminal accountability in the wake of the TRC should, thus, be embedded in the normal court procedures. After the agreement was reached, the consultations were practically concluded and only continued with the participation of Zuma and Minister of Justice, Maduna, on an infrequent basis as a matter of courtesy and to conduct a rather general exchange of thoughts on the topic until 2004.[153]

The solution provided that perpetrators of politically motivated offences falling within the ambit of the TRC Act should not principally be exempted from criminal liability.[154] In case they are criminally charged, an alleged perpetrator who had not received amnesty by the TRC could then in the criminal trial launch a special plea on amnesty. Once such a plea was launched, a special inquiry by the judge embedded in the normal public criminal trial should ensue. Should the plea for amnesty succeed, the trial needed to result in an acquittal of the accused.[155] The envisaged preconditions for a successful plea on amnesty were that the criminal offence in question needed to satisfy exactly the same test which was outlined as a precondition to the granting of amnesty according to the TRC Act. It, thus, had to be committed within the fixed time frame applicable for the TRC Act and had to be connected with a political objective and committed in the course of the conflicts of the past etc.[156] Furthermore, the alleged perpetrator would then have to make a full disclosure before the court in order to succeed with the plea.[157] Whether the criteria are satisfied should be

[151] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).
[152] Ibid.
[153] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).
[154] Ibid.; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).
[155] Ibid.
[156] Ibid.
[157] Telephone Interview with Jürgen Kögl (June 14, 2006).

subject to the scrutiny of the judge and other participants as is normal procedure in a criminal trial.[158] If the plea would not succeed, the trial would resume.[159]

The solution that was agreed upon at the consultations of the generals and the government, thus, embodied an exact replication of the TRC amnesty scheme. The only difference was that the competence to decide on the granting of indemnity would rest with an ordinary criminal court and not with a special committee such as the Amnesty Committee of the TRC. The idea to introduce a special plea on amnesty to criminal procedure law was not at all new. Before the TRC process began, the NP launched a similar proposal aimed at extending the amnesty regime by the same means.[160]

By late 2002 the proposal had been worked out in great detail by the Justice Department and was practically ready to be presented to Parliament for enactment.[161] The public was neither informed of the existence of the proposal nor of details thereof. By the end of 2002, it was first put forward for the consideration of President Thabo Mbeki. The implementation of the proposal depended on the decision of President Mbeki.[162] In early 2003 it was eventually rejected by President Mbeki.[163] The President apparently did not expressly communicate to the consultation group of generals and ANC government representatives that he rejected the draft law. However, his announcements in the speech at the tabling of the TRC Report in Parliament in April 2003 effectively and unmistakably signalled to the consulting parties a rejection of their proposal on another round of indemnity legislation.[164] As mentioned above,[165] Mbeki had announced that it would be up to

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[158] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

[159] Ibid.

[160] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 143.

[161] Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

[162] Ibid.

[163] Ibid.

[164] Ibid.

[165] See *supra* Chapter 3(1.3).

the NPA to pursue post-TRC prosecutions according to its normal procedures and that any approach such as general amnesty will not be considered, which of course means that the specific indemnity procedure proposed would, at least at the beginning, not be implemented. What exactly motivated Mbeki to turn away from the proposal at that stage cannot be established. However, it is implicit from his speech that he apparently did not consider such an obvious legislative introduction of another amnesty mechanism similar to that of the TRC as appropriate, since he expressly stated that any new amnesty approach, whether applied regionally or nationally, would harm the TRC process. However, elements of the consultations did, as will be shown below, reappear in later policy decisions.

3. *A Prosecution Policy for TRC-Related Cases*

It becomes clear from the consultations with the security forces that the government attempted to introduce new legal mechanisms aimed at avoiding trials directly after 1998. As has been outlined in the preceding paragraphs, the solution, which had been reached by late 2002, was in early 2003 not found fit by the President to provide a sufficient new indemnity mechanism. However, the urge to introduce a satisfactory mechanism persisted. It took until late 2004 for the government to start a new process of developing a solution. Eventually in early 2006, a new legal approach to post-TRC prosecutions was introduced. On 24 January 2006 the NPA presented a set of new guidelines to the public, which were supposed to apply specifically to prosecutions of political crimes connected with the conflicts of the apartheid past.[166] The so-called 'prosecution policy and directives relating to the prosecution of offences emanating from the conflicts of the past and which were

[166] See NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006).

committed before 11 May 1994' were an amendment to the general prosecution policy of the NPA.[167]

Traditionally, prosecutors in South Africa have wide discretion on the decision on whether or not to initiate a prosecution.[168] According to section 179(5)(a) and (b) of the Constitution and 21 of the NPA Act, the NDPP, with the concurrence of the Minister of Justice, has to determine and issue policy directives, which have to be observed by the prosecutors in the prosecution process.[169] In guiding the prosecutors' discretion, this generally tries to achieve fair, transparent, consistent and predictable processes.[170] The directives are not a statute but outline binding guidelines for the exercise of the prosecutors' discretion. As section 21(2) of the NPA Act states, they have to be tabled in parliament. According to sections 179(5)(a) of the Constitution and 21 of the NPA Act, the prosecution policy is drafted by the NDPP. However, in this case it was in fact not the NDPP but the government, more precisely the Department of Justice, which entirely drafted the guidelines and only formally were they issued by the NDPP.[171] Although the policy amendment was only presented to the public in January 2006, it had already come into effect on 1 December 2005.[172] It has given rise to

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[167] Prosecution Policy, appendix A.

[168] M. Schönteich *Lawyers for the people* (2001) 19–20; F.G. Richings 'The prosecutor's discretion: a plea for circumspection' (1977) 1 no. 2 *South African Journal of Criminal Law and Criminology* 143 at 143–44.

[169] The section reads:

> (5) The National Director of Public Prosecutions
>
> (a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;
>
> (b) must issue policy directives which must be observed in the prosecution process.

Section 21 (1) of the NPA Act repeats this instruction.

[170] M. Schönteich *Lawyers for the people* (2001) 52.

[171] Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[172] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006).

considerable controversy and was suspended by the High Court of Pretoria in December 2008.

3.1 *Previous history*

After the conclusion of the consultation processes and the establishment of the PCLU in early 2003, no political interventions occurred for over one year. This situation changed significantly in late 2004, when the first prosecutions were initiated by the PCLU. The PEBCO-Three prosecution had been initiated in early 2004, Ronnie Blani had been charged in October 2004 and in November 2004 the PCLU was ready to effect arrests in the Chikane case.

The events in the Blani and Chikane cases had triggered the decision to develop specific guidelines. With regard to the indictment of Ronnie Blani, many criticised that priority was put on such a case, considering that apartheid officials were rarely forced to account for their crimes.[173] This decision to prosecute a former liberation force cadre raised concerns and unease in high echelons of the government and in ANC circles as well as in local ANC structures.[174] In addition to this, the arrests in the Chikane case were imminent. As outlined above, the accused' attorney Jan Wagener immediately intervened politically and apparently put great pressure on the government to stop the proceedings.[175] Following this and in an extraordinarily swift move, the NPA was advised on behalf of President Mbeki to suspend the arrests,[176] which it did. The NPA's official explanation for its action was that it had realised that there was no strategic plan as to how to deal with TRC-related cases and that it was necessary to approach them on a

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[173] See *supra* Chapter 2(8.).

[174] C. Terreblanche and A. Quintal *NPA feels the heat on amnesty* The Sunday Independent, Nov 28, 2004.

[175] See *supra* Chapter 2(9.1). The imminent arrests according to Ackermann decisively contributed to the decision to work out guidelines (E-mail from Anton Ackermann (Oct 18, 2005)).

[176] Interview with Jan Wagener in Pretoria (May 8, 2006).

holistic and uniform basis.[177] The events reportedly prompted meetings of the Minister for Justice and the Minister of Safety and Security with high-ranking NPA and police officials, at which appropriate political and policy approaches to post-TRC prosecutions were discussed.[178] In November 2004, they eventually resolved to impose a moratorium on all TRC-related prosecutions and investigations pending the composition and approval of guidelines.[179]

It took more than a year until the moratorium was resolved in January 2006. During the presentation of the completed prosecution guidelines, the NPA announced that prosecutions would go ahead.[180] On 17 January 2006, representatives of the NPA tabled the guidelines in Parliament's portfolio Committee on Justice and Constitutional Development.[181] The portfolio committee was given only short notice on the scheduled presentation and was convened for an ad hoc meeting.[182] Although the guidelines are of great significance for the further conduct of post-TRC prosecutions, there was no parliamentary participation in their drafting and proper parliamentary discussion at their presentation was also impossible due to the ad hoc nature of the presentation.[183]

During the process of drafting the guidelines it was also not possible for the public and civil sector to participate in any way. None of the major South African NGOs, such as the victim organisation Khulumani,

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[177] S. Adams *Drama in Chikane's poison case* The Star, Nov 11, 2004.

[178] C. Terreblanche and A. Quintal *NPA feels the heat on amnesty* The Sunday Independent, Nov 28, 2004.

[179] E-mail from Anton Ackermann (Oct 21, 2005). The acting NDPP Bulelani Ngcuka had advised the PCLU to stop all further investigations and prosecutions (E-mail from Anton Ackermann (Oct 18, 2005)).

[180] *NPA apartheid-era prosecutions to start* SAPA, Jan 24, 2006.

[181] See Justice and Constitutional Development Portfolio Committee *Briefing and deliberation on the amendment of the prosecuting policy to provide for directives for the prosecution of matters before 11 May 1994*, Jan 17, 2006 (protocol of minutes available at http://www.pmg.org.za).

[182] Interview with Sheila Camerer in Cape Town (March 30, 2006).

[183] Ibid. However, sections 179(5) of the Constitution and 21 of the NPA Act do not provide for parliamentary participation apart from the mere tabling of the completed policy.

could give any input or were in any way consulted on the contents of the document.[184] Moreover, although the Foundation for Human Rights and Khulumani had constantly requested that the Department of Justice issues information about the guidelines and eventually furnishes a copy thereof, they were not heard or adhered to.[185] The government was generally extraordinarily reluctant to issue information.[186] More precise details on the contents were only reported in the media shortly before the guidelines came into effect.[187] The former security force members were also allegedly not properly involved in the process of developing the guidelines.[188] However, according to the attorney Jan Wagener on a very occasional and infrequent basis representatives of this side were consulted informally.[189]

3.2 *Contents*

The amendments to the prosecution policy shall be applicable to the prosecution of crimes arising out of the conflicts of the past, which

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[184] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[185] Ibid.

[186] The Foundation for Human Rights and Khulumani learned only in late 2004 from a journalist that a policy amendment was drafted at all. There were signs that the guidelines would reintroduce an amnesty scheme similar to that of the TRC. A coalition of human rights and victim NGOs then in December 2004 and September 2005 wrote letters to the NDPP and Minister of Justice requesting further information and cautioning against the repetition of the TRC amnesty scheme. All requests remained unanswered. Again only through hints of a journalist did the NGOs learn in December 2005, that the policy amendment had been completed (Interview with Yasmin Sooka in Pretoria (May 3, 2006)). Moreover, the victim organisation Khulumani, although having contacted the NPA continuously for information, was not even informed of the scheduled press conference in January 2006, on which the guidelines were presented. Only through journalists was the organisation informed of the presentation shortly beforehand.

[187] C. Terreblanche *Back door amnesty plan revealed* The Sunday Independent, Nov 27, 2005.

[188] Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[189] Interview with Jan Wagener in Pretoria (May 8, 2006).

were committed before 11 May 1994, i.e. crimes that also fell within the jurisdiction of the Amnesty Committee.[190] On the one hand, the document lays out a procedure that must be strictly adhered to regarding persons who want to make representations to the NDPP in relation to TRC crimes.[191] On the other hand side, the amendment lays out a catalogue of material criteria which, in addition to the general criteria outlined in the normal prosecution policy, govern the discretionary decision of the prosecutors on whether or not to prosecute a case.[192] It was further determined that the regional Directors of Public Prosecutions must refer all post-TRC prosecutions to the NPA, thus, all TRC-related cases are centralised in the office of the PCLU.[193]

The procedural part of the policy amendment determined, apart from a number of negligible formal requirements, that any person possibly facing prosecution may submit an affidavit containing representations on the alleged criminal offence, if he wished to enter into arrangements with the NPA.[194] Such affidavit must contain

> …a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.[195]

The material criteria governing the prosecutor's decision to take a case to trial are of critical importance. There are basically three sets of criteria. The first set is based on the preconditions for granting amnesty as stated in the TRC Act.[196] First, it must be taken into account 'whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances' concerning the alleged offence.[197] The next

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[190] Prosecution Policy, appendix A.

[191] Ibid., para. B.

[192] Ibid., para. C. The criteria expressly shall be applicable besides the general criteria governing the discretion of the NDPP set out in paragraph 4 of the general prosecution policy.

[193] Prosecution Policy, appendix A, para. B.5.

[194] Ibid., para. B.3.

[195] Ibid.

[196] See section 20 of the TRC Act.

[197] Prosecution Policy, appendix A, para. C.3.(a).

factor is whether the offence was associated with a political objective and committed in the course of the conflicts of the past, which needs to be determined on the basis of a number of factors: the motive; the object or objective; whether the offence was committed in furtherance of an order or with the approval of an organisation, institution or liberation movement of which the accused offender was a supporter, agent or member; and finally, the relationship between the offence and the objective pursued and the proportionality in respect thereof, which does not include objectives of personal gain and personal malice, ill-will or spite.[198]

The second set of criteria encompasses factors relating to the personal circumstances and behaviour of the alleged offender:[199]

- the degree of cooperation of the alleged offender, including his endeavours to disclose 'the truth of the conflicts of the past, including the remains of victims; or possible clandestine operations […] including the exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.'
- the health of the alleged offender and other humanitarian considerations;
- 'the credibility of the alleged offender';
- the offender's 'sensitivity towards the need for restitution';
- 'the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation';
- the 'renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender'; and
- 'the degree of indoctrination to which the alleged offender was subjected'.

[198] Ibid., para. C.3.(b).

[199] Ibid., paras. C.3.(c) and (d).

The final set of criteria contains a range of rather general factors:[200]

- 'whether the offence is serious';
- the extent to which the prosecution or non-prosecution may positively or negatively affect the national project of nation-building through transformation, reconciliation, development and reconstruction;
- 'whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place';
- 'if relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general';
- 'considerations of any views obtained for purposes of reaching a decision' and any other criteria deemed relevant.

The NDPP must obtain the views of concerned victims before reaching a decision and consult with victims in any further process concerning the perpetrator.[201] Any decision to continue or discontinue investigations or proceed with prosecutions must be approved by the NDPP.[202] Furthermore, the Minister of Justice must be informed of all decisions taken or imminent in respect of procedures under the amendment.[203] A decision not to prosecute and the reasons thereof must be made public.[204] The NPA and other agencies shall not use any information obtained from the alleged offender in the procedure in any possible subsequent criminal proceeding against the person who made the disclosure.[205]

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[200] Ibid., paras. C.3.(e)–(j).
[201] Ibid., para. B.9. and 13.
[202] Ibid., para. B.7.
[203] Ibid., para. B.11.
[204] Ibid., para. B.10.
[205] Ibid., para. B.15.

3.3 *Rationales*

The policy amendment was intended to give effect to the aforementioned announcements of the President from 2003.[206] Generally, it was stated that it was necessary to standardise the dealings with all post-TRC cases in terms of specifically defined criteria, and that the normal policy would not have sufficed for this purpose.[207] As such, to ensure consistency and also considering the complexities of the cases, the amendment determined that all post-TRC prosecutions are centralised at the PCLU. Consistency was especially necessary to avoid undermining the project of nation-building. Thus, the guidelines were designed to provide a uniform, rational, effective and reconciliatory basis on which the cases will be dealt with in the future.[208] A more detailed justification for the guidelines was not provided. Another motive underlying the guidelines, however, seems to be the perceived sensitivity that such cases require in terms of reconciliation and nation-building.[209] Apparently, the guidelines were generally designed to allow the NDPP to stop a prosecution wherever it is deemed detrimental for the overall progress of reconciliation and nation-building.

3.4 *Practical implementation*

Soon after the policy amendment was introduced, the Foundation for Equality before the Law approached the NPA attempting to discover

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[206] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006). See also Prosecution Policy, appendix A, para. A.1.

[207] Ibid.; Presentation at the tabling of the prosecution policy amendment in the Justice Portfolio Committee, Jan 17, 2006, para. 5.3 (available at http://www.pmg.org.za); Justice and Constitutional Development Portfolio Committee *Briefing and deliberation on the amendment of the prosecuting policy to provide for directives for the prosecution of matters before 11 May 1994* Jan 17, 2006 (protocol of minutes available at http://www.pmg.org.za).

[208] Prosecution Policy, appendix A, para. A.5.

[209] Ibid., paras. C.3.(f) and (g).

how the guidelines would be implemented in practice.[210] Various clients of the organisation's attorney, Jan Wagener, were willing to launch an application with the NPA under the policy procedure, should a prosecution target them.[211] Apparently, a satisfactory answer could not be given, which indicates that the practical scope and implementation had yet to be worked out.

As far as the records show, up to the completion of this research in April 2009, only one set of proceedings had been completed under the guidelines. As has already been outlined above, soon after the guidelines came into effect, applications according to the policy amendment were tendered by the three former security police officers, Otto, van Staden and Smit, accused of having attempted to murder Frank Chikane.[212] Shortly thereafter, Vlok and van der Merwe also entered into a disclosure proceeding in terms of the guidelines.[213] The five subsequently made representations during September 2006 and possibly thereafter concerning the crime as required by the policy. In January 2007, the NPA announced that it would push ahead with the charges against the three accused,[214] which obviously meant that it had not decided against initiating a prosecution after conclusion of the guidelines procedure.

For the attorney of the accused, Jan Wagener, the decision to proceed with the charges came unexpectedly.[215] The attorney was absolutely adamant that his clients made full disclosure of their knowledge of the events as required by the guidelines.[216] Vlok, van der Merwe and Smith even submitted themselves to a polygraph test that allegedly proved they had told the full truth.[217] Indeed it is expressly pointed out in the plea

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[210] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[211] Interview with Jan Wagener in Pretoria (May 16, 2006).

[212] See *supra* Chapter 2(9.2).

[213] E-mail from Jan Wagener (Sep 13, 2007).

[214] J.J. Joubert and W. Jordaan *Cops up for apartheid crimes* Beeld, Feb 7, 2007; W.J. da Costa and T. Mtshali *Prosecuting apartheid's soldiers 'divisive'* Pretoria News, Feb 8, 2007.

[215] E-mail from Jan Wagener (Feb 12, 2007).

[216] E-mail from Jan Wagener (Sep 13, 2007).

[217] A. Vlok, J. van der Merwe, C. Smith, G. Otto and M. van Staden, press statement (Aug 17, 2007).

agreement that the accused approached the NPA immediately to take part in the procedure under the guidelines and made disclosure. The plea bargain ambiguously states in Afrikaans that the accused have '*oop kaarte gespeel*', which means that they have played with their cards on the table.[218] Although it is not expressly stated that there was full disclosure, the expression nevertheless logically indicates that the accused did not hide anything. Furthermore, the accused eventually asked for forgiveness and showed remorse. Chikane had previously indicated that he is not really interested in their prosecution.[219] In a spectacular symbolic act of repentance Vlok publicly washed Chikane's feet in August 2006 at the Union Buildings in Pretoria,[220] which coincided with and was certainly connected with the guidelines procedure. Vlok and van der Merwe cooperated with the TRC to a considerably higher degree than other leading apartheid officials. All of these factors are explicit criteria of the guidelines, which logically can only lead to one decision: not to prosecute. This is especially true for Vlok and van der Merwe who came forward voluntarily. On the basis of the guidelines, it is therefore not clear why the NDPP nevertheless decided to prosecute. The decision might have been taken for obscure political reasons.

However, the NPA refused to furnish reasons for its decision to the public or the accused and did not provide any information whatsoever on the proceedings.[221] On the occasion of the presentation of the plea bargain arrangement, the guidelines proceeding was also not properly investigated, although it was obviously closely connected to the plea agreement.

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[218] *S v Johannes Velde van der Merwe en andere* (Pretoria High Court) pleit en vonnisooreenkoms 15 August 2007 at para. 80.

[219] E. Naidoo *No general amnesty for apartheid crimes* The Sunday Independent, July 3, 2005.

[220] M. Swart 'Sorry seems to be the hardest word: apology as a form of symbolic reparation' (2008) 1 *South African Journal on Human Rights* 50 at 64.

[221] E-mail from Jan Wagener (Feb 16, 2007).

3.5 *Reactions to the guidelines*

The reactions from within the sector of human rights, victim organisations and activists to the guidelines and the process of their drafting were overwhelmingly critical. As the criticisms have common features, the main points can be summarised here:[222]

- The guidelines effectively amount to a replica of the amnesty procedure as was laid out in the TRC Act. As the NDPP is entitled to decide against an indictment if the perpetrator makes a full disclosure, the policy confers powers on the NPA, which were formerly exercised by the Amnesty Committee. This continuation of the TRC's legal regime on amnesty is unacceptable since the amnesty process had taken place in a carefully confined and negotiated framework, which was not meant to be extended.
- Perpetrators were deliberately given a second chance to achieve impunity, although many shunned the TRC process in the first place by rejecting the very generous offer of amnesty or presented untruthful versions of their crimes. This is totally unacceptable considering the great concession the amnesty scheme demanded of victims.
- The process outlined by the policy amendment totally lacks transparency. In stark contrast to the TRC legislation, the new guidelines do not make provision for the publication of information deriving from perpetrator testimonies or the records thereof. The procedures will be carried out *in camera*. The public does not even have to be informed if a procedure according to the guidelines is taking place.

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[222] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006); Memorandum of Howard Varney on discussion concerning the prosecution policy amendment attended by Yasmin Sooka, Marjorie Jobson, Howard Varney, Ahmed Motala (executive director of the CSVR), Jody Kollapen (chair of the South African Human Rights Commission) (Dec 9, 2005) (on file with author); Y. Sooka *Panel presentation at the Institute for Justice and Reconciliation conference 'the TRC: ten years on'* (April 20, 2006); M. Jobson *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006); Institute for Justice and Reconciliation *Statement: the IJR conference on the TRC: ten years on* (2006).

- Sufficient provision is not made for a satisfactory involvement of victims in the process. There are not even provisions for concerned victims to be given an exact record of the representations made by the relevant perpetrator.
- Although the policy amendment fundamentally concerns the rights and interests of many victims of apartheid era crimes, there was regrettably no consultation or cooperation with victim organisations in their drafting. While the TRC process was always accompanied by extensive public participation and discussion, the drafting of the guidelines took place entirely behind closed doors. This contravenes the spirit of openness and democratic debate, which had been established during the TRC process.
- The centralisation of all TRC cases in the office of the PCLU needs to be accompanied by a huge increase in the provision of resources, if the unit is to be capable at all of dealing with all possible cases. Otherwise the result would be a de facto amnesty for most cases.
- The NPA's contention that victims should not feel aggrieved if a prosecution is not pursued, since they can seek civil redress or prosecute privately,[223] is utterly disingenuous.[224] It is absolutely clear that neither private prosecutions nor civil claims are a realistic option. Generally, according to section 7 of the Criminal Procedures Act anyone with a substantial interest in a case can institute a private prosecution, in the event that the NDPP has issued a certificate stating that the State declines to prosecute the matter.[225] The privately prosecuting party must carry out the complete investigation for the case.[226] The NPA is not even obliged to hand over evidence and incriminating material it has already prepared.[227] The private litigant is also without investigative

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[223] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006). See also Prosecution Policy, appendix A, paras. A.3.(d) and A.4.

[224] Interview with Howard Varney in Johannesburg (May 6, 2006).

[225] *Nolle prosequi* certificate. See sections 7–16 of the Criminal Procedure Act.

[226] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 218.

[227] Ibid.

rights similar to those of the NPA and police.[228] Furthermore a private prosecution imposes a great financial onus and risk on the litigant, since they must finance the investigation and, in the event of an acquittal, not only incur their own legal costs but also those of the accused's defence team.[229] Victims and NGOs certainly cannot meet these demands.[230] Furthermore, the time limit to pursue civil claims has lapsed in most cases and is thus also not a realistic option.[231]

Right after the amendments entered into force a number of human rights organisations have asked the government to set the guidelines aside.[232] Various international NGOs have also joined in criticising the guidelines. For example, the International Bar Association expressed deep concern over the policy, since it replicates the TRC amnesty legislation, seriously violates victims' rights and could foster a culture of impunity for the human rights violations committed under apartheid.[233] A number of African human rights organisations, the International Centre for Transitional Justice and former Constitutional Court Judge Richard Goldstone voiced similar concerns in a letter to the President.[234] It is also noteworthy that the policy was also rejected by senior members of the PCLU.[235] Some prosecutors requested civil society to

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[228] Ibid., 46.

[229] Ibid.

[230] Interview with Howard Varney in Johannesburg (May 6, 2006); Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[231] Interview with Howard Varney in Johannesburg (May 6, 2006).

[232] Y. Sooka *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[233] Letter from Mark S. Ellis, executive director International Bar Association, to Brigitte Mabandla, Minister of Justice and Constitutional Development (March 14, 2006) (on file with author). See also International Bar Association, press statement *IBA critical of amendments to South Africa's prosecution policy* (March 29, 2006). The International Bar Association is a leading international organisation of legal practitioners, bar associations and law societies.

[234] Letter to President Thabo Mbeki, President of South Africa (April 7, 2006).

[235] T. Pretorius *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

monitor the processes carefully to see that the guidelines are not being misused.[236] They argued that the guidelines did not add any practical value to their work and are simply not necessary to conduct effective and successful prosecutions.[237]

Considering the strong rejection of the amendments by human rights and victim groups, it is rather surprising that the representative of perpetrators, the Foundation for Equality before the Law, also strongly rejected the guidelines. They believed that the criteria's vagueness and obscurity make them highly unpredictable.[238] They also suggested that prosecutors will not be able to conduct the procedure in an impartial way, since they will have already investigated the case and have prepared an indictment.[239] They, thus, will have reached specific conclusions on the course of events in the specific case. Regardless of whether such conclusions are correct or not, the prosecutors will inevitably judge the credibility of a perpetrator's 'full disclosure' on the basis thereof. It would have been important and far better, if such a procedure had been placed before an independent forum, such as a court, as had previously been suggested in the consultations with the government.[240] Some have nevertheless identified positive potential for the guidelines' procedure, as perpetrators who had been denied amnesty unjustly at the TRC would get a second chance and generally the probability of criminal trials would be diminished.[241] However, representatives of perpetrators had expected, on the basis of the apparently promising negotiations with the government, a clear legislative solution providing for an independent and foreseeable indemnity mechanism, which would lay out clear preconditions and a strict obligation to grant indemnity. However, the guidelines did not meet this expectation. Against this

[236] Ibid.

[237] Interview with Anton Ackermann in Pretoria (May 11, 2006).

[238] Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[239] E-mail from Johan van der Merwe (May 31, 2006); E-mail from Johan van der Merwe (June 4, 2006).

[240] Ibid.

[241] Interview with Jan Wagener in Pretoria (May 8, 2006).

background, to some in the Foundation for Equality before the Law the guidelines were rather unexpected.[242]

3.6 *Court challenge of the guidelines*

In July 2007, various relatives of victims of crimes committed by the apartheid security forces as well as human rights NGOs launched an application at the Pretoria High Court against the amendment of prosecution policy. The application sought an order of the High Court to suspend and stay the operation of the prosecution guidelines and to eventually declare the policy amendments to be inconsistent with the South African Constitution, and therefore unlawful and invalid.[243]

The applicants were Thembisile Nkadimeng, the sister of MK activist Nokuthula Simelane, who was abducted, tortured and probably murdered by the security police in 1983,[244] Nyameka Goniwe, Nombuyiselo Mhlauli, Sindiswa Mkhonto and Nomonde Calata, the widows of the four liberation movement activists known as the Cradock-Four, who were murdered by members of the Eastern Cape security police in 1985[245] as well as three human rights organisations, the Khulumani Support Group, the CSVR and the International Centre for Transitional Justice in New York.[246] The respondents were the NDPP, the Minister of Justice, the alleged perpetrators in the Cradock-Four murder case, Eric

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[242] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[243] *Thembisile Nkadimeng and others v National Director of Public Prosecutions and others*, Notice of Motion, Case no. 32709/07 (T) July 2007 (on file with author).

[244] See *infra* Chapter 4(5.1.1).

[245] See *infra* Chapter 4(5.2).

[246] The applicants were represented by lawyers from the Legal Resources Centre in Johannesburg and the Foundation for Human Rights has contributed to the funding (Interview with Howard Varney in Johannesburg (May 6, 2006)). The victims' relatives brought the application in their own interest as family members of the deceased persons in terms of section 38(a) of the Constitution, the organisations' application was based on their own interest and the representation of the public interest in terms of section 38(d) of the Constitution. All applicants also based their interest on the overall interest of the group of all apartheid victims possibly concerned by the Prosecution Policy in terms of section 38(c) of the Constitution.

Taylor, Johannes Lotz, Johannes van Zyl and Hermanus du Plessis as well as the alleged perpetrators in the Simelane case, Willem Coetzee, Anton Pretorius, Frederick Mong and Msebenzi Radebe.

The applicants expect the prosecution of the alleged perpetrators, since they were refused amnesty either completely, as in the Cradock-Four case, or for parts of the crimes, as in the Simelane case. They argue that the prosecution policy potentially prevents this from happening, should the alleged perpetrators successfully apply for indemnity under the procedure, a result that they seek to prevent.[247] It is submitted that the policy amendment allows for the NDPP to grant de facto indemnity to perpetrators and thereby infringes the right to dignity according to section 10 of the Constitution, as the protection of perpetrators from prosecution is at the expense of victims and victims' families who are thereby denied justice and whose quest for closure is prevented. Their respect, dignity and value in the wider community is undermined and the constitutional pact underlying the agreement on amnesty, on which many victims relied, is demeaned. The right to life according to section 11 of the Constitution would be violated, as murderers remain unpunished. As the impunity mechanism also encompasses acts of torture and abduction, the right of an individual to his/her freedom and security, as stated under section 12 of the Constitution, would also be violated. Moreover, there would also be a violation of section 9 of the Constitution, the right to equal protection and equality before the law, since the policy discriminates against victims of a crime committed with a political objective before 11 May 1994 and perpetrators who participated in the amnesty process in good faith and were granted amnesty as well as those who did not participate at all or were refused amnesty but who now get a second offer of indemnity. The unlawfulness of the policy is further highlighted in two ways: first, by the fact that it is not a law of general application, which is required by section 36(1) of the Constitution for any limitation of the Bill of Rights; and second, by the rule of law as enshrined in section 1 of the Constitution, since the

[247] *Thembisile Nkadimeng and others v National Director of Public Prosecutions and others*, Founding Affidavit, Case no. 32709/07 (T) July 2007 (on file with author).

policy grants selective impunity in a manner that lacks transparency and prevents sufficient participation of interested parties. The policy guidelines would also constitute an infringement of South Africa's international law obligations as it violates the International Covenant for Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The respondents answered the criticism that the policy amendments would not allow for decisions not to prosecute in cases where there is sufficient evidence. Furthermore, it could not amount to effective indemnity in any event, because perpetrators would still be exposed to private prosecutions and civil claims. During the court hearings, the NDPP counsel submitted that representations in terms of the amendments would have no other purpose than to be used for plea and sentence or state witness arrangements in terms of sections 105A and 204 of the Criminal Procedure Act.

With the judgment on 12 December 2008 of judge Legodi, the High Court of Pretoria declared the policy amendments to the National Prosecution Policy to be inconsistent with the Constitution, unlawful and invalid and therefore suspended them.[248] The Court found that representations by perpetrators as envisaged by the policy amendment are not sanctioned by the Constitution. Section 179(5)(d) of the Constitution only provides for representations in cases where a decision to institute a prosecution has already been taken. However, in the view of the Court, representations in terms of the amendments apply to persons who are still facing possible prosecution.[249] The Court went on to point out that representations in terms of the guidelines cannot be the representations which are required in terms of sections 105A (plea bargaining) or 204 (state witnesses) of the Criminal Procedure Act, because both provisions apply only to situations where a prosecution has already been initiated. Furthermore, in terms of section 204

[248] *Nkadimeng and others v The National Director of Public Prosecutions and others* (Transvaal Provincial Division) Case no 32709/07, unreported, at para. 18.1.

[249] Ibid., at para. 15.3.1.1 and 15.3.1.2.

of the Criminal Procedure Act, indemnity is granted by a court and not by the NDPP.[250]

The Court accordingly concluded that the policy amendments could only mean that perpetrators be granted indemnity in cases of full disclosure, because otherwise the making of representations would not make sense. There would also be no incentive for perpetrators to come forward and make representations on their deed, if they would not afterwards be rewarded with a decision by the NDPP not to prosecute.[251] Consequentially, there would be simply no need for the disclosure procedure if it was not intended to result in indemnity.[252] Against this background the Court labelled the amendments in drastic terms as a "recipe for conflict and absurdity".[253] Accordingly, the Court confirmed the position of the applicants in that it views the amended guidelines as a copy of the TRC amnesty mechanism. It also pointed out that there cannot be any systematic connection between criteria such as the degree of remorse, the effects on reconciliation etc and a decision whether to prosecute or not.[254] The Court considered that the NPA has to prosecute where there is sufficient evidence to secure a conviction and a decision not to do so under such circumstances would be unconstitutional.[255] In this context it referred to a constitutional obligation of the NPA to prosecute.[256] The Court stated that it is not for victims to investigate crimes but much rather the responsibility of police and prosecutors to do so.[257] The making of representations directed at allowing for decisions

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[250] Ibid., at para. 15.3.1.4.

[251] Ibid., at para. 15.5.3.1. The court apparently presumed that there is no protection mechanism for self-incriminating disclosures. It either did not consider paragraph B.15. of the amendment, where it is stated that no state agencies shall use information stemming from perpetrator disclosures in any proceedings against the person at a later stage, or did not consider that provision to sufficiently rule out the use of self-incriminating evidence, since it is not a law.

[252] Ibid., at para. 15.5.4.

[253] Ibid., at para. 15.5.3.

[254] Ibid., at para. 15.14.3.

[255] Ibid., at para. 15.4.4.

[256] Ibid., at para. 15.5.2.1.

[257] Ibid., at para. 16.2.3.3.

not to prosecute would accordingly be unlawful but in light of sections 105A and 204 of the Criminal Procedure Act also totally unnecessary. The normal prosecution policy is sufficient to provide guidelines for the decision whether to prosecute or not.[258]

Thus, in strong terms the Court declared the amendments to be unconstitutional. However, the judgment lacks supportive legal analysis. The Court did not base the conclusions it reached on a systematic legal interpretation and application of the respective explicit or implicit constitutional provisions at all. The NPA has lodged an appeal against the High Court ruling at the Supreme Court of Appeal, which had still not been heard or concluded upon the publication of this book.

3.7 *Evaluation*

The amendment of the prosecution policy reveals a great deal on the political viewpoints of the government and the developments on post-TRC prosecutions behind the scenes. They will therefore be evaluated in the following paragraphs.

3.7.1 *The guidelines criteria*

The criteria are rather vague. This is especially the case with respect to those criteria relating to a perpetrator's personal circumstances, such as the degree of remorse and his/her attitude towards reconciliation, the willingness to abide by the Constitution, etc. The same is true for criteria concerning the possible impact of a trial on society such as its effect on nation-building and reconciliation. It appears very unlikely that prosecutors will be in a position to determine such implications properly and with certainty so as to be able to apply the criteria in a consistent manner. Furthermore, the policy document does not specify how the individual preconditions that make up the criteria relate to each other in practical application. According to the NPA, there is no

[258] Ibid., at para. 15.3 and 15.4.

hierarchy in the catalogue.[259] Thus, what if the accused makes a full disclosure before the NDPP, yet shows no inclination to effect restitution? What if a victim demands prosecution, but the perpetrator has complied with all other criteria? The policy amendment does not even outline what the specific result of the process must be, if the alleged perpetrator has complied with most criteria. It is only stated that the criteria must be applied in a balanced way before reaching a decision on whether or not to prosecute.[260] The final decision remains in the NDPP's discretion.

However, even though the implementation in the Chikane case provided a different example, in theory, regarding the logic of the guidelines, one would expect that the satisfaction of the disclosure and political offence requirements in particular were intended to lead to a decision to preclude prosecution. Also, should the NDPP be convinced that a specific prosecution will have a negative impact on reconciliation, lead to renewed trauma or that the perpetrator cooperated satisfactorily, such circumstances were also meant to lead to a non-prosecution. What sense would it, in terms of the guidelines, make to press for a prosecution, if such a case would obviously harm the reconciliation effort in a specific case? Or why should one decide to prosecute an alleged perpetrator if he came forward and made a full disclosure and cooperated with the authorities in unearthing the truth? Thus, in theory the catalogue of criteria essentially outlines a whole range of reasons on which a decision not to prosecute can be based.

Furthermore, most criteria seem rather out of place for that particular stage of a criminal procedure. For one, with regard to the general prosecution policy, it is incomprehensible why factors like the accused's willingness to abide by the Constitution should contribute to a decision to forego prosecution, especially in the context of such serious crimes as murder or torture. Secondly, personal factors, such as the degree of indoctrination, should be considered by the trial court in handing

[259] *Presentation at the tabling of the prosecution policy amendment in the Justice Portfolio Committee*, Jan 17, 2006, para. 5.3 (available at http://www.pmg.org.za).

[260] Prosecution Policy, appendix A, para. C.3.

down a just sentence but should not have a connection to the question of whether a trial should be initiated in the first place.

It also seems inappropriate to place such a procedure before the NDPP. The NDPP's sole purpose in terms of section 179(2) of the Constitution is to hold perpetrators of crimes accountable. However, prosecutors would be required by the guidelines to consider a range of criteria on behalf of the perpetrator, which are outside the normal criteria outlined in the general prosecution policy. A conflict of interest between exercising the duty to prosecute and assessing wide-ranging factors for the perpetrators is inevitable. Obviously, a court would have been better charged with conducting such a process, as it would resemble more closely its usual tasks in a criminal trial of assessing mitigating and aggravating circumstances on the side of the accused.

3.7.2 *A copy of the amnesty process?*

The policy amendment more or less repeats verbatim the preconditions for granting amnesty through the Amnesty Committee according to the TRC Act. As such, the requirement for the crime to be associated with a political objective and to be committed in the course of the conflicts of the past,[261] including the catalogue of factors determining this,[262] is repeated, as well as the requirement to make a full disclosure of all relevant facts, factors and circumstances concerning the crime.[263] The major difference to the TRC Act is that the policy amendment does not provide an outline for attaining a strict resolution. Whereas the Amnesty Committee was legally obliged to grant amnesty once it was satisfied that the preconditions had been met, the decision in terms of the guidelines still remains at the discretion of the NDPP. However, it is clear that under the terms of the amendment the NDPP may refuse to prosecute once a full disclosure has been made and the offence can be deemed political. As also the High Court of Pretoria has pointed out, this might logically even be a decision intended for such cases by

[261] See section 20(1)(b) of the TRC Act.

[262] See section 20(3) of the TRC Act.

[263] See section 20(1)(c) of the TRC Act.

the authors of the prosecution policy guidelines. Also, since private prosecutions are not a realistic option, a decision by the NDPP not to prosecute grants the perpetrator a *de facto* indemnity or amnesty. Thus, in essence the amendments repeat the basic TRC amnesty scheme of a trade-off of impunity for a full disclosure, yet at the full discretion of the NDPP. The NPA was, however, at pains to stress that the guidelines were not meant to be a rerun of the TRC amnesty process, which is also emphasised in the policy amendment.[264] The strong resemblance of the guidelines to the TRC Act suggests otherwise.

However, there are major differences between the policy process and the TRC amnesty process with regard to victim and public participation. While the Amnesty Committee hearings relating to gross human rights violations took place in public,[265] and the records of hearings and decisions were published, the process outlined by the policy amendment could take place completely *in camera*. Confessions made on a specific crime could not necessarily be published. Also, while at TRC amnesty hearings concerned victims could be present, testify, adduce evidence or submit other relevant material,[266] no such provisions were made in the policy amendment. Obviously the interest was to ensure the procedures received as little public attention as possible. Moreover, there are other fundamental differences. While the run-up to the amnesty legislation was accompanied by large-scale public participation and gave ample opportunities for victim interest groups to give their input, the drafting process for the guidelines did not involve public participation at all and numerous demands of the major victims organisation, Khulumani, for information were simply totally ignored.

These facts contradict the President's statements, in which he maintained that the involvement of victims would be crucial in determining the future course of action and specific agreements between perpetrators and the NPA. He also stated that the matter could not be dealt with

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[264] NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006); Prosecution Policy, appendix A, para. A.3.

[265] See section 33(1)(a) of the TRC Act.

[266] See section 19(4)(b) of the TRC Act.

by another amnesty process as this would fly in the face of victims, considering their concessions made in the first amnesty process.

3.7.3 *A political instrument and product of the consultations?*
The political consultations with representatives of the former security forces, which preceded the enactment of the guidelines, indicate that the amendment of the prosecution policy was designed merely to meet the political concerns, highlighted at the meetings. Any discernable similarity between the two processes would underline this perception that the guidelines were intended to be a tool to pursue a political agenda driven by the concerns and motivations, which surfaced at the talks.

However, there was not a direct continuity between the drafting of the guidelines and the consultations, which came to an end by 2004. The meetings with the generals resulted in a specific legislative proposal, which was not enacted in the form agreed upon. Thereafter, the process of drafting the policy amendment was conducted without the proper involvement of the former security forces. The generals were not even involved.[267] Thus, the policy amendment was not a direct product of the consultation processes. Nevertheless, it was certainly influenced by it to a great extent, since there are significant similarities between what was discussed or agreed upon in the consultations and what was incorporated in the policy. The policy amendment reproduces the basic scheme, which already formed the core of the draft legislation worked out in the SADF consultations, i.e., that a full disclosure of a political crime can result in non-prosecution. Equally, the negotiations with former police members envisaged the granting of indemnity, if some kind of disclosure was made and if the crime satisfied the political offence requirement according to the TRC Act criteria. Accordingly those who participated in the consultations or had insight into their operation, maintain that the guidelines contain a number of central features from the negotiations on how to avoid full-scale prosecutions

[267] Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

in the wake of the TRC.[268] Thus, although the guidelines even go beyond that, the repetition of central preconditions for the granting of amnesty contained in the TRC Act is a feature, which emanates from and was worked out in the consultations with perpetrator groups. One must therefore conclude that the guidelines' enactment was obviously part of, and was in a way the conclusion of a broader political process that was characterised by the secret consultations with the perpetrator groups, which were already underway in 1998.

There are, however, two major differences. While both proposals of the security forces envisaged that any further indemnity process should be outlined by specific legislation, the guidelines are not a law but merely a directive for prosecutorial practice. Secondly, while the proposals envisaged that the indemnity process must take place before a court or in the course of a trial and must be conducted by a judge, the policy amendment places the decision concerning a non-prosecution in the discretion of the prosecutor. This point in particular makes the guidelines, in terms of how the public can benefit from further perpetrator disclosures and in terms of what should be required for a consistent and reliable process of post-TRC prosecutions, even less attractive than the proposals from the consultations. The proposals would have guaranteed public transparency as the process would have taken place in a criminal trial or at least before a court. Through the court records and possibly the reasons given by the judge for his decision, the information deriving from the perpetrator testimonies would have been retained and could have contributed to the compilation of a public record on apartheid atrocities. Furthermore, if indemnity had been granted in the course of an ordinary criminal trial, there would have been fixed rules for victim participation according to the normal provisions of criminal trials. Accordingly the solutions would have ensured more reliability and independence since indemnity would have been granted by a judge and in the course of a criminal trial. Thus, the

[268] Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Wagener in Pretoria (May 8, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006).

proposals from the consultations clearly had some significant advantages over the guidelines.

The decision to turn away from these specific features of the proposals was certainly for concrete reasons. By not enacting the indemnity scheme as a law, the intention may have been to shield the guidelines, to a certain degree, from scrutiny according to the constitutional principles outlined by the Constitutional Court concerning the constitutionality of the TRC Act's amnesty legislation, which had also set out guidelines for the validity of any future legislation on amnesty.[269] This speculated goal was not reached, at least in the High Court litigation. Furthermore, placing the decision to prosecute at the discretion of the NDPP retains a much greater degree of influence for the government on criminal proceedings. The events in the Chikane case have clearly shown that the government is in a position to influence decisions of the NDPP and that its position is not entirely independent from political influence. The NDPP followed the instructions of the government to revoke a specific prosecutorial decision, although the preconditions for a prosecution of the accused had certainly been fulfilled. Although the Minister of Justice has final word on the NPA in terms of section 179(6) of the Constitution, the government is by no means entitled to interfere with the actual conduct of specific prosecutions and may not influence a specific discretional decision to prosecute. The NDPP is also by no means obliged to obey instructions by the government in respect thereof.[270] However, with regard to post-TRC prosecutions, the situation is obviously different. This was shown by the imposition of the moratorium on all post-TRC prosecutions and the political intervention in the scheduled arrests of the three security police officers in the Chikane case.

Also, it was often suggested that the position of the NDPP was generally strongly exposed to political influence and that the NDPP

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[269] See *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996. See also infra Chapter 4(1.1.1).

[270] J. de Waal and I. Currie *The new constitutional and administrative law* vol. 1 (2001) 313.

had thus far been very loyal to the government.[271] The legislative setup of the restructured prosecution authority has given rise to criticisms concerning the position of the NDPP in conjunction with politics. On the one hand, it provides for the appointment of the NPA's head by a totally independent decision of the President,[272] and on the other hand it gives the NDPP a very powerful position; it can review any decision to prosecute and has generally great influence on practically all prosecutors and criminal proceedings[273].[274] Considering the appointment process of the NDPP, which is entirely in the discretion of the President, there were doubts that the NDPP would be sufficiently independent and thus subject to politics.[275] The appointment of a highly political figure as the first NDPP has further fuelled such apprehensions.[276]

The policy amendment foresees that the decision-making process as to whether to prosecute a post-TRC case is entirely up to the NDPP since it is empowered to make any final decision. Due to this, and the fact the policy is, to a certain degree, the conclusion of the political process of consultations it is probable that the guidelines were meant to serve as a political instrument. One can assume that the process was drafted to give the government a tool to exercise political influence in situations where it is deemed necessary, such as in the Chikane case and eventually to pursue the agenda discussed at the consultations of keeping the number of trials to a minimum.

3.7.4 *Conclusion*

The prosecution policy amendment for TRC-related cases was certainly driven by the government's motivations arising out of the consulta-

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[271] Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Jan Wagener in Pretoria (May 8, 2006).

[272] See section 179(1)(a) of the Constitution and section 10 of the NPA Act.

[273] See section 179(5)(d) of the Constitution and section 22 of the NPA Act.

[274] D. van Zyl Smit and E. Steyn 'Prosecuting authority in the new South Africa' in *Centre for the Independence of Judges and Lawyers Yearbook* vol. 8 (2000) 137 at 146.

[275] Ibid., 151 and 153; M. Schönteich *Lawyers for the people* (2001) 44 and 46.

[276] Ibid.

tions with various representatives of the former apartheid security forces, which were aimed at finding solutions to keep the number of post-TRC trials as low as possible. The guidelines for their setup and criteria create wide-ranging opportunities to forego prosecuting the crimes of apartheid and had the potential to easily prevent a number of cases from reaching the stage of indictment.

The first case considered under the guidelines did not lead to impunity. Although *prima facie* a number of the most important criteria were complied with, the NDPP decided to prosecute. However, it cannot be determined with certainty what the NPA's reasons were for deciding to lay charges in the Chikane case after all, since no information was made public on the guidelines procedure preceding the plea and sentence agreement. It also cannot be ruled out that the decision was essentially political and thus not representative. The Chikane procedure at least shows that the guidelines are a highly flexible means according to which arbitrary decisions can be made without any public participation or reasoning. It also shows that, contrary to what one would expect on the basis of the theoretical setup of the policy amendment, one cannot assume with certainty that the guidelines procedure automatically resulted in a *de facto* indemnity of the alleged perpetrators, in cases where its criteria were complied with.

Since the concept of the process is lacking transparency and public participation, neither victims nor the public could be certain to benefit in terms of publishing more information regarding the truth about apartheid era atrocities. Generally, the practical value of the procedure would be very limited. The main reasons for the guidelines put forward by government officials were that a holistic approach was necessary and that effect should be given to the President's speech to reveal more information on possibly dangerous networks.[277] However, in terms of

[277] The proposition that secret networks at all still pose a latent danger to the state is strongly rejected by many but cannot be answered conclusively in this book (Interview with Jan Geldenhuys in Pretoria (May 15, 2006); Interview with Johan van der Merwe in Pretoria (May 5, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Yasmin Sooka in Pretoria (May 3, 2006)). The existence of a range of weapons caches which are still hidden is, however, not doubted.

giving incentives to perpetrators to reveal more information, it would also be possible to use the two legal mechanisms of plea and sentence and state witness agreements according to sections 105A and 204(2)(a) of the Criminal Procedure Act. Both mechanisms encourage perpetrators to come forward and disclose in exchange for a complete or partial indemnity.[278] Since it is unlikely that perpetrators who thus far deliberately refused to cooperate will now come forward voluntarily, the basic precondition of the threat of an imminent prosecution is the same. Moreover, plea-bargaining and state witness arrangements, which take place within a clear legislative framework and are independently adjudicated by a court, might also be far more convenient for perpetrators, especially considering the Foundation for Equality before the Law's strong critique concerning the vagueness and unpredictable nature of the guidelines. The proceedings in the Chikane case are also indicative with regard to the apparent lack of practical necessity, since it is not comprehensible why the accused first underwent the new procedure and apparently made extensive disclosures, if they were eventually convicted via a plea and sentence agreement.

By enacting the guidelines, which could potentially prevent further trials, the government contradicted the recommendations of the TRC and the overall scheme of conditional amnesties, which foresaw prosecutions in cases where amnesty was not granted. Furthermore, a setup which allows for the granting of *de facto* indemnity on a regular basis in cases where a full disclosure is made, as the High Court asserts the function of this amendment to be, is an essential reproduction of the amnesty process, which would have grave consequences for the legitimacy and reputation of the TRC's amnesty process and for the interests of victims in the amnesty process. The TRC Act provided for a definite and specified time frame for the amnesty process. This was the result of extensive discussions and part of a broad consensus. It was never meant to be extended in any form. This would be totally unacceptable for victims who relied on the fixed framework of the

[278] See for both mechanisms also *infra* Chapter 4(3.3).

amnesty legislation.[279] Furthermore, the drafting process has led to further alienation of official politics from the civil sector, human rights and victim organisations.

As a result, one must conclude that the guidelines marked a grave step backwards in the process of establishing accountability for apartheid era crimes after the conclusion of the TRC; a step which has been reversed by the High Court in Pretoria. However, the great delay and uncertainty in prosecuting apartheid era crimes which has been caused by the enactment is irreversible.

4. *Conclusion on Government's Political Considerations*

As shown above, the issue of criminal accountability in the wake of the TRC is, to a large extent, charged with political influences and considerations. In the following subchapter the political motivations and considerations on the part of the government will be summarised and evaluated. New aspects will be highlighted.[280]

Although in 1998 President Mandela called for trials within a fixed timeframe, the subsequent government under President Mbeki was clearly reluctant to create the appropriate conditions to institute trials on a general basis. Instead it engaged in working out solutions on how to avoid further trials and on how to enact new indemnity legislation, stopped a promising prosecution and imposed a moratorium, which further delayed the proper start of trials for more than one year. The approach indicates a clear lack of political will.

Key reasons for the government's generally dismissive attitude towards prosecutions lie in the motivations for entering into consultations with

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[279] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Desmond Tutu in Cape Town (March 22, 2006).

[280] It is important to mention that no comment or statement was made by government officials. The deputy Minister of Justice, Johnny de Lange and the Director-General of the President's office, Frank Chikane, were both unsuccessfully approached for comment by the author. The government's approach therefore had to be determined on the basis of the information laid out in the subchapters above.

the SADF generals, which have been laid out above.[281] However, there are other factors that contribute to the generally dismissive attitude towards trials. Commentators and experts on the issue of post-TRC prosecutions see as a central factor the fact that former liberation fighters can also become the focus of the prosecution authorities.[282] Former liberation movement cadres who were not granted amnesty are legally as exposed to criminal liability as former security forces operatives. The trial of former activist Ronnie Blani highlighted discomfort among ANC and government members concerning the prosecution of liberation activists. Of course, not only ordinary rank and file but also members of the higher echelons of the ANC and government could be vulnerable to prosecution. A number of leading ANC members submitted 'collective' amnesty applications, which had been refused.[283]

In November 1997, 37 high-ranking members of the ANC submitted applications for amnesty. Among them were current President Thabo Mbeki,[284] former Deputy President Jacob Zuma and ministers such as Charles Nqakula or the National Commissioner of Police Jackie Selebi. In support of their application, all commonly referred to a declaration of the ANC formulated for this purpose.[285] As such the applications

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[281] See *supra* Chapter 3(2.2.2).

[282] Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Desmond Tutu in Cape Town (March 22, 2006); Interview with Charles Villa-Vicencio in Cape Town (March 29, 2006); J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 265–66. Klaaren and Varney also suggested that the prospects of huge delictual claims against the state or political organisations such as the ANC following a conviction in a criminal trial could be a factor. However, since no further signs indicating the relevance of this issue could be made out and thus far no claims have been lodged, this issue can be left aside.

[283] See further L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 39–44; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 15 and 214; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 140; *TRC Report*, vol. 1, chap. 7, para. 95 (Practically all sources only deal with the political and legal implications of the applications and not with the contents thereof.).

[284] Application no. AM/5506/97.

[285] Decision no. AC/99/0046.

stated that collective responsibility was assumed for all criminal acts committed by ANC members in the execution of the ANC's strategic and policy decisions during the struggle against apartheid.[286] It was further stated that none of the applicants had been aware of or involved in any crimes and could not have knowledge of all particular acts committed on the basis of their policy directives. Accordingly no particular acts or specified incidents were mentioned in the applications.[287] Although they obviously contravened section 20(1) of the TRC Act, which requires that a particular crime should be disclosed in any application for amnesty, the Amnesty Committee granted amnesty for the 37 applications.[288] The decision was challenged by both the TRC and the NP.[289] The Cape Town High Court in May 1998 reversed the decision to grant amnesty and ordered that the applications be considered anew.[290] Meanwhile, over 70 other applications by high-ranking ANC members had been tendered, which were also based on the common declaration.[291] Eventually, in the second run, the Amnesty Committee refused to grant amnesty in any of the applications since no specific conduct, which could constitute a crime, had been disclosed.[292]

However, since no particular acts were disclosed in the applications it does not automatically mean that a prosecution concerning the application has to follow. Nevertheless, the mere fact that top ANC members had been denied amnesty was politically exploited

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[286] *TRC Report*, vol. 1, chap. 7, para. 95.

[287] Decision no. AC/99/0046; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 16.

[288] *TRC Report*, vol. 1, chap. 7, para. 95.

[289] See L. McGregor 'Individual accountability in South Africa: cultural optimum or political facade?' (2001) 95 *American Journal of International Law* 32 at 41. Due to section 5(e) of the TRC Act, the TRC could not instruct the Amnesty Committee to withdraw its decision. The NP accused the Amnesty Committee of bias.

[290] *The National Party of South Africa and James Marren Simpson v The Chairperson; Committee on Amnesty of the Truth and Reconciliation Commission and 38 others* (C) Cases no 3626/98, 3859/98, 3729/98 8 May 1998, unreported.

[291] Decision no. AC/99/0046; J. Sarkin *Carrots and sticks: the TRC and the South African amnesty process* (2004) 276.

[292] Decision no. AC/99/0046.

and used to pressure the government. As mentioned above, various political parties and organisations called for 'even-handed' prosecutions, 'equally' targeting ANC members.[293] As most of the advocates of such calls rejected the idea of prosecutions and preferred the concept of a general amnesty, it is obvious that the call is intended to pressure the government into stopping further trials. The Foundation for Equality before the Law, represented by its attorney, Wagener, even went so far as to compile complete dockets supporting the prosecution of top ANC members, including about five of the top ANC leadership, among them President Mbeki.[294] An attorney, Jaap Cilliers, who had also been the attorney of Wouter Basson, had been approached to evaluate the dockets. It was claimed the dockets contained sufficient evidence to support charges.[295]

The PCLU even requested the Foundation for Equality before the Law to hand over the dockets since it intended to investigate the matters and evaluate the possibility of pressing charges.[296] The organisation refused. It of course had no interest in the conviction of top ANC members, since its preference was for the preclusion of all prosecutions.[297] Only in the event of further trials, especially if such prosecutions focused only on the former apartheid side and not on liberation movement crimes, was there an intention to use the gathered information as a means to exercise political pressure and to publish the information and, only theoretically, to eventually engage in private prosecutions, all with the aim of preventing any further trials.[298] In 2004, when the arrests in the Chikane case were suddenly suspended on the directions of the President, the issue apparently played an influential role. According to Wagener, he used the matter successfully to pressure the govern-

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[293] See *supra* Chapter 3(1.2.1).

[294] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[295] Ibid.

[296] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 75.

[297] Interview with Johan van der Merwe in Pretoria (May 5, 2006).

[298] Ibid.

ment to stop the arrests.[299] Thus obviously the matter weighs heavily in the government's considerations. In July 2008 representatives of the Foundation for Equality before the Law publicly reiterated their willingness to act against leading ANC officials by instituting private prosecutions, should the state move ahead with criminal proceedings against their members.[300]

The former SADF generals also view the issue of potential criminal liability of ANC members as a major consideration for the government. Moreover, if any of the generals had been charged after the TRC, they were willing to pressure the government with exactly the same means, politically exploiting the issue by calling for the prosecution of ANC members.[301]

Advocates of even-handed prosecutions suggest that criminal liability could concern various orders given through the specific direct command structure of the ANC in exile.[302] During the apartheid years the ANC directed violent struggles against the South African state from abroad. The top command structure of the ANC at the time was the National Executive Committee (hereinafter NEC), which exercised direct responsibility over any sizeable militant ANC organisation or cell operating in South Africa.[303] The NEC also directed the ANC's armed wing, MK. Most of the 37 ANC amnesty applicants who were denied amnesty are former members of the NEC.[304] The past conduct of the ANC and its organs was also subject to investigations and hearings by the TRC. The TRC later in its report emphasised that the ANC was an internationally recognised liberation movement involved in a just war against apartheid, which was considered a crime against humanity.[305] Nevertheless, it found that ANC organs at times used means that resulted in unjustifiable

[299] Interview with Jan Wagener in Pretoria (May 8, 2006).

[300] B. Webb *Tit-for-tat threat by apartheid generals* Sunday Tribune, July 20, 2008.

[301] Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

[302] Interview with Jan Wagener in Pretoria (May 16, 2006).

[303] *TRC Report*, vol. 2, chap. 4, appendix, page 393.

[304] Ibid.

[305] *TRC Report*, vol. 2, chap. 4, para. 2.

gross human rights violations.[306] These conclusions were drawn especially with regard to the bombing and the landmine campaigns, both of which were launched by the ANC to target state facilities and security force personnel and equipment in South Africa.

Now, advocates of even-handed prosecutions claim that these campaigns, especially the landmine campaign, which was instructed by the NEC and carried out by MK, could form the basis for a criminal liability of former NEC members.[307] The TRC pointed out that it had been the declared aim not to harm civilians in such campaigns[308] but that inevitably and foreseeably bombs directed at other targets also killed civilians.[309] The landmine campaign was also designed and ordered by the NEC. During the mid-1980s, MK was given the task of planting landmines in rural areas of northern South Africa and other border regions to target military patrols.[310] According to the TRC this inevitably led to many civilian casualties, which was also the reason that the ANC quickly abandoned the campaign.[311] From the findings of the TRC it is clear that bomb attacks, such as the Church Street bomb, and the landmine campaign were directly attributable to orders given by the NEC. It is further clear that in many cases it was obvious and foreseeable, even though clearly not intended, that civilians would be harmed by such actions.[312] These circumstances might potentially provide the basis to

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[306] Ibid. See further *TRC Report*, vol. 3, chap. 6, paras. 500–12; *TRC Report*, vol. 2, chap. 4, paras. 13–45.

[307] Interview with Jan Wagener in Pretoria (May 16, 2006).

[308] *TRC Report*, vol. 6, s. 5, chap. 3, para. 30.

[309] *TRC Report*, vol. 2, chap. 4, para. 37. The most prominent of such bomb attacks was the explosion of a car bomb in front of the South African Air Force headquarters in Church Street, Pretoria, in 1983, which killed 21 people, 10 of whom were civilians. Another prominent attack was that in 1986 on the Magoo's Bar/'Why Not' Bar, a bar in Durban popular among security force members. It resulted in three deaths (see *TRC Report*, vol. 2, chap. 4, paras. 13–37).

[310] *TRC Report*, vol. 2, chap. 4, para. 38.

[311] Ibid., para. 45.

[312] *TRC Report*, vol. 6, s. 5, chap. 3, paras. 30, 39, 40, 42–43. See also *TRC Report*, vol. 2, chap. 7. The TRC report illustrates that lower and local ANC parts of the organisation also account for numerous deaths in the course of the struggle. Equally

establish the criminal liability of high-ranking ANC and government members who were involved in the NEC or other command structures at that time and who had been refused amnesty.

The NPA had, however, announced in 2004 that there was not sufficient evidence warranting criminal investigations against the 37 ANC members who had been refused amnesty.[313] Regardless, it seems highly unlikely that it would be easy for the PCLU to institute criminal proceedings against leading politicians of the ANC, such as former President Thabo Mbeki. Nevertheless, the more crucial factor is that the side of the security forces, police and military alike, can use their influence to exercise political pressure, stir up significant political conflict and unrest and to damage the reputation of leading ANC officials by publicly linking them to criminal acts and claiming they could be charged for murder or other crimes. This would of course affect the stability of the government. Furthermore, the opponents of prosecutions will continue to claim that post-TRC prosecutions are unjust and harm reconciliation if they only concentrate on former security force members. These circumstances must certainly contribute to the government's reluctance to promote post-TRC prosecutions and to their desire to consult with the perpetrator groups.

A range of other factors certainly also contribute to the lack of political will to pursue post-TRC prosecutions. It has been mentioned above that one of the ANC leaders stated that prosecutions were not in the country's interest.[314] It is likely that this represents a common position among many government members. As such, sources from the Justice Ministry were reported in the media as mentioning that the government had no interest in South African politics being dominated and disrupted by a series of spectacular trials relating to the apartheid era.[315]

Underlying this are probably concerns, which were also voiced in the public debate on post-TRC prosecutions. Post-TRC trials would

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many gross human rights violations resulted from decisions of MK operatives, taken independently from any official command structures.

[313] *NPA won't prosecute ANC 37* SAPA, June 2, 2004.

[314] See text accompanying *supra* Chapter 3 note 75.

[315] J. Steinberg *Juggling justice, practically* Business Day, June 21, 2001.

constantly highlight accounts of the injustices, atrocities and crimes of the apartheid past over a period of several years. It is most probably feared that this could result in the recurrence of rifts between the ethnic groups and fuel alienation and accusations concerning the apartheid past.[316] As mentioned above, compared to the period when the TRC was in session, during which the media reported almost daily on the TRC and its revelations and findings on the violent conflicts of the past, public debate has generally become rather quiet and sporadic. The government probably welcomes this since it indicates that the ethnic groups might have left the conflicts of the past behind. The government certainly fears that this quiet could be changed by a row of TRC-related trials.[317] The recent prosecutions, especially that in the Chikane case, the PEBCO-Three and Ronnie Blani cases, have shown that such occasions inevitably also give rise to renewed public discussion and conflicts based on ethnic grounds. The Afrikaans speaking white population in particular might perceive prosecutions as part of an overall attack on their ethnic group and might therefore further feel alienated from the new South African state.[318] The concern is, thus, that old wounds might be opened up and that some of the good effects the TRC had on nation-building might be tainted. Thus, as far as South African society is concerned, the government is surely anxious that prosecutions will be a serious obstacle in the process of leaving the past behind and moving forward towards a reconciled nation with harmony reigning between the various ethnic groups. The government's sensitivity towards such issues is also obvious from the amended policy guidelines, as it is stated there that the NDPP needs to take into account how a prosecution could impact on the 'national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society' and whether the prosecution could cause renewed trauma and conflict where reconciliation has already taken place.[319]

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[316] Interview with Desmond Tutu in Cape Town (March 22, 2006); Interview with Charles Villa-Vicencio in Cape Town (March 29, 2006).

[317] Interview with Desmond Tutu in Cape Town (March 22, 2006).

[318] Ibid.

[319] See *supra* Chapter 3(3.2).

Simple issues of governance thereby also come into play as any government is interested in heading a stable society and not one constantly shaken by ethnic conflicts or alienation. There may also be an economic dimension as it is certainly more advantageous in this regard to signal to the international community that the conflicts of the past have ceased indefinitely and the multi-ethnic society and country have stabilised for good.

Apart from these general considerations, concrete practical factors also militate against further wide scale prosecutions. The process of post-TRC prosecutions starts with a legacy of failure.[320] At least as far as the high profile cases are concerned, two very extensive, costly and time consuming trials, the trial of former Minister of Defence Magnus Malan and others, and the Wouter Basson trial ended with acquittals. TRC cases have proved to be very arduous, time-consuming and expensive. The current government has to face an extremely high crime rate[321] and has limited resources for the police and prosecutors.[322] In this regard it is probably reluctant to assign sufficient resources to the prosecution of apartheid crimes, considering the pressing need to deal with current crime and the past examples of failed TRC prosecutions attempts.

On the other hand, the government is aware that the TRC amnesty scheme unequivocally demands prosecutions. It had been commonly acknowledged in the consultations with the apartheid security forces after 1998 that due to this a general amnesty would not be feasible politically.[323] It is clear that abstaining completely from pursuing prosecutions, which would, according to the above findings, suit the government,

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[320] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[321] In 2006 18,500 cases of murder, 55,000 of rape and 119,000 of armed robbery were recorded (crime statistics available at http://www.saps.gov.za).

[322] See L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed.) *Justice in transition* (2006) 65 at 77–79. The later constitutional court judge Richard Goldstone had already in 1994 pointed out that the justice system of the new South Africa would simply not be capable to cope with all crimes committed during apartheid (P. Parker 'The politics of indemnities, truth telling and reconciliation in South Africa' (1996) 17 1–2 *Human Rights Law Journal* 1 at 9).

[323] Interview with Johan van der Merwe in Pretoria (May 5, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

could seriously damage the legitimacy and the reputation of the TRC. Harming the TRC and its beneficial effects for the country is not in the government's interest. Thus, the government faces a dilemma regarding its obvious reluctance to foster prosecutions.

The guidelines were certainly intended to balance these conflicting factors. With them, the government decided that prosecutions would go ahead, turned away from strict indemnity procedures in a court, *prima facie* leaving it in the hands of the NDPP to decide whether to prosecute. At first glance, this satisfies the TRC's requirement for trials to go ahead. Nevertheless, the intention of the government to restrict the scope of prosecutions could also easily be satisfied by the policy amendment, since it provided for ample and flexible measures to influence any specific criminal proceeding. According to the design of the policy amendment, a prosecution, for example, may be rejected if it is deemed detrimental for reconciliation and nation-building, which is the factor that most obviously introduces political considerations into the prosecution process.

As a result of the considerations outlined above, one must conclude that the government had a tendency to prefer a course of partial and controlled forgetting about the past over comprehensively and unequivocally dealing with past political crimes through criminal proceedings.

Chapter Four

Normative Standards and Practical Prospects for Further Prosecutions

The process of initiating and conducting criminal trials in the wake of the TRC for those who committed politically motivated gross human rights violations during the apartheid conflict has certainly not been dealt with exhaustively. During the decade succeeding the official end of the TRC in 1998, very few trials were initiated. The task to conduct post-TRC prosecutions is, thus, far from conclusion.

The following chapter will highlight the features of the applicable legal framework which must guide the official approach to establishing criminal accountability for politically motivated human rights violations in South Africa. This also includes dealing with statutory limitations and legally consistent prioritisation criteria. Concurrently, the practical prospects for further trials and the question of whether we may expect a significant number of further proceedings will be examined. Although it is not possible to assess here which cases could still be prosecuted, a short collection of cases will be presented, which were either announced by the NPA as exhibiting sufficient prospects for a successful prosecution, or which due to certain specific features are of extraordinary or exemplary relevance for victims and the issue of post-TRC criminal accountability as a whole.

1. *Constitutional and International Law Requirements*

Criminal proceedings concerning the politically motivated gross human rights violations of the apartheid era are invariably embedded in a legal framework. As such, norms and legal standards from both

constitutional as well as international law place specific obligations on the government and also determine the legality of the current official approach and the actual conduct of prosecutions through the NPA. The South African government and the NPA must consider this legal framework and fulfil any legal requirements. The extent to which the State continues to fail to conduct a significant number of criminal trials and its policy of trying to prevent trials on a large scale might be seen as conflicting with such requirements. However, any possible legal obligations and South Africa's compliance therewith will be outlined in the following paragraphs.

1.1 *Constitutional law obligations*

The politically motivated crimes which were committed in the course of the apartheid conflict violated a range of fundamental human rights, which are meanwhile explicitly protected in the Constitution of democratic South Africa. Many apartheid opponents were abducted, tortured and killed by the security forces simply for their resistance to the inhumane regime. Many civilians also died through activities of the liberation movement. The relevant rights of the Constitution's Bill of Rights[1] concerned by such conduct are the right to the respect of human dignity of every human being, as enshrined in section 10 of the Constitution, the right to life, according to section 11 of the Constitution and the fundamental rights of freedom and security emanating from section 12 of the Constitution. Section 12 contains the rights not to be arbitrarily deprived of personal freedom, not to be detained without trial, to be free from all forms of violence regardless whether public or private, not to be tortured and not to be treated in a cruel, inhuman or degrading way, as well as the right to bodily and psychological integrity.

According to section 7(2) of the Constitution the state is obliged to protect, respect, promote and fulfil the Bill of Rights. This obligation is not confined to preventive measures but extends to punitive measures

[1] See sections 7 to 39 of the Constitution.

if there has been a serious violation of a right contained in the Bill of Rights. Impunity for such serious violations would effectively render the rights meaningless. The prosecution of murder, thus, is a central means to protect the right to life and the prosecution of assault likewise is a central means to protect the right to bodily integrity.[2] The state is accordingly obliged to protect the life of its citizens through the enforcement of the criminal law to the best of the state's abilities.[3] The obligation arises, to the same extent, also for violations of other fundamental rights such as the right not to be subjected to violence and torture.[4] As a result, the state has a constitutional obligation to prosecute offences that threaten or violate the rights of citizens, and this obligation is of central importance in the overall constitutional framework.[5]

The importance of the institution of criminal proceedings where rights are violated is further underlined through section 179 of the Constitution, which establishes the prosecution service and outlines that it needs to exercise its functions without fear, favour or prejudice.[6] It is of specific relevance in the present context, that the prosecution service's obligations apply not only to violations of rights that occurred after the Constitution came into force but also to offences committed beforehand.[7]

1.1.1 *The AZAPO rationale*

However, according to section 7(3) of the Constitution, constitutional rights can be subject to limitations. The Constitutional Court has elaborated extensively on the limitation of rights in cases of indemnity from prosecution for politically motivated crimes committed in the course of the apartheid conflict. In 1996, the Court dealt with the constitu-

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[2] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 31.

[3] J. de Waal et al., *The Bill of Rights handbook* 4ed (2001) 242.

[4] Ibid., 259.

[5] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at paras. 31–32; *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 144.

[6] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 33; *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 144.

[7] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 37.

tionality of the amnesty legislation contained in the TRC Act in what commonly became known as the "AZAPO case".[8] The decision is of great significance for the general constitutional principles applicable to prosecuting past human rights violations.

The Court had to decide whether section 20(7) of the TRC Act, which exempts perpetrators who were granted amnesty from criminal and civil liability, contravened the Interim Constitution. It, thus, had to decide under which circumstances the non-prosecution of politically motivated human rights offenders of the apartheid era was constitutionally justified. The applicants in the case[9] argued that the relevant amnesty regulations of the TRC Act were unconstitutional since the state would thereby violate its constitutional duty to prosecute crimes committed during the apartheid regime.[10] Specifically, the applicants claimed that section 20 of the TRC Act would violate section 22 of the Interim Constitution, according to which '[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.' The respective provision is now enshrined in section 34 of the Constitution.

From the outset, the Constitutional Court made it clear that an amnesty, that is, the official granting of indemnity or factual impunity,[11]

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[8] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996. See on the judgment C. Braude and D. Spitz 'Memory and the spectre of international justice: a comment on AZAPO' (1997) *South African Journal on Human Rights* 269–82; J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258–68; F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 105–32; Z. Motala 'The Promotion of National Unity and Reconciliation Act, the constitution and international law' (1995) 28 *Comparative and International Law Journal of Southern Africa* 338–62; J. Sarkin 'The trials and tribunals of South Africa's Truth and Reconciliation Commission' *South African Journal on Human Rights* (1996) 617 at 625–39.

[9] The challenge was brought by the AZAPO, the widow of Steve Biko and relatives of Griffith Mxenge and Florence and Fabian Ribeiro who were murdered by the security police.

[10] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 106.

[11] Ibid., 7–9.

impacts on fundamental rights since all persons are entitled to the protection of the law against unlawful invasions of the right to life, respect for and protection of their dignity and the right not to be subjected to torture.[12] The Court pointed out that in case rights are invaded, the victims must have the right to obtain redress before ordinary civil or criminal courts and that the perpetrators must account before such courts for the crimes they commit. The Court was obviously also then of the conviction that, although the Constitution only came into force at a later stage, it nevertheless demands redress for the crimes committed during apartheid. The Court stated that an amnesty effectively obliterates such rights.[13] In the Court's view therefore, the submission that an amnesty constitutes a violation of section 22 of the Interim Constitution, had considerable merits.[14] Accordingly the Constitution needed to authorise such a violation.[15]

In clarifying whether this was the case, the Court mainly focussed on a provision in the epilogue of the Interim Constitution. The part in question is the passage which provides for the enactment of a law on amnesty. As pointed out above, it says that 'amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.'[16] The Court found the epilogue to be of no lesser status than any other provi-

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[12] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 9.

[13] Ibid.

[14] Ibid., at para. 10. In this regard the decision contradicts with later decisions of the Constitutional Court where it explicitly ruled that section 34 of the Constitution, formerly section 22 of the Interim Constitution, only applies to non-criminal disputes (*S. v Pennington and Summerley* (CC) Case no. CCT 14/97 18 September 1997 at para. 46). Yet the Court in the AZAPO case obviously applied section 22 also to criminal disputes. See also M.E. Bennun 'Amnesty and international law' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 92 at 106 and J. de Waal et al., *The Bill of Rights handbook* 4ed (2001) 555.

[15] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 10. See section 33 of the Interim Constitution and 36 of the Constitution.

[16] See text accompanying *supra* Chapter 1 note 41.

sion of the Interim Constitution and found that this section not only permitted the granting of amnesty but even obliged the legislature to pass an appropriate law on amnesty.[17] The Court found two subsequent reasons supporting the constitutionality of the amnesty provision.

First, the special political circumstances of the negotiation and transition period of the early to mid 1990s were taken into account.[18] The Court pointed out that the crucial factor for upholding the amnesty provisions was that without amnesty the 'historic bridge', as outlined in the epilogue, might never have been successfully erected.[19] Amnesty in this sense was, according to the Court, a vital means of effecting a successful and peaceful transition to a democratic society.[20] It stated that the negotiated hand-over of power to a democratically elected government with the full support of the former state forces and the agreement on a democratic constitution might not have been reached, was it not for the epilogue's provision on amnesty as a means to promote nation-building and reconciliation.[21]

Secondly, the Court took into account the fact that it would be of overwhelming importance for the victims of political violence, the nation as a whole as well as the project of nation-building to uncover the truth about the apartheid crimes in order to establish a better public record of the past atrocities. To achieve this only by means of criminal investigation would, due to the secretive methods involved, widespread cover-ups and the dearth of investigations during the apartheid era, be very difficult. Accordingly, it would be necessary to offer incentives

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[17] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 14.

[18] The Court made extensive reference at various points to the difficult task of negotiation, transition and the spirit of reconciliation encapsulated in the Interim Constitution (*The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at paras. 2–4, 17, 21, 48).

[19] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 19.

[20] Ibid., at para. 32.

[21] Ibid., at para. 19.

to those who are aware of the information by means of amnesty to uncover the truth about past human rights abuses.[22]

The reasons can be summarised to the effect that amnesty was justified on the basis of the epilogue and was required by the objectives of effecting a peaceful transition to democracy and uncovering the truth about criminal acts committed during the apartheid era.

1.1.2 *The present approach and the constitutional framework*

In examining whether the State's present approach to post-TRC criminal accountability does justice to these constitutional requirements or to what extent it might be unconstitutional, we must recall once again two features which characterise this present approach.

For one, there have been very few criminal proceedings in TRC-related cases after 1998. After 2003, when proceedings were actually meant to be pursued by the centrally located PCLU, the number of proceedings declined even further. Only two significant prosecutions, those in the Blani and Chikane cases, have been concluded by the PCLU between 2003 and 2008. Only the prosecution in the PEBCO-Three case is currently pending. It has been pointed out that there are many practical restrictions that bar the PCLU from making greater progress in terms of the number of prosecutions. However, there have certainly not been as many prosecutions as were potentially possible,[23] even when the significant constraints on resources are taken into account. Thus, the NPA is, to a certain degree, simply refraining from investigating and prosecuting cases, thereby, to a certain extent, creating a state of *de facto* indemnity. The government contributes significantly to this state of impunity by not giving the NPA the support it would need to go further. Instead it has, as shown above, attempted to restrict prosecutions from progressing further. Although the NPA is independent under the terms of section 179 of the Constitution, the government restricted potential criminal proceedings and sought to put in place measures to further limit their potential.

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[22] Ibid., at para. 17.

[23] See for concrete practical prospects *infra* Chapter 4(5).

It is certainly possible that the constitutional obligation to prosecute only extends to that which is reasonably and practically possible, and, thus, must also take account of the very limited resources available to the NPA and other pressing needs of the state. However, to the extent that the NPA deliberately refrains from instituting criminal proceedings in cases exhibiting sufficient prospects of success, it violates this constitutional obligation. The minimal progress in reaching anywhere near the maximum capacity for prosecutions does not do justice to these constitutional requirements and the NPA and the government are obliged to do more.

The other critical circumstances are discretionary decisions of the NDPP not to prosecute, either based on the ordinary prosecution policy of the NPA or on any possible amendment of the policy applicable to TRC-related cases. It has already been pointed out that, unlike countries that adopted the so-called Principle of Legality which obliges prosecutors to pursue every crime, in South Africa prosecutors generally have a wide discretion as to whether to indict a perpetrator or not.[24]

As already mentioned above, the High Court of Pretoria abstained from analysing the underlying constitutional provisions when coming to the conclusion that the policy amendment, which was intended to guide the use of discretion, is unconstitutional. However, the government's intended policy approach needs to be examined on a basis similar to the amnesty law during the 1990s. The fact that the amendments were not introduced as a law, that they do not outline a legally binding concrete result and that the NDPP's generally prosecutorial decisions according to the general prosecution policy neither effect criminal nor civil liability does not exempt them from constitutional muster similar to that of the TRC Act in the AZAPO litigation before the Constitutional Court. Once again without systematic constitutional law analysis, the High Court concluded accordingly when adjudicating the amendments. It confirmed that the guidelines create the possibility for the prosecutors to grant perpetrators *de facto* indemnity. What is generally crucial in this regard is that decisions of the NDPP not to institute a prosecution are

[24] M. Schönteich *Lawyers for the people* (2001) 19–20.

tantamount to legal amnesty, as perpetrators would effectively receive impunity. It has already been pointed out that private prosecutions are simply not a realistic option for apartheid era victims.[25]

Moreover, according to section 8(1) of the Constitution, the Bill of Rights binds all state organs. Generally therefore, it cannot make a difference whether perpetrators are not prosecuted on the basis of a law or an administrative policy, as long as this results from a decision of a state organ and effectively grants the perpetrator immunity from criminal accountability. It also flows from section 179(2) of the Constitution, which states that '[t]he prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings', that the institution of criminal proceedings is a matter of importance to the state. Indeed, it is one of the primary tasks of the state connected to its constitutional duty to protect the Bill of Rights.[26] Thus, it is clear that the NDPP cannot simply justify a decision not to prosecute by referring to the possibility to prosecute privately. The High Court strongly confirmed this trite perception, when plainly stating that it is not for victims to investigate crimes.[27] Accordingly, it would be inappropriate to evaluate discretionary decisions not to prosecute differently to the amnesty law simply with reference to the fact that criminal and civil liabilities legally remain intact.

Decisions of the NDPP to preclude prosecution, whether based on specific guidelines or on the general prosecution policy, effectively obliterate the victims' rights to judicial redress and their human rights in the Bill of Rights in the same way recognised by the Constitutional Court in the AZAPO decision on the amnesty law.[28] Yet there is no constitutional provision in the current constitution which, like the epi-

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[25] See text accompanying *supra* Chapter 3 note 230.

[26] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 33; *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 144.

[27] *Nkadimeng and others v The National Director of Public Prosecutions and others* (Transvaal Provincial Division) Case no. 32709/07, unreported, at para. 16.2.3.3.

[28] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at paras. 9–10.

logue of the Interim Constitution, authorises the state not to prosecute gross human rights violations which occurred under apartheid.

However, item 22 of schedule 6 of the Constitution extends the provisions of the Interim Constitution's epilogue to the present constitution as it provides that:

> Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

However, commentators have pointed out that this section is only applicable to maintain the purposes of the TRC Act, thus, providing for the option of amending it only in terms of its defined scope and ambit.[29] Undoubtedly the section does not constitute a general extension of the epilogue's broad requirement to grant amnesty into the future. Thus, it is not possible to base a completely new process of indemnity on it. It is clear that it was not the intention of the legislator to provide for any new and separate indemnity process in the new Constitution.

Apart from the epilogue, the Constitutional Court's other main consideration in upholding the amnesty law were the necessities of the political situation during the negotiation period. The situation was very unstable and the country found itself on the brink of open civil war. The support of the security forces for the transition needed to be assured. Commentators consequently pointed out that an expiry of the transition period alters the evaluation of any further amnesty mechanism drastically.[30] There can be no doubt that at present the South African state has stabilised significantly and the new democratic order is well established. There are certainly no forces in the country, which are willing or capable of threatening the stability of South Africa

[29] J. Klaaren and H. Varney 'A second bite at the amnesty cherry?' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 265 at 281.

[30] Ibid., 279.

in any significant way.[31] Thus, there is no constitutional authority, which could now, some 13 years after the first democratic elections, justify the extended non-prosecution or indemnification of apartheid era political crimes.

However, the general prosecution policy concerning the prosecutor's conduct with regard to the exercise of prosecutorial discretion states in paragraph 4.(c), that in cases where a reasonable prospect for a successful prosecution was established, a decision not to prosecute might nevertheless be taken by the prosecutor if the public interest so demands. This test needs of course to be applied on a case by case basis, but nevertheless indicates that with regard to TRC-related cases the public interest might be used to justify non-prosecution in terms of the general prosecution policy in certain cases. Constitutional considerations must certainly be taken into account when applying the general prosecution policy, as a decision that is in blatant opposition to important constitutional principles can hardly be claimed to be in the public interest. The benefit of enhancing the public knowledge on past atrocities by offering perpetrators incentives to disclose was identified by the Constitutional Court as a major aspect of the public interest when upholding the legality of the amnesty legislation.

However, this factor was only one of many in the Court's considerations. When considered alone, it is clearly outweighed by the following considerations: the public interest in prosecution is strengthened by the mere gravity of the crimes in question. According to section 7(1) of the Constitution, the Bill of Rights is considered a cornerstone of South Africa's new democracy. Accordingly, it hardly seems possible, in general terms, to declare the non-prosecution of violations of its central values, such as the right to life, to be in the public interest. Furthermore, as made clear at the outset, the TRC's legal scheme on amnesty demands the prosecution of those who were not granted amnesty. Not only might the legitimacy of the whole mechanism be seriously harmed should prosecutions not follow, but victims who relied on the central proposition of post-TRC prosecutions when accepting

[31] Interview with Charles Villa-Vicencio in Cape Town (March 29, 2006).

the indemnification of perpetrators might justifiably feel betrayed. Furthermore, a central statement of the Constitution is, according to its section 1(a), that South African democracy is based on the values of the advancement of human rights, freedom and equality to which the Bill of Rights gives specific expression. Constitutional Court judge Albie Sachs has pointed out that:

> Nothing shows greater disrespect for the principles of equality, human dignity and freedom than the clandestine use of state power to murder and dispose of opponents. It follows that any exercise of judicial power which has the effect of directly inhibiting the capacity of the state subsequently to secure accountability for such conduct goes to the heart of South Africa's new constitutional order.[32]

This statement forcefully demonstrates how important it is for the public interest to prosecute the crimes committed by the apartheid security forces. To do otherwise would be in blatant opposition to these principles, undermine the rule of law according to section 1(c) of the Constitution and would do nothing to promote a human rights culture. Any decision not to prosecute that is not prompted by practical realities, such as availability of evidence, thus, cannot be justified. Moreover, due to the aforementioned forceful assertion of constitutional rights and values, the Constitution implicitly prohibits the use of discretion in this regard altogether, as it would subtract from these fundamental legal pillars. In a legal sense and in the public interest the Constitution even obliges the NPA to prosecute violations of the Bill of Rights wherever possible.

The High Court of Pretoria accordingly and correctly declared the policy amendment unconstitutional. The government is barred from introducing a similar indemnity process in the future. Any discretionary decision of the NPA not to prosecute gross human rights violations, although there is sufficient evidence and a prospect of success is therefore unconstitutional. Furthermore, the lack of progress on criminal

[32] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 112 (separate opinion of Sachs J.).

proceedings does not do justice to the Constitution's general requirement to protect the Bill of Rights by applying the criminal law. Thus, the government is obliged to provide more support and must refrain from restrictive interference.

1.2 *International law obligations*

The question whether the South African state's present conduct of criminal investigations and prosecutions of politically motivated human rights violations satisfies legal requirements also has implications under international law, as many of the crimes might constitute international crimes. The litigation at the Constitutional Court in the Basson case already highlighted that international law places obligations on the NPA and national courts regarding criminal accountability for past human rights abuses, which must certainly be considered to a far higher degree in the future than has thus far been the case.[33] The following subchapter seeks to outline in broad terms whether the South African state is obliged, under international law, to institute criminal proceedings when there is evidence supporting charges in cases of political human rights violations during the apartheid era, and likewise whether refraining from instituting criminal proceedings under such conditions violates international law. 'Prosecution' in this context refers to the criminal investigation, charging and possible sentencing of perpetrators alleged to have committed the type of crimes referred to previously, if there is sufficient evidence that there is a reasonable prospect of a successful conviction.[34]

In the South African context, academic research has focussed largely on the question of whether the TRC amnesty programme violated international obligations.[35] Although the question of whether states

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[33] See *supra* Chapter 2(2.3).

[34] See K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 163.

[35] J. Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001–15; J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997)

have a duty under international law to prosecute must be assessed under the same premises, determining the legality of an amnesty under international law must be done in a particular way. While a general and unconditional amnesty would not be acceptable under international law, the South African scheme on conditional amnesty needed to be judged in a differentiated manner.[36] A restricted amnesty was inevitably necessary and legally permissible for the restoration of peace in the transitional society.[37] As has already been outlined above, the TRC Act fulfilled these conditions. However, the same circumstances no longer apply with the passage of time. These specific national features which were considered with respect to amnesty laws, thus, cannot be considered when determining whether South Africa has a duty under international law to prosecute.

It is clear that under certain circumstances international law imposes an obligation on states to prosecute international crimes, such as crimes against humanity or war crimes.[38] Duties to prosecute derive first and foremost from international covenants but might also derive from customary international law.[39] It is necessary to consider whether the criminal acts of the apartheid forces committed abroad or in South Africa by SADF or police members constitute crimes under international law covered by international law obligations.

South African Journal on Human Rights 258–68; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 300–35; G. Werle *Principles of international criminal law* (2005) paras. 188–92; M.E. Bennun 'Amnesty and international law' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 92–114. See also *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996.

[36] G. Werle *Principles of international criminal law* (2005) paras. 190–91; J. Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001 at 1009–13; C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 167–68.

[37] Ibid.

[38] G. Werle *Principles of international criminal law* (2005) para. 177.

[39] Ibid., para. 179.

1.2.1 *Treaty law*

Various statutory sources of international law impose specific duties on states to institute criminal proceedings if treaty obligations are breached. As such, the four Geneva Conventions of 1949[40] and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 26 June 1987 (hereinafter "Torture Convention") are of particular relevance.

Each of the four Geneva Conventions outlines a catalogue of prohibited grave breaches of prohibitions of the Conventions.[41] Common to them all are, *inter alia*, any wilful act of killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person. Apart from defining the breaches, each Convention explicitly obliges signatory states to provide for effective legal sanctions to prohibit grave breaches and 'to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches' and to 'bring such persons, regardless of their nationality, before its own courts'.[42] These provisions undoubtedly convey a duty to prosecute perpetrators of grave beaches.[43] South Africa acceded to the Geneva Conventions in 1952.[44] The Conventions' application is, however, according to Article 2 common to the four Conventions (hereinafter "Article 2"), primarily confined to international armed conflicts. Purely internal conflicts are generally excluded from the Conventions' ambit.

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[40] Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention III relative to the Treatment of Prisoners of War; Convention IV relative to the Protection of Civilian Persons in Time of War; Geneva 12 August 1949.

[41] Article 50 Convention I, art. 51 Convention II, art. 130 Convention III, art. 147 Convention IV.

[42] Article 49 Convention I, art. 50 Convention II, art. 129 Convention III and art. 146 Convention IV.

[43] M. Scharf 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 *Law & Contemporary Problems* 41 at 44.

[44] J. Dugard *International law* (1994) 56.

With regard to the South African context, three major fields of operation of the apartheid security forces need to be distinguished: first, the security police's activities in resisting the liberation movement's opposition efforts inside South Africa; second the state's actions against the guerrilla activities of the Namibian liberation movement SWAPO; and finally, the military operations conducted by the SADF in Angola, the war against the Angolan army and Cuban forces.

The South African conflict between the security forces and the national liberation movements is of a genuinely internal character, notwithstanding the fact that on various occasions the ANC was attacked outside South Africa's borders. The character of the conflict with SWAPO in Namibia is less obvious.[45] South-West Africa was, at the time, *de facto*, a part of South Africa. In 1920 the territory was entrusted to South Africa by the League of Nations and, although the United Nations (hereinafter UN) subsequently revoked the mandate, South Africa remained entirely in charge of the political and administrative instruments of the territory.[46] The country only gained independence in 1990. It is, thus, not possible to characterise Namibia of the time as a sovereign state.[47] Thus, the conditions of this conflict do not qualify it as an international conflict. The war fought against Angola, which was started during the 1970s and drastically intensified during the 1980s, however, must certainly be classified as an international armed conflict in terms of Article 2 of the Conventions. South Africa is under an obligation in terms of the four Geneva Conventions to prosecute possible grave breaches which occurred during this war.[48]

An obligation to prosecute human rights violations committed in Namibia and South Africa might, however, be established under article

[45] See for human rights violations committed during security force operations in Namibia: *TRC Report*, vol. 2, chap. 2, paras. 73–157.

[46] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at paras. 194–196.

[47] The Constitutional Court in the Basson matter explicitly refrained from exploring the precise characterisation of the conflict with SWAPO (*S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 179).

[48] See for human rights violations committed by the SADF in Angola: *TRC Report*, vol. 2, chap. 2, paras. 10–72.

3 common to the Geneva Conventions (hereinafter "Article 3"), which lays down minimum standards, which must be fulfilled in non-international armed conflicts. According to Article 3, persons not actively taking part in the armed conflict shall not be subjected to *inter alia* violence to life and bodily integrity, in particular, murder of all kinds, mutilation, cruel treatment and torture. The application of Article 3 to the conflict in South Africa and the SWAPO conflict would, however, mean that the threshold of an 'armed conflict' was reached. This is the case in protracted states of armed violence between governmental authorities and organised armed groups.[49] The fight against SWAPO guerrilla activities, which took place mainly in the northern border regions of Namibia's Owamboland but also in Angola, was conducted primarily by military means and certainly reached high levels of prolonged armed violence.[50] It has also been classified as an armed conflict by the Constitutional Court, which stated in the Basson judgment that, regardless of whether the conflict in Namibia was international or not, the minimum standard of Article 3 would apply.[51]

Whether the same can be concluded with regard to the conflict with the liberation movement, mainly ANC and PAC, in South Africa is rather doubtful. In contrast to riots and occasional disruptions and clashes, an armed conflict requires high levels of protracted violent conflict.[52] The apartheid conflict, however, never reached the stage of full-scale civil or guerrilla warfare. Although political unrest climaxed during the 1980s, it was largely confined to township areas and the liberation movement never seriously threatened the apartheid state by military means.[53] The Constitutional Court consequentially stated in its AZAPO decision of 1996 that it was not convinced that the conflict

[49] C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 117.

[50] See *TRC Report*, vol. 2, chap. 2, paras. 1–157.

[51] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 179.

[52] M. Scharf 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 *Law & Contemporary Problems* 41 at 44.

[53] See also A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 323–24.

reached levels required for an armed conflict in terms of Article 3.[54] Thus, Article 3 applies in the Namibian context but does not apply to the conflict within South Africa.

However, does this mean that South Africa has an obligation under the Geneva Conventions to prosecute the political crimes committed during the Namibian conflict? The Convention's formulation of an obligation to prosecute extends explicitly to cases of grave breaches and does not deal with Article 3. It is nevertheless pointed out by legal scholars that the prohibitions of Article 3 must be viewed as included in the grave breaches doctrine, since only such an interpretation would do justice to the development of human rights protection mechanisms during the preceding decades.[55] Such an approach seems questionable, considering the conscious separation of Article 3 and the grave breaches doctrine in terms of the state's duty to prosecute. However, it must be borne in mind that this differentiation stems from a conviction to maintain a strict separation of internal and international conflicts. This approach has become increasingly blurred in international law, especially since the ruling of the International Court of Justice in the Nicaragua case.[56] With regard to such developments, there is in fact no justification to treat breaches of Article 3, which occurred in internal conflicts, different from those that occurred in international conflicts. Civilians must, therefore, also be treated as protected persons. The Constitutional Court has also strongly expressed its willingness to accept an overlap of internal and international conflicts in analysing the application of Article 3 in the framework of the overall protection regime of the Geneva Conventions.[57] Thus, breaches of Article 3 must be interpreted as constituting grave breaches in terms of the Conven-

[54] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 29.

[55] G. Werle *Principles of international criminal law* (2005) para. 180.

[56] K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 185.

[57] *S. v Basson* (CC) Case no. CCT 30/03 9 September 2005 at para. 179.

tions.[58] The duty to prosecute as outlined in the Geneva Conventions, thus, extends to violations of the rules for internal armed conflicts.

The effect of this interpretation is that South Africa has an obligation under the Geneva Conventions to prosecute any breach of Article 3 that occurred in the conflict with the SWAPO liberation movement in Namibia.

Further obligations regarding the internal conflicts might derive from the two additional 1977 Protocols to the Geneva Conventions. Article 1(4) of Protocol I[59] supplements Article 2 of the Geneva Conventions so that jurisdiction is extended to armed conflicts fought against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination.[60] Thus, the full application of the Geneva Conventions according to Article 2 is extended to the situations outlined in Protocol I. The Protocol was apparently motivated to a large degree by the apartheid conflict in South Africa.[61] The outlined situations clearly fit the Namibian conflict. Protocol II[62] supplements Article 3 of the Geneva Conventions to the effect that it shall include

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[58] G. Werle *Principles of international criminal law* (2005) para. 180; K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 186; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 306. See further on the distinction between international and non-international conflict C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 114–23; T. Meron 'International criminalisation of internal atrocities' (1995) 89 *AmJIntL* 554–77; *Prosecutor v Dusko Tadic*, Decision on the defence motion for interlocutory appeal on jurisdiction (AC) Case no. IT-94-1-AR72 2 October 1995 para. 83.

[59] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

[60] The right is enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[61] J. Dugard *International law* (1994) 334.

[62] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

armed conflicts that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.

Both Protocols, however, again require an armed conflict, which did not exist for the internal South African conflict. Furthermore, the requirements of Protocol II were clearly not met by the expansion of militant opposition activities in South Africa, which were far from being able to exercise sustained military operations in apartheid South Africa. Moreover, South Africa only became party to the Protocols in November 1995, which, thus, have no application for state sponsored crimes committed during the apartheid era.[63] Whether the Protocol I in that exact form codified customary international law, which was already applicable during the period in question, is rather doubtful.[64] This is especially so for South Africa, which specifically refrained from acceding to the Protocols to avoid their possible application to the state's fight against liberation movement activities.[65]

A further treaty source establishing an obligation to investigate and charge perpetrators of gross human rights violations is the Torture Convention. The covenant, which entered into force in 1987, requires each signatory state to ensure that acts of torture are investigated, charged and sentenced.[66] Torture in terms of the Convention is, according to Article 1(1), defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing

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[63] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 29.

[64] A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 323.

[65] J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 265.

[66] See articles 4–7 Torture Convention.

him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The TRC found that the South African police systematically used torture against the liberation movement for political and often arbitrary reasons, but mostly to force them to cooperate or disclose information about underground activities.[67] There can be no doubt that this practice constitutes torture in terms of the Convention. Yet South Africa only ratified the Torture Convention on 10 December 1998. Moreover, according to a decision of the Committee Against Torture, a treaty body established under Article 17 of the Torture Convention, the Convention only covers incidents, which took place after its entry into force in 1987.[68] It is also not possible to sustain the proposition that South Africa might nevertheless, by acceding to the Convention, have accepted a duty to prosecute all as yet unpunished acts of torture that took place after 1987. Article 28 of the 1969 Vienna Convention on the Law of Treaties, to which South Africa is a party, makes it clear that a convention only is applicable to situations which occurred after the entry into force of the convention for the signatory state in question. According to Article 27(2) Torture Convention, it only enters into force 30 days after ratification by acceding states. Thus, no duty to prosecute arises from the Convention for South Africa.

Eventually it is necessary to address the question of whether South Africa is obliged under international conventions to prosecute the racial segregation and discrimination of apartheid as such.[69] According to Article I.1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 (hereinafter Apartheid

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[67] *TRC Report*, vol. 6, s. 5, chap. 2, para. 16.

[68] Report of the Committee Against Torture to the General Assembly on its 45th session on 21 June 1990, supplement No. 44 (A/45/44), Annex V, para. 7.5.

[69] See generally on apartheid as a crime against humanity R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267–300.

Convention)[70] signatory states declare apartheid to be a crime against humanity and all racist and discriminatory acts flowing from the apartheid policies as crimes violating the principles of international law. Article II of the Convention outlines policies and practices of racial segregation and discrimination, which typically occurred during the apartheid era, as criminal conduct in terms of the Convention. According to Article IV of the Convention, signatory states are obliged to prosecute persons accused of acts which constitute crimes of apartheid under the Convention.

However, South Africa never became a party to the Apartheid Convention, not even today.[71] The Convention, thus, only establishes an obligation to prosecute the discriminatory policies of apartheid for the present government, if the Convention became part of customary international law. Although the Apartheid Convention was not unanimously adopted by states[72] some commentators have contended that the Apartheid Convention's definition of apartheid as a crime against humanity has meanwhile found expression as customary international law.[73] Also the Rome Statute for the International Criminal Court has incorporated in its Article 7(1)(j) the crime of apartheid as a crime against humanity.[74] Nevertheless, considering the limited international

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[70] International Convention on the Suppression and Punishment of the Crime of Apartheid, ratification by General Assembly resolution 3068 (XXVIII) of 30 December 1973, entry into force 18 July 1976.

[71] J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 262; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 325.

[72] R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 293.

[73] J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 263; R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 300.

[74] The Rome Statute, however, only concerns crimes falling in the ambit of the Statute, thus only those committed after its entry into force in 2002 (A. du Bois-Pedain

support of the Apartheid Convention's obligation to prosecute,[75] it cannot be said that a specific obligation under customary international law has developed that conveys a specific duty on the South African state to prosecute the politics of apartheid as such. Furthermore, there would be no grounds in South African law to prosecute the political acts of apartheid. The acts of designing and executing the policies of apartheid were not penalised at the time. Within its own system, the legality of apartheid for the past remained intact, even under the new dispensation.[76] This follows from the Interim Constitution,[77] in which the apartheid laws were repealed, but which did not abolish the legality of apartheid retroactively.[78]

1.2.2 *Customary international law*

Apart from these limited sources in statutory international law, obligations for South Africa to prosecute might also arise out of customary international law.[79] The preamble of the Statute of the International Criminal Court (hereinafter "Rome Statute"), to which South Africa is also a party, states that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured', as well as 'that it is

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Transitional amnesty in South Africa (2007) 326).

[75] R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 293–95; A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 307–8.

[76] G. Werle 'Without truth no reconciliation' (1996) 29 *Verfassung und Recht in Übersee—Law and politics in Africa, Asia and Latin America* 58 at 63.

[77] Ibid. See section 229 on the continuation of existing laws. See generally H. Corder 'Towards a South African constitution' (1994) 57 4 *The Modern Law Review* 491–533.

[78] See also M.R. Rwelamira 'Punishing past human rights violations: considerations in the South African context' in M.R. Rwelamira and G. Werle (eds) *Confronting past injustices* (1996) 3 at 7.

[79] See on the forming of customary international law: J. Dugard *International law* (1994) 24–32.

the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.[80]

Today, there is overwhelming scholarly support for the contention that customary international law has indeed developed after the second world war so that it places states under a duty to prosecute certain serious crimes under international law.[81] Although it is rather doubtful that this also obliges third party states, regardless of where the crime was committed, it is strongly supported with regard to the state of commission.[82] The progress of human rights protection mechanisms and treaties are cited as support for this contention. These include the International Law Commissions Draft Code of Crimes against the Peace

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[80] It needs to be pointed out that this passage alone does not constitute a specific obligation (C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 338). Also, the wording 'jurisdiction' might be ambiguous regarding the interpretation of the precise scope of the statement (C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 163).

[81] K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 203; J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 262; D.F. Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2537 at 2582–94; C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 342–43; G. Werle *Principles of international criminal law* (2005) para. 179. C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 162–63 cautions that whether a duty can be established in this regards depends on the methodological approach to determining customary international law. M. Scharf 'The letter of the law: the scope of the international legal obligation to prosecute human rights crimes' (1996) 59 *Law & Contemporary Problems* 41 at 59 rejects the notion of a customary law duty to prosecute since multiple examples of amnesty laws adopted by states in transition indicate that no consistent state practice in this regard exists.

[82] G. Werle *Principles of international criminal law* (2005) para. 179; C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 343.

and Security of Mankind; several declarations and resolutions of the UN General Assembly, such as the adopting of the Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity;[83] and the great progress made in trying crimes under international law since the Nuremberg trials, i.e. the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.[84]

Basically, crimes under international law concern acts that involve direct and individual criminal responsibility as laid out by statutory or customary rules of international criminal law.[85] The core crimes under international law are war crimes, crimes against humanity, genocide and the crime of aggression.[86] The international element of crimes under international law is established through the scope and gravity of the acts in question, such as the systematic and large-scale use of force typically by state organs, suggesting that important values of the international community are concerned.[87] Such an international link exists, for instance, in cases of systematic violations of basic human rights.[88] Given the fact that during the apartheid conflict grave human rights violations occurred on a regular and widespread basis over decades, the relevance of international law is obvious.

War crimes are to a large extent covered by the codification of international humanitarian law, which has been referred to above. However, the international law duty to prosecute crimes against humanity as separate crimes under international law is of specific interest in the South African context. Crimes against humanity generally require a

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[83] General Assembly resolution 3074 (XXVIII) of 3 December 1973.

[84] J. Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001 at 1003; D.F. Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2537 at 2593.

[85] G. Werle *Principles of international criminal law* (2005) para. 72.

[86] Ibid., para. 74.

[87] Ibid., para. 81.

[88] Ibid., para. 102.

widespread or large-scale and systematic attack on a population or parts of a population or large groups of civilians.[89] The attack needs to target a specific group, a civilian population or also a political group.[90] The specific disruption of values of the international community in cases of crimes against humanity occurs by systematic or large-scale violations of fundamental human rights of the civilian population.[91] Recent developments mean that crimes against humanity are no longer required to take place in the context of an armed or international conflict.[92]

Torture on a widespread and systematic scale is, on this basis, typically considered to be a crime against humanity.[93] As such, under customary international law torture is understood to be the infliction of severe pain or suffering by a person acting in an official capacity especially if this is part of a widespread or systematic practice.[94] Widespread and systematic use of extrajudicial killings and abductions or enforced disappearance of persons are also typically considered to be crimes against humanity, if such conduct was authorised, supported or acquiesced in by the state or a political organisation.[95]

Of the criminal acts committed by the state security forces during the conflict in South Africa, murder, kidnapping and abduction are some of the most prominent.[96] As has already been pointed out in this book,

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[89] G. Werle *Principles of international criminal law* (2005) paras. 82 and 666; C. Tomuschat 'The duty to prosecute international crimes committed by individuals' in H.J. Cremer et al., (eds) *Tradition und Weltoffenheit des Rechts* (2002) 315 at 340; K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 187–88.

[90] G. Werle *Principles of international criminal law* (2005) para. 633.

[91] Ibid., para. 84.

[92] K. Ambos *Straflosigkeit von Menschenrechtsverletzungen* (1997) 188; C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 127; R.C. Slye 'Apartheid as a crime against humanity: a submission to the South African Truth and Reconciliation Commission' (1998–1999) 20 *Michigan Journal of International Law* 267 at 286.

[93] G. Werle *Principles of international criminal law* (2005) para. 710.

[94] A. Cassese *International criminal law* (2003) 119.

[95] Ibid., 74 and 80; G. Werle *Principles of international criminal law* (2005) paras. 675–77 and 752–57.

[96] See on the use of the security forces of such practices *supra* Chapters 1 and 2.

acts of torture were committed by the security forces on a widespread basis. In fact torture of prisoners was a very common tool to get information. Political prisoners were commonly subjected to often severe torture in order to move them to work for the police as informants or to extract information on their colleagues. Torture was so common that thousands of prisoners became victim of such conduct. What in many cases preceded the torture of political captives was the kidnapping of the opposition activist and what usually followed such conduct in cases of denied cooperation was the elimination of the liberation activist. Extrajudicial killings and abductions of apartheid opponents increased significantly from the early 1980s onwards and were a means often used to combat political resistance. It is clear from this that there was a systematic pattern in the state security force's use of torture and, to a lesser but still very significant degree, of kidnapping and murder of political opponents in the quest to quell resistance to apartheid. In terms of the aforementioned definition of crimes against humanity, state organs committed such acts on a large scale and widespread basis. The acts were directed at a political group—the opponents to apartheid.

However, a legal evaluation of this subject denied that the high threshold required for actions to constitute crimes against humanity was met in the South African context.[97] With regard to torture, it is referred specifically to Article 7(2) of the Rome Statute, which requires the crime against humanity to be committed in the furtherance of a state policy to commit such violations. As such, it is pointed out that many of the criminal acts were committed on an operational level only and, though they were certainly accepted or even welcomed by superior authorities as they contributed to the purpose of quashing the resistance, there is not sufficient proof that torture was part of a state policy or even ordered by figures at the highest political levels.[98] The crimes were not committed in a holistic and concentrated effort to violate rights but rather on a case by case basis.

This view, however, is not convincing. The definition of torture in the Rome Statute does not necessarily conform to the understanding

[97] A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 326–27.

[98] Ibid.

of torture as a crime against humanity in terms of customary international law. In fact, the customary international law definition of crimes against humanity does not require a policy element.[99] Since the Nuremberg trials, most definitions of crimes against humanity did not encompass a policy element.[100] The policy element in the Rome Statute can be interpreted as a mere reference to the requirements of a widespread and systematic attack.[101] The systematic and widespread nature of the crimes has already been pointed out. Furthermore, the TRC found sufficient indicators that the criminal conduct in question was not something developed solely on an operational level but clearly resulted, at least indirectly, from policy guidelines of the highest state levels demanding a violent, if not even criminal conduct.[102]

Even if one opts for requiring a policy element in terms of persecution on political, ethnic or religious grounds,[103] which it has been pointed out is not required by the customary law definition, the crimes of the South African security forces committed in quashing the resistance to apartheid can be defined as crimes against humanity. The definition employed by the French *Cour de Cassation* for instance held that crimes against humanity are

> …inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy whatever the form of their opposition.[104]

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[99] G. Werle *Principles of international criminal law* (2005) para. 666.

[100] Ibid.

[101] Ibid., para. 667.

[102] See *TRC Report*, vol. 5, chap. 6, paras. 84–99.

[103] See J. Dugard 'Is the truth and reconciliation process compatible with international law? An unanswered question' (1997) *South African Journal on Human Rights* 258 at 263.

[104] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie* (France, Cour de Cassation) [1984] 78 ILR 125 at 137.

It is clear that the human rights violations were committed by the security forces in the course of furthering and protecting the racist and oppressive apartheid state policy of ideological supremacy. The crimes were committed on racial grounds but mainly against opponents for their political opposition, which underlines that the crimes in question must be seen as crimes against humanity. The South African Constitutional Court on occasion of the Basson case also stated that it was firmly convinced that apartheid led to the commission of crimes against humanity, though it did so in rather general terms without explaining whether this held true only for the situation in Namibia or also for the conflict in South Africa.[105]

As a result, the systematic and large-scale use of kidnapping, extrajudicial killings and torture by the apartheid security forces, which was committed to protect the apartheid regime against political opposition, qualifies as crimes against humanity in terms of the above mentioned definitions. Thus, on the basis of the customary international law duty to prosecute crimes against humanity, South Africa is obliged to investigate and prosecute such acts of murder, abduction and torture committed by the apartheid state security forces.[106]

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[105] *S. v Basson* (CC) Case no. CCT 30/03 10 March 2004 at para. 37.

[106] Some even argue for a rule under customary international law imposing a duty on states to prosecute every human rights violation committed by organs of a prior regime, even in cases where they occur on an occasional basis without constituting crimes against humanity (D.F. Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' (1991) 100 *The Yale Law Journal* 2537 at 2583–85). In support of this notion reference is made to a wide range of United Nations and intergovernmental organisations' practices and activities with regard to the prohibition of certain human rights violations as well as the incorporation of such a duty in various international instruments such as the Inter-American Convention to Prevent and Punish Torture or the Draft Declaration on the Protection of Persons from Enforced Disappearance prepared under UN auspices. Above the International Covenant on Civil and Political Rights is cited for support. It is, however, rather doubtful whether such a rule under customary international law has indeed already developed.

1.2.3 *Conclusion*

South Africa is obliged under international law to prosecute any crime constituting a grave breach in terms of the four Geneva Conventions, violations of common Article 3 and acts of the security forces as far as they constitute crimes against humanity under customary international law. The Constitutional Court has pointed out in the Basson judgment the circumstances in which South African courts have jurisdiction to try crimes which were committed in Namibia and abroad.[107]

Any of the international law obligations outlined only concern acts, which are attributable to the state and committed by state organs. If the NPA refrains from investigating and prosecuting members of the apartheid security police, SADF or other state employees who are alleged to have committed political crimes, which constitute grave breaches or breaches of Article 3 or crimes against humanity, despite evidence that there are sufficient prospects of a successful prosecution, South Africa will violate international law. Any legal setup providing for extended non-prosecution of apartheid era human rights offenders would equally constitute a violation of international law.

The government must further, as also explicitly required by the Geneva Conventions, undertake to enact appropriate legislation to provide for criminal proceedings to take place. In this regard it must refrain from enacting restrictive measures since otherwise it would breach its obligations under international law. The reluctant and restrictive approach of the South African government towards criminal proceedings equally does not do justice to the requirements of international law.

2. *The Prosecution of Torture and Statutes of Limitation*

In the preceding subchapters, it has been shown that under certain circumstances South Africa is obliged to prosecute acts of torture committed during the apartheid conflict, should those acts constitute crimes against humanity. However, there is one major obstacle for the

[107] See *supra* Chapter 2(2.3 and 2.5).

NPA to comply with this obligation. According to the limitation period in section 18 of the Criminal Procedure Act, the right to lay criminal charges, except for *inter alia* cases of murder and kidnapping as well as the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, lapses after 20 years from the point of time the crime was committed.[108] The prosecution of offences listed in section 18 never becomes statute barred. The 20 year limit is not absolute since prescription is interrupted by the institution of a prosecution.[109]

Concerning the prosecution of the most serious crimes relevant for post-TRC prosecutions, murder, kidnapping and torture, the statute of limitation has the effect that murder and kidnapping are not subject to any time limitation. Torture, however, is prosecuted as assault or assault causing grievous bodily harm, which is covered by the statute of limitation and cannot be prosecuted after 20 years from the time the offence was committed. Thus, section 18 of the Criminal Procedure Act currently precludes the NPA from prosecuting any acts of torture that were committed before 1988. This is especially serious considering the fact that the mid- to late 1980s witnessed a climax in violence in South Africa, which resulted in increased incidents of torture. The massive delay in instituting criminal proceedings in a significant number of post-TRC cases has, therefore, led and continues to lead to many cases of torture being time-barred from prosecution. However, the following subchapter seeks to outline the possibility to argue that under

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[108] Section 18 of the Criminal Procedure Act ('Prescription of right to institute prosecution') reads:
The right to institute a prosecution for any offence, other than the offences of- (*a)* murder; *(b)* treason committed when the Republic is in a state of war; *(c)* robbery, if aggravating circumstances were present; *(d)* kidnapping; *(e)* child-stealing; or *(f)* rape; *(g)* the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, shall, unless some other period is expressly provided by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

[109] See *R. v Magcayi* 1951 (4) SA 356 (O) and *R. v Friedman* 1948 (2) SA 1034 (C).

international law the statute of limitation of section 18 of the Criminal Procedure Act does not apply to torture. It also seeks to point out ways under constitutional law to neutralise the statute of limitation.

Section 18(g) of the Criminal Procedure Act itself exempts certain international crimes from the statute of limitation. It provides that the crime of genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act no. 27 of 2002, are not covered by the statute of limitation. This exemption, however, is only applicable from the point of its introduction in 2002 and is obviously only related to the crimes contemplated in the Rome Statute. Article 29 Rome Statute determines that statutes of limitation are not applicable to crimes within the jurisdiction of the court. This provision required implementation in the national law of signatory states.[110] In South Africa, this was done with the introduction of section 18(g) of the Criminal Procedure Act, which is designed to implement only the Rome Statute, from 2002 forward, and not to apply to all past circumstances of international crimes.

The UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 16 November 1968 also constitutes an attempt to rule out any obstacles in national law to the prosecution of serious international crimes. According to Article 1 of the Convention, national statutes of limitation shall not be applicable to war crimes and crimes against humanity. However, thus far only 50 states have signed the treaty[111] and South Africa has never been party to it. The rules outlined therein are, thus, not applicable.

It has been argued, however, that there is also a rule under customary international law that precludes the application of national statutes of limitation at least with regard to the most egregious of international crimes, such as genocide, crimes against humanity and torture.[112] Statutes of limitation would contradict the rules penalising such crimes. It is submitted that these crimes are so abhorrent that their authors

[110] W.A. Schabas *An introduction to the International Criminal Court* 3ed (2007) 233.

[111] See http://www.ohchr.org/english/countries/ratification/6.htm.

[112] A. Cassese *International criminal law* (2003) 319.

must be invariably punished, otherwise the important deterrent effect of preventing future reoccurrences could be undermined. Furthermore, the universal nature of international crimes is in conflict with various national statutes of limitations.[113] The French *Cour de Cassation* took a similar view as it ruled that crimes against humanity, in that case the murder of thousands of Jews during World War II, could not be subject to the French statute of limitation.[114] Other commentators have pointed out that whether and to what extent such a rule has become part of customary international law is far from being clear.[115] The moral and technical desirability for the non-application of statutory limitations to serious international crimes, which are the aspects mainly cited in support of a customary rule, is certainly not matched by a consistent state practice and *opinio juris* in this regard, as necessary for customary international law.[116]

Calls by states in support of a respective rule under international law have largely been made through resolutions of the UN General Assembly, which are not binding.[117] Moreover, the highly limited acceptance of the relevant UN convention and the lack of a consistent widespread practice in national approaches to the issue indicate that a state practice, in terms of customary international law, has yet to be established.[118] The European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes of 1974 has equally only been met with minimal support and has not

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[113] Ibid., 318.

[114] *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v Barbie* (France, Cour de Cassation) [1984] 78 ILR 125 at 315.

[115] G. Werle *Principles of international criminal law* (2005) para. 553.

[116] C. Kress 'War crimes committed in non-international armed conflicts and the emerging system of international criminal justice' (2000) 30 *Israel yearbook on human rights* 103 at 164–65.

[117] W.A. Schabas *An introduction to the International Criminal Court* 3ed (2007) 233–34. See General Assembly resolutions 3(I); 170(II); 2583(XXIV); 2712(XXV); 2840(XXVI); 3020(XXVII); 3074(XXVIII).

[118] S.R. Ratner and J.S. Abrams *Accountability for human rights atrocities in international law* (2001) 143–44; H. Kreicker 'Die völkerstrafrechtliche Unverjährbarkeit und die Regelung im Völkerstrafgesetzbuch' (2002) *Neue Justiz* 281 at 285.

entered into force yet.[119] Moreover, the process of drafting the Rome Statute for the International Criminal Court highlighted that the various delegations were clearly not in agreement as to the acceptance of rules under international law concerning statutes of limitation.[120] Furthermore, in the South African context, the most serious crimes of concern, such as murder, are, unlike the regulation of the respective legislation in France, which was examined by the *Cour de Cassation*,[121] exempted from the South African statute of limitation. Thus, a rule does not exist under customary international law that precludes the applicability of section 18 of the Criminal Procedure Act with regard to torture.

However, the non-applicability of the provision with regard to torture might also be argued under South African constitutional law.[122] During apartheid, the crimes of the security forces were virtually never prosecuted and operatives were protected by a system and policy of non-prosecution.[123] This practice of impunity is contrary to the values of human rights and the rule of law according to the democratic constitution. Thus, it might be argued that compelling constitutional implications require an interpretation of the statute of limitation to the effect that the limitation period is interrupted during the apartheid period when there was not a prospect of prosecution.[124] In the preceding subchapters it was pointed out that deliberate impunity for state sponsored, political and gross human rights violations is in stark conflict with fundamental constitutional values and international law. The state of impunity for state sponsored political crimes during the apartheid era is, thus, absolutely incompatible with the present constitutional order. The Constitutional Court found that the duty to prosecute extends to

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[119] Ibid.

[120] Ibid.

[121] See W.A. Schabas *An introduction to the International Criminal Court* 3ed (2007) 233.

[122] See V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 67–69.

[123] K. Koppe *Wiedergutmachung für die Opfer von Menschenrechtsverletzungen in Südafrika* (2005) 26.

[124] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 69. Nerlich, however, rejects this proposition considering that with murder and kidnapping the most serious crimes of apartheid remain prosecutable.

crimes committed before the Constitution came into effect. The same should be true concerning a possible interruption of the statute of limitation during times before its entry into force. These circumstances indeed provide good grounds to assume that compelling constitutional circumstances mean that the statute of limitation was interrupted during the state of systematic impunity for security force violence. Only from 1994 and more specifically from the coming into force of the Interim Constitution on 27 April 1994 onwards was there a realistic prospect and possibility for apartheid crimes to be prosecuted.

German courts took a similar view in the prosecution of political crimes committed under the Nazi regime and in the former socialist GDR. According to the *Bundesgerichtshof*, the German Federal Supreme Court, the German statute of limitation's limitation period was suspended until the capitulation of the German army in May 1945 if the crimes in question were condoned or ordered by the former regime and not prosecuted due to an unlawful policy of impunity for politically motivated gross human rights violations.[125] Similar findings were made with respect to certain crimes of state forces of the GDR and legislation was enacted accordingly after 1990.[126]

Academics have pointed out yet another way of neutralising the statute of limitation. It has been argued that the crimes of the security forces could be prosecuted directly as international crimes which, according to section 232 of the Constitution, would be directly applicable in South Africa as international law and not only under national South African law.[127] Section 18 of the Criminal Procedure Act would then have no application, as it is confined to South African crimes, such as assault.

It remains to be seen how, if at all, South African courts will be willing in potential future trials to interrogate and possibly follow such arguments. First, the NPA would be required to adopt a more open attitude to such approaches and not to strictly rely on the statute of limitation.

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[125] BGHSt 18, 367 (368–369).

[126] BGHSt 40, 48–59; K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 5–7.

[127] See V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 81–96.

3. *Strategies and Priorities*

The issue of strategy has proved to be of major concern in considering the approach towards post-TRC prosecutions. In the face of highly limited resources and considering the large number of *prima facie* politically motivated crimes for which amnesty was not granted, choices invariably have to be made regarding which cases to concentrate on with criminal proceedings.

However, the most important consideration regarding prosecution prioritisation is whether there is sufficient evidence available to prosecute or whether there is a sufficient prospect of gathering more evidence to prosecute successfully. Although there are potentially thousands of cases, most cannot be considered because the availability of evidence is too limited.[128] To a certain degree, the question of who to prosecute will also often be driven by the prosecutors' practical considerations concerning their specific strategy in certain cases. As such, the experience of Jan D'Oliveira has shown that it is often advisable in cases involving different levels of command to prosecute the operatives first in order to be able to establish a solid case against their superiors.[129] Nevertheless, with regard to those cases that would provide a reasonable practical prospect of success, those arguing against trials in the public debate frequently express doubts as to whether it is possible to decide whom to prosecute and whom not to prosecute using consistent criteria.[130] Should the focus be on those who created the policies of apartheid or those who executed orders and should liberation movement members be put on trial in an 'even-handed' way like apartheid agents?[131] Selective prosecutions could fail to establish accountability where the command and political responsibility actually lay.[132] The gross human rights violations committed in the name of the apartheid state were not

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[128] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[129] Interview by Gerhard Werle with Jan D'Oliveira in Pretoria (March 2004).

[130] Interview with Jan Wagener in Pretoria (May 8, 2006).

[131] See on such strategic dilemmas N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 44–45.

[132] See also A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 345.

a range of isolated acts but flowed from a systematic pattern of abuse that resulted from political guidelines and often from the orders of superiors. Although operatives are generally more easily implicated by evidence, to prosecute them alone and not also those from the higher ranks would, thus, not do justice to the systematic nature of apartheid policies. The question, thus, that needs to be addressed is which criteria should be used to identify higher priority cases.

With the prosecution guidelines for TRC-related cases, a rather inappropriate attempt was made to create prioritisation criteria. The following subchapter will deal with the issue of how to differentiate between cases on a consistent normative basis and will highlight ways concerning how to deal with limited evidence and the need to encourage further perpetrator disclosures.

3.1 *Prioritisation*

A very noteworthy approach to prioritisation has been presented by a lawyer closely involved with TRC matters.[133] It is suggested that generally the egregiousness and the rank and authority of the perpetrator should govern the decision whether to focus on a case or not. As such, it is viewed as a mitigating factor when a junior perpetrator has acted on the basis of specific instructions issued to him or when a crowd involved in mob violence is concerned. Aggravating circumstances include situations in which the perpetrator acted in a position of great influence, authority and leadership, thus, a position of high personal responsibility that enabled the perpetrator to determine whether and how the specific operation takes place, and which, therefore, could have allowed him to resort to legal means. The egregiousness of the offence in question should be determined on the basis of the proportionality test similar to that outlined for the granting of amnesty by the Amnesty Committee

[133] H. Varney *Exploring a prosecutions strategy in the aftermath of South Africa's Truth & Reconciliation Commission* discussion paper presented at the Foundation for Human Rights and International Centre for Transitional Justice conference 'Domestic prosecutions and transitional justice conference' (Magaliesburg, May 16–19, 2005)(on file with author).

according to section 20(3)(f) of the TRC Act.[134] Accordingly, an offence should be considered egregious if the political objective pursued is out of proportion to the gravity of the offence, which is determined by the scope and value of the violated human rights. On this basis, three categories of priority are identified: low priority cases involve non-egregious offences committed by junior perpetrators; middle order priority cases involve egregious offences committed at least by low ranks; and high priority cases concern egregious offences committed by senior perpetrators. Low priority cases should not be prosecuted at all. Most attention should be paid to high priority cases and middle order priority cases should be pursued when there are practical demands to do so or when resources allow it.

A number of examples suffice to illustrate the point.[135] The attempted murder of Frank Chikane is a high priority case. It involved a number of high-ranking security force officials, infringed against a high legal value and, considering the fact that Chikane was clearly a non-violent opponent and the objective of the offence was to protect the racist and oppressive apartheid regime, the offence was disproportionate.[136] Generally, an aggravating factor with regard to security forces crimes is that they could have resorted to far less violent means to achieve their goal. Especially during the many states of emergency during the 1980s, the state had a huge range of official legal tools at hand to quash resistance, such as detention for indefinite periods without charge or

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[134] In terms of the TRC Act the proportionality test determined, *inter alia*, the polical character of the crime. It is important to remember that the Amnesty Committee applied the proportionality test very generously so that crimes that were clearly disproportionate to their aims were still considered to be politically motivated (A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 121–26. The practical implementation of the proportionality test by the Amnesty Committee thus cannot be adopted by the NPA when prioritising cases.

[135] H. Varney *Exploring a prosecutions strategy in the aftermath of South Africa's Truth & Reconciliation Commission* discussion paper presented at the Foundation for Human Rights and International Centre for Transitional Justice conference 'Domestic prosecutions and transitional justice conference' (Magaliesburg, May 16–19, 2005)(on file with author).

[136] Ibid.

trial and the banning of persons believed to be a security risk. Notwithstanding these options the security police often chose instead to murder their enemies.

The refusal of amnesty to 37 ANC leaders which might relate to the bombing and landmine campaigns and other violent acts ordered during the armed struggle of the ANC is also significant. It is contended that the overwhelming majority of such offences committed under orders of the NEC must be classified as non-egregious since they were proportional to the objective pursued.[137] The objective of the ANC was to liberate the country from an internationally condemned regime of racism and oppression of the population's majority and to establish a system based on democracy and human rights. It must also be pointed out that the liberation movement tried in vain to achieve its goals by means of public and non-violent political protest and only when after decades of massive oppression and intransigence of the apartheid government this proved fruitless did they resort to violent means of protest. Violent acts were overwhelmingly directed at state facilities and police or military personnel. They generally attempted, though often unsuccessfully, to avoid harm to civilians. Such acts, accordingly, cannot be seen as egregious, they should be of low priority. However, there were occasionally individual acts that were primarily directed at civilians that went beyond official ANC policy. Any conscious attack of liberation fighters on defenceless civilians, regardless of ethnic group, cannot be seen as proportional in terms of the struggle for liberation.[138]

The outlined criteria of this prioritisation proposal[139] seem to offer a consistent and plausible way of prioritising factors, as the personal responsibility of commanders is generally greater.

3.2 *The call for even-handedness*

The considerations regarding prioritisation according to egregiousness and the statements concerning the distinction between the liberation

[137] Ibid.
[138] Ibid.
[139] Ibid.

movement and state forces also find support in the framework of the Constitution. The South African state is, according to section 1 of the Constitution, founded on the values of human dignity, freedom, equality, non-racialism, democracy and the advancement of human rights. In light of these parameters, acts of murder, torture and abduction, which were committed by the state security forces in order to oppress free and democratic political developments and to maintain a system of racism, inequality and violation of basic human dignity, in legal terms, cannot simply be equated with acts that were committed in a violent liberation struggle, conducted as a last resort and aimed only at state forces in order to establish these very constitutional values.

The decisive circumstance regarding the legal evaluation of 'even-handedness' lies, however, with the relevance of international law. As has been outlined above, the systematic, large-scale and widespread use of torture, extra-judicial killings and kidnapping of opposition activists by the state security forces are covered by an international law obligation to prosecute. In contrast to this, liberation movement crimes are not crimes under international law or crimes against humanity, since they were not orchestrated by state organs or on behalf of a state. From an international law viewpoint, the liberation movement conducted a lawful and legitimate struggle.[140] This strongly underlines the comparatively higher egregiousness of security forces crimes. In order for South Africa to fulfil its international law obligations, the NPA's first priority must be to prosecute the outlined systematic crimes orchestrated by the apartheid state forces.

It certainly does not mean that there is no criminal liability concerning e.g. the many civilians who fell victim to the landmine campaign by the ANC. It does, however, mean that on the basis of constitutional requirements as well as of international law requirements, the NPA's primary focus must be on prosecuting criminal acts committed by the security forces in the furtherance of apartheid. Constitutional Court

[140] M.R. Rwelamira 'Punishing past human rights violations: considerations in the South African context' in M.R. Rwelamira and G. Werle (eds) *Confronting past injustices* (1996) 3 at 16.

judge Albie Sachs underlined this perception when he made it clear that securing accountability for the clandestine use of state power to murder and dispose of opponents 'goes at the heart of South Africa's constitutional order'.[141]

However, the request for 'even-handedness' was nevertheless based on section 9 of the Constitution.[142] Section 9(1) of the Constitution states that everyone is equal before the law and section 9(3) prohibits the unfair discrimination through the State. It would certainly be unacceptable under section 9 to indemnify certain criminals generally while others are held criminally liable. Yet this does not answer the question of which cases must be considered more appropriate for prosecution. Section 9(1) of the Constitution only rules out differentiations that are not justified on reasonable grounds.[143] The abovementioned legal circumstances in international and constitutional law clearly provide such reasonable grounds for a differentiation.

The request for even-handedness towards apartheid crimes and liberation movement crimes, thus, is not of perceptible legal merit and must be considered as merely political. It should not be considered in any decision-making process of the prosecution authorities concerning on which cases to focus. There is no legal authority demanding equal prosecution of liberation movement and security force members and the process of post-TRC prosecutions would not be discredited in legal terms should the NPA primarily focus on former state forces. Nevertheless, for other societies in transition, opting for a similar system to deal with past atrocities, one must conclude that the new rulers and former liberation fighters must participate in the process unequivocally so that they are not exposed to political claims of unjust proceedings and a lack of 'even-handedness' in prosecutions and to avoid political obstacles to trials.[144]

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[141] See *supra* Chapter 4 note 32.

[142] Interview with Jan Wagener in Pretoria (May 8, 2006).

[143] See J. de Waal et al., *The Bill of Rights handbook* 4ed (2001) 199–222.

[144] It must, however, be pointed out that the ANC did support the TRC amnesty proceedings and encouraged its members to apply for amnesty. Nevertheless there obviously were gaps, as highlighted by the applications of the 37 ANC leaders.

3.3 *Limited evidence*

In terms of strategy, another issue needs to be addressed, which is general paucity of evidence in TRC-related cases and the often heavy demands such cases place on prosecutors. Various high profile trials that failed, like those of Malan and Basson but also the Chikane case, where the convictions of Vlok and van der Merwe were not reached due to strong evidence, are proof of such difficulties.

Generally, the crimes of the security forces were committed in great secrecy and evidence was meticulously concealed and never properly investigated by the police.[145] Witnesses of the criminal acts were mostly involved in the deeds themselves. Urging them to cooperate with the State, would require prosecutors to find evidence, which implicates the potential state witnesses themselves.[146] Problems of evidence increase, the higher one looks in the chain of command of the apartheid state. Written orders or records of policy directives to combat the liberation movement by criminal means are rarely obtainable.[147] Furthermore, before the first democratic government was constituted in 1994, apartheid government and security force agents destroyed huge amounts of sensitive documents.[148]

Where the prospect of a successful conviction is limited due to the insufficient capacity to compile more evidence, such difficulties could, at least to a certain degree, be countered by an extended use of plea and sentence agreements in terms of section 105A of the Criminal Procedure Act.[149] The agreements might deal with far reaching issues, such as an admission of the accused regarding the details of the crime.[150] In exchange, the accused could be rewarded with a significantly reduced

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[145] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 45.

[146] Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[147] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 46.

[148] See *TRC Report*, vol. 1, chap. 8, paras. 1–106; and *TRC Report*, vol. 5, chap. 6, para. 105.

[149] See also *supra* Chapter 2(9.2).

[150] Du Toit et al., *Commentary on the Criminal Procedure Act* service 35 (2006) § 105A 15–7.

sentence.[151] Thus, perpetrators willing to make disclosures regarding offences they were involved in could do so in exchange for a suspended and/or greatly reduced sentence under a plea bargain, as was already done in the Chikane case. The declared intention of the government to offer incentives for perpetrators to come forward and disclose could thereby be met. The extended use of plea-bargaining could be accompanied by specifically drafted directives applicable only for post-TRC criminal cases in order to meet the specific demands and challenges of post-TRC prosecutions.[152] According to section 105A(11) of the Criminal Procedure Act, the NDPP with the concurrence of the Minister of Justice can issue binding directives for the use and implementation of plea and sentence agreements. Consistent criteria could, thus, outline how to apply plea-bargaining to TRC-related cases, to treat and test information that is provided and to reward perpetrators willing to make full disclosures. It could also provide for victim participation and publication of information.

These measures could also easily replace the policy approach which the government considered, as perpetrators would be encouraged to make full disclosures. The benefit would be that for plea-bargaining the participation of victims is legally required,[153] the court proceedings and its records are accessible to the public, perpetrators have to admit their guilt publicly and although they might only receive low or suspended sentences, are held criminally liable, which avoids complete impunity. Since a court tests the validity of the agreement and assesses the guilt of the accused in a plea-bargaining situation, possibly also through a process of questioning and considering evidence,[154] such procedures certainly have far greater legal legitimacy with regard to the principle of the rule of law under section 1(c) of the Constitution than decisions

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[151] Ibid., 15–5.

[152] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 69–70.

[153] E. Du Toit et al., *Commentary on the Criminal Procedure Act* service 35 (2006) §105A 15–7.

[154] Ibid.

of the NDPP to grant impunity under unknown and untested circumstances. Plea-bargaining certainly cannot replace trials completely but is advisable where resources and evidence are limited, there is an increased interest for victims to reveal the facts of the case and the interest in avoiding years long, possibly futile, criminal proceedings.

Furthermore, it is trite to point out that the challenges of prosecuting higher echelons of the command structures could, to a certain degree, be met by the use of section 204 of the Criminal Procedure Act. According to section 204(2)(a) of the Criminal Procedure Act, a witness who testifies on behalf of the State shall be discharged from prosecution for the offence in question if the court is satisfied that he has answered all questions put to him frankly and honestly. The provision is designed to protect perpetrators of a crime from criminal liability who have testified for the prosecution against their co-perpetrators.[155] Especially lower level operatives, who are generally more easily implicated since they were the ones carrying out the operations, can be offered indemnity from prosecution should they testify against those from whom they received their orders. As has already been mentioned, the mechanism continues to be of enormous practical value for the PCLU.

The above discussion shows that there are worthwhile strategy approaches for TRC-related cases. However, it is important to remember that an imminent threat of prosecution will nevertheless usually still be required since it is rather unlikely that a perpetrator who previously refused to take part in the amnesty process would, subsequently, volunteer to cooperate with the NPA without such incentive.[156]

4. *General Prospects for Further Trials*

The fact that dozens of amnesty applications concerning *prima facie* politically motivated offences were refused due to a lack of full disclosure

[155] Ibid., service 33 (2004) § 204 23–50B.

[156] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 70.

suggests that, potentially, a great number of cases could still be dealt with by the PCLU. Furthermore, in many instances of politically motivated human rights violations, amnesty was not applied for at all. Thus, from her experience during the TRC, a former Commissioner consequently estimated that a great number cases could still warrant further investigation.[157] This is also suggested by the fact that the TRC handed to the NPA a list containing over 300 references to criminal incidents, which came to light during the TRC investigations and hearings.

However, it has already been pointed out that the actual prospects for further trials depend on the availability of evidence and the willingness of co-perpetrators to testify on behalf of the State, among other things. It has been mentioned in the preceding paragraphs that evidence is often highly limited, especially when it comes to those who occupied the higher echelons of the state. That other former officials of the apartheid government would be willing to follow the example of Vlok's and van der Merwe's voluntary admissions in the Chikane case appears rather unlikely. The two had already cooperated greatly in the process during the TRC, at least compared to other leading apartheid officials and politicians, and were, thus, possibly more willing to cooperate again with the PCLU. Especially leading figures in the ranks of the SADF, who obviously also played a central role in the Chikane case, are likely to continue to refuse to cooperate in even the slightest regard, as was already the case during the TRC proceedings. The continued lapse of time aggravates problems concerning evidence gathering, as witnesses' memory of the crimes, which often happened over 20 years ago, diminish. Some potential witnesses may have passed away, as well as certain alleged perpetrators, such as Gideon Nieuwoudt or security police general Nicolaas van Rensburg. The delay also has other negative consequences, since public and political awareness generally decline.

Another vital precondition for the conduct of successful prosecutions, is that there are sufficient investigative resources and skilled and experienced investigators available to tackle the intricate cases of apartheid

[157] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

era crimes. However, these are not in place.[158] It has been outlined above that the PCLU generally does not have sufficient investigative resources and funding to conduct prosecutions on a broader basis than has already happened. The PCLU is rather modest and small compared to the task it has to face.[159] Furthermore, apart from TRC cases, it was also assigned other significant responsibilities that demand a lot of its resources.[160] Thus, there is certainly also a need for greater numbers of experienced prosecutors and investigators to conduct the proceedings. Considering these shortcomings in terms of resources, it appears rather unlikely that the PCLU will be capable to proceed with more than a few cases at a time or to guarantee that a broader spectrum of crimes can be prosecuted during a short time frame.

Given these realities, the number of cases that potentially could be prosecuted diminishes significantly in comparison to what could be expected from the number of refused amnesty applications. Consequently, at one stage the PCLU referred to only 16 cases it considered at all prosecutable, five of which were of high priority and had already been investigated to an advanced stage.[161] It is certainly possible that more cases could be pursued, were there more resources available. Thus, in general, apart from problems of evidence, the prospects of further successful trials hinge on whether the government has the political will to promote prosecutions and whether it will assign more resources to the NPA.[162] Yet as has been shown above, the government is clearly lacking political will to support prosecutions and to assign sufficient resources to the process. Moreover, considering the overall resource constraints of the judicial system in the face of the extraordinarily high present-day crime rate, it is unlikely that significantly more resources

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[158] Interview with Anton Ackermann in Pretoria (May 11, 2006); Interview with Torie Pretorius and others in Pretoria (May 2, 2006).

[159] See N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 47.

[160] See *supra* Chapter 2(1.2).

[161] Ibid.

[162] D. Ntsebeza 'The legacy of the TRC' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 23 at 25.

will be assigned to the PCLU in the future.[163] Should possible future mechanisms of the kind that the government adopted with the prosecution policy amendment prevail over legal challenges, it would have the effect that many cases would not reach the court room.

As has been outlined above, the bleak prospects for further trials will also remain unaffected by the legal option to conduct private prosecutions, since victims and NGOs do not have the means necessary for such proceedings.[164]

Further trials might also potentially be interrupted by certain perpetrators from the ranks of the security police, exercising their right to apply for a review of their amnesty refusal, should they have been clients of Jan Wagener, with the consequences highlighted by the PEBCO-Three prosecution.[165] With regard to the need to have a consistent and short period of prosecutions, it was a bad decision to create the option to apply for a review of certain amnesty decisions years later.

Essentially, we must conclude that, although constitutional as well as international law requires the government to pursue post-TRC prosecutions vigorously, in the circumstances, the prospects for a significant number of further trials are absolutely minimal. However, it is still possible that a small number of cases will nevertheless be prosecuted.

5. *Non-Prosecutions*

The following subchapter will outline the practical prospects of further proceedings by describing an array of exemplary cases. Given the practical realities such as evidence, the choice of cases is not necessarily what might be desired by specific groups or the public generally. Thus, for instance, the prominent Steve Biko case, which many had expected to be prosecuted, will not go ahead. The popular political activist Steve Biko was the founder of the Black Consciousness movement. He was severely

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[163] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 47.

[164] See text accompanying *supra* Chapter 3 note 230.

[165] See *supra* Chapter 2(7.2).

assaulted and tortured in police custody and died as a result thereof in 1977.[166] Five amnesty applications were refused in this matter, among those that of since deceased Gideon Nieuwoudt.[167] The NPA, however, stated that a prosecution would not be sustainable since sufficient evidence was not available to prove charges relating to the death, and other charges, such as assault, had lapsed under the statute of limitation.[168] As mentioned above, others have called for the prosecution of leading ANC members. The possible grounds for this have already been outlined.[169] However, the list of priority cases at the PCLU allegedly does not contain cases of ANC members[170] and the PCLU has, as had already been mentioned, denied that sufficient evidence would exist to prosecute any of the ANC leaders who were denied amnesty.

Although the NPA has not made public which are its priority cases, the media referencing NPA sources reported that it would focus on, *inter alia*, the cases of the St. James Church massacre, Nokuthula Simelane, both of which will be described below, and the Cradock-Four.[171] Yet charges in a number of other cases could potentially be pursued. More indications to the practical scope of a possible prosecution can be found regarding the cases outlined below.

5.1 *The cases of missing Simelane and Morudu*

Cases in which the whereabouts of the victim and the exact circumstances of his or her death remain unknown are of specific relevance.

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[166] See *TRC Report*, vol. 2, chap. 3, paras. 184–85; *TRC Report*, vol. 4, chap. 5, para. 12; *TRC Report*, vol. 3, chap. 2, para. 120.

[167] Decision no. AC/99/0020.

[168] N. Rousseau 'Prosecutions' in E. Doxtader (ed) *Provoking questions* (2005) 37 at 47.

[169] See *supra* Chapter 3(4.).

[170] Interview with Sheila Camerer in Cape Town (March 30, 2006) (Camerer claims to have had insight in the list). See also C. Terreblanche *Apartheid massacres go to court* The Sunday Independent, April 23, 2006.

[171] C. Terreblanche *Apartheid massacres go to court* The Sunday Independent, April 23, 2006.

5.1.1 *The Nokuthula Simelane case*

An example for this is the case of Nokuthula Simelane, which many people, such as the former TRC commissioner Yasmin Sooka, believe should be investigated and prosecuted at the PCLU. The case is an example of a very egregious, yet not untypical, act of security police violence against anti-apartheid activists.

Nokuthula Simelane acted as a courier for MK and was based in Swaziland.[172] Through covert agents of the security police branch of Soweto, Simelane was lured into a trap while she was on a mission in Johannesburg in September 1983. According to the findings of the TRC in this case, Simelane was abducted and brought to a remote farm in the north-west of South Africa, where she was held captive for a period of approximately five weeks. During this period, the security police attempted to get information from her and to recruit her as an informer for the police. She was continuously and seriously assaulted and tortured until she was almost unrecognisable and could barely walk. Yet according to the TRC's findings, all attempts to get information and to recruit her remained fruitless. After Simelane's torture ordeal on the farm, she was taken away without a trace. Her exact fate has never been established with any certainty. It is, however, quite clear that she is dead.

The Amnesty Committee received eight amnesty applications in connection with the events, among them those of the three white security police officers Willem Coetzee, Anton Pretorius and Frederick Mong,[173] who were given the task of overseeing and directing the operation. Applications were also received from two black policemen, Veyi and Selamolela. All, except Veyi, participated in the abduction as well as in the subsequent torture. Compelling differences emerged in the testimonies of the black and white policemen. Whereas the white policemen maintained that Simelane was only tortured during the first

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[172] Unless otherwise is cited, the information concerning the Simelane case derives from *TRC Report*, vol. 6, s. 3, chap. 1, paras. 199–206 and *TRC Report*, vol. 2, chap. 3, paras. 287–92.

[173] Applications no. AM/4122/96; AM/4389/96; AM/4154/96.

week of her detention and that she eventually agreed to cooperate as an informer, whereafter she had been returned to Swaziland, the black policemen denied Simelane ever agreed to cooperate. According to them she was held captive for several weeks, during which she was continuously tortured, allegedly also with electric shocks, which was denied by the white policemen. The last time the black policemen saw Simelane was when she was loaded into the boot of Coetzee's car and taken away. She was allegedly in such a bad state that it would have been absolutely impossible to return her to Swaziland. They claim to have been told by another black policeman, who has since died, that Simelane was subsequently shot by Pretorius and Coetzee and buried near Rustenburg.

The Amnesty Committee found strong indicators that the versions of the white security policemen were false and accordingly refused to grant them amnesty for the torture. Amnesty was, however, granted to all applicants regarding the abduction.[174] No conclusion could be reached on her eventual fate but it is highly likely that Simelane was murdered after being kept on the farm.

Although the case is certainly being considered by the PCLU and an investigation had already started before the TRC hearings, which was then pending the amnesty decisions, the case was simply not taken further by the NPA after the Amnesty Committee eventually refused amnesty in May 2001. This inexcusable failure has grave consequences since prospects for a successful prosecution now seem limited. Possible criminal conduct in the Simelane matter concerns kidnapping, assault, assault causing grievous bodily harm and murder. The NPA, however, refuses to investigate charges of assault because of the limitation period of section 18 of the Criminal Procedure Act, according to which the right to pursue assault charges lapses after 20 years.[175] As the torture of Simelane constituted assault in a legal sense, the possibility to charge the white policemen, who had been denied amnesty for the torture, lapsed after 20 years in September 2003. They can also not be

[174] Decision no. AC/2001/185.

[175] Interview with Howard Varney in Johannesburg (May 6, 2006).

prosecuted for kidnapping, since they all were granted amnesty for Simelane's abduction.[176] What possibly remains are charges of murder. Yet a possible murder seems very hard to prove, as there is apparently not enough evidence and possible witnesses are not forthcoming or have meanwhile passed away.[177]

The case, thus, drastically illustrates the grave consequences of the massive delay of prosecutions. Had the NPA pursued assault charges before 2003, a conviction might have been achieved. Likewise, the alleged perpetrators could have possibly been urged to testify against each other concerning the murder or to fully disclose their knowledge in a plea and sentence agreement. The NPA has also been asked to initiate investigations into the involvement of other security branch members, who possibly participated in the abduction, such as Msebenzi Radebe and Willem Schoon, neither of whom even applied for amnesty.[178]

5.1.2 *The Moss Morudu case*

Many similar cases exist in which the exact facts concerning the fate of still missing victims remain unknown.[179] One such case is that of the MK operative Moses "Moss" Morudu, in which the notorious and infamous Northern Transvaal security branch was involved. The security police believed that Morudu was part of a special MK unit, the so-called "Icing Unit", which was engaged in eliminating black collaborators with the apartheid regime such as black policemen.[180] On the instruction of Captain Hendrik Johannes Prinsloo, Morudu was abducted in October 1986 from his home in Mamelodi/ Pretoria

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[176] The attorney Howard Varney, who is presently acting for the Simelane family, has pointed out that the decision to grant amnesty for the abduction was flawed in a legal sense, since the Committee basically failed to distinguish between the two legal terms abduction and kidnapping. The attorney of the family at the time failed to apply for a review of the amnesty decision in this regard on behalf of the relatives. The possibility to apply for review has since lapsed. The option to apply for condonation has been assessed and found not to be promising.

[177] Interview with Howard Varney in Johannesburg (May 6, 2006).

[178] Ibid.

[179] See generally *TRC Report*, vol. 6, s. 4, chap. 1.

[180] *TRC Report*, vol. 6, s. 3, chap. 1, para. 269.

and taken to a farm.[181] He was interrogated and brutally tortured for approximately one week.[182] What happened to him afterwards remains unknown. His family, however, had been deceived into believing he had gone into exile.[183]

The only amnesty applications concerning this incident were tendered by three black former security police members.[184] They only applied for their role in the abduction and later captivity of Morudu on the farm and claimed to have no knowledge of what eventually happened to Morudu, since they had not been present or involved for the whole time. They implicated the other security police operatives Hechter, Ludick, dos Santos, Mokhaba, Joe Mamasela and especially Captain Prinsloo, who was allegedly in charge of the operation. All of them denied any involvement.[185] Another officer believed to have been present during the interrogation is Northern Transvaal security branch constable van Vuuren.[186] The applicants claimed that at some point Morudu was taken away from the farm while they themselves had not been present and that Prinsloo had thereafter simply ordered them to remove all signs of their presence on the farm. It still remains unclear what eventually happened to Morudu. It is, however, again highly probable that he was executed and his remains were disposed of somewhere.

The problems in prosecuting this case are similar to those in the Simelane matter, since there is not any proper evidence of a murder and the possibility of prosecuting for assault has lapsed. Yet in this case, the alleged perpetrators, such as Prinsloo, had not applied for amnesty and might possibly, providing there was evidence to support the charge, be prosecuted for the kidnapping.

Commentators close to the TRC claimed that the Northern Transvaal security police's activities were generally not properly investigated by the TRC and that prosecutions should focus more on this area, since

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[181] Ibid., para. 272.

[182] Ibid.

[183] Ibid., s. 4, chap. 1, para. 1.

[184] Applications no. AM/3756/96, AM/3755/96, AM/6064/97.

[185] Decision no. AC/2000/010.

[186] *TRC Report*, vol. 6, s. 3, chap. 1, para. 272.

amnesty applications were often not submitted.[187] As such, especially Prinsloo is believed to be a very worthwhile target for prosecution.[188]

5.1.3 *The relevance of prosecution in missing persons cases*

The family of Nokuthula Simelane and especially her mother suffers severely, mentally and physically, from the lack of closure.[189] According to Simelane's sister, it is extremely important for the family to find out the whole truth of Simelane's probable murder and to see the perpetrators admit their guilt. Only by discovering the full truth and being able to retrieve the remains for a proper burial could the family find closure and leave their grief behind. The yet unresolved situation prevents them from doing so and is a continuous source of pain.[190] This example is representative for others. The relatives of Moss Morudu experience similar problems.[191] It is generally essential for victims' families to get to know the exact fate and whereabouts of the remains of family members for whose disappearance is still unaccounted.[192] Otherwise they are unable to find closure.[193] As the TRC Report aptly put it, families remain 'trapped in the past, unable to move on' and 'constantly caught between near certainty that the missing person has not survived and hope that he or she will return'.[194]

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[187] Interview with Madeleine Fullard in Pretoria (May 4, 2006).

[188] Ibid. See further *TRC Report*, vol. 6, s. 3, chap. 1, paras. 267–77.

[189] T. Nkadimeng (sister of N. Simelane) *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[190] Ibid.

[191] See for an account of equal suffering caused by the unresolved situation for the relatives of missing former activist Moss Murudu: S. Russouw *'All I want is to bury my son'* The Star, March 31, 2007. See for an exemplary account from a victim's point of view on this issue and the implications for reconciliation with regard to victims: Y. Sooka 'Apartheid's victims in the midst of amnesty's promise' in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 309 at 312.

[192] *TRC Report*, vol. 6, s. 4, chap. 1, para. 115.

[193] Y. Sooka *Panel presentation at the Institute for Justice and Reconciliation conference 'The TRC: ten years on'* (April 20, 2006).

[194] *TRC Report*, vol. 6, s. 4, chap. 1, para. 7.

Although in such cases it is generally more important for victims to get to know all the facts than to see the perpetrator being sentenced to a long jail term,[195] criminal proceedings are nevertheless an important tool to extract this very information. In both above examples, the possible perpetrators are not willing to cooperate with the NPA or the victims' relatives to clarify the facts. An imminent threat of prosecution is absolutely critical in presenting an incentive to move the perpetrators to disclose information.

Both cases have shown the grave consequences that the non-investigation of security police violence during the apartheid years and the statute of limitation has with regard to torture. On the basis of the above elaborations,[196] it can be argued that the limitation period should be extended. Furthermore, in terms of the above outlined prioritisation approach, both cases should be considered as of high priority for the PCLU, since the crimes in question are very egregious and can qualify as crimes against humanity. Both cases also give proof that it is worthwhile to explore an extended use of plea-bargaining. Perpetrators could be offered a suspended or reduced sentence in exchange for a full disclosure on the victims' fates.

5.2 *The Cradock-Four case*

The Cradock-Four case is a well-known case, typical of police violence against opposition activists.[197] Four leading UDF members of the Eastern Cape town of Cradock, Matthew Goniwe, Sparrow Mkhonto, Fort Calata and Sicelo Mhlauli, were abducted and executed by the security police in 1985.[198] All four had already previously been frequently arrested,

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[195] Interview with Marjorie Jobson in Pretoria (May 9, 2006); Interview with Y. Sooka in Pretoria (May 3, 2006).

[196] See *supra* Chapter 4(3.).

[197] See on the case *TRC Report*, vol. 2, chap. 3, paras. 245–52; *TRC Report*, vol. 3, chap. 2, paras. 294–98. The Motherwell-Four case is connected to this case, since there the killings took place to prevent revelations concerning the Cradock-Four murders (*TRC Report*, vol. 3, chap. 1, appendix, page 28).

[198] *TRC Report*, vol. 3, chap. 2, para. 295.

tortured and harassed by the police.[199] On 27 June 1985, after returning from a UDF meeting in Port Elizabeth, they were abducted by the security police and shortly thereafter shot or stabbed to death.[200] To avert suspicion from the security police their bodies and the car were burned.[201] The corpses were later found in the vicinity of Port Elizabeth.[202] In 1987 an inquest into the matter did not find any indications of security force involvement in the murders. However, in 1993 a secret document containing a message of the regional SADF command to the State Security Council secretariat was found, which called for the 'permanent removal from society' of the four activists.[203] Thereafter the inquest was reopened. The inquest judge found that there was *prima facie* evidence that the security forces carried out the murders and recommended the institution of criminal proceedings.[204]

Prompted by later investigations of the Transvaal Attorney-General in the case,[205] the Amnesty Committee received amnesty applications in relation to the murders from six security police officers: Hermanus du Plessis, Gerhardus Johannes Lotz, Harold Snyman, Johannes Martin van Zyl, all of whom had also been involved in the PEBCO-Three case, which happened only six weeks beforehand, Eric Taylor and General Nicolaas van Rensburg.[206] All applications with regard to the abduction and killing were refused in 1999 since the Committee was not convinced the applicants had made a full disclosure.[207] Snyman and van Rensburg have since passed away. Thus, the PCLU could potentially prosecute the four remaining security police perpetrators. However, since the amnesty refusals, the NPA has not made an attempt to lay charges.

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199 *TRC Report*, vol. 2, chap. 3, para. 247.

200 Ibid., para. 250.

201 Ibid.

202 *TRC Report*, vol. 3, chap. 2, para. 296.

203 *TRC Report*, vol. 2, chap. 3, para. 248.

204 Ibid.

205 *TRC Report*, vol. 6, s. 3, chap. 1, para. 17.

206 Applications no. AM/4384/96, AM/3921/96, AM/3918/96, AM/5637/97, AM/3917/96, AM/3919/96.

207 Decision no. AC/99/0350.

The Cradock-Four case must be considered as egregious and of high priority, since it involves systematic, ordered and very grave police violence against opposition members. However, should a prosecution be initiated, at least with regard to van Zyl, and possibly also with regard to some of the other alleged perpetrators, if they are clients of the lawyer Jan Wagener, the agreement to apply for a review of the amnesty refusal could again come into play and possibly delay or even prevent the start of a trial, as was the case in the PEBCO-Three matter.[208]

5.3 *The St. James Church massacre*

Among the cases believed to be under close scrutiny by the PCLU, there is at least one case that concerns the former liberation movement, the St. James Church massacre. The massacre was committed by members of the APLA, the military wing of the PAC. On 25 July 1993, a service congregation of St. James Church in Kenilworth, a district in Cape Town with predominantly white inhabitants, was stormed by APLA members.[209] The attackers opened machine gun fire and threw hand grenades at the about 1000 churchgoers. Eleven people were killed and fifty-eight were wounded.[210]

Four people applied for amnesty in relation to the attack, among them Letlapa Mphahlele,[211] former APLA commander and later president of the political party PAC. Mphahlele was director of operations of the APLA at the time of the massacre.[212] He was allegedly involved in the planning and authorisation of the attack.[213] Mphahlele later effectively withdrew his application before a decision of the Committee was handed down.[214] According to him, this was done in protest against a

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[208] See *supra* Chapter 2(7.2).

[209] *TRC Report*, vol. 2, chap. 7, para. 472.

[210] Ibid.

[211] Application no. AM/3018/96.

[212] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 271.

[213] Ibid., 277.

[214] *TRC Report*, vol. 6, s. 3, chap. 4, para. 114.

perceived lack of objectivity of the TRC.[215] All other applicants were granted amnesty.[216]

The APLA attack was exceptionally brutal. It appeared highly senseless and totally unjustifiable in terms of the struggle against apartheid. The only reason for the APLA to attack the church was allegedly that white churches were used to legitimise apartheid and were, thus, perceived to be a means of oppressing the black population.[217] However, this specific church community consisted of very liberal whites, who actively engaged in cooperating with black church communities in poor areas of Cape Town.[218] Furthermore, about one third of the congregation consisted of people of colour.[219] The massacre also happened at a time when the Interim Constitution was about to enter into force and the transition to democracy was well under way. It was presumed by many that the attack was an attempt to thwart the negotiations, which were not supported by the PAC.

The APLA was also responsible for a number of other attacks during the negotiation period, which were only aimed at killing civilians. Among those are the Heidelberg Tavern massacre of December 1993 and the King William's Town Golf Club attack of November 1992, both of which left four people dead.[220]

In September 2006 Mphahlele was elected president of the political party PAC.[221] His prosecution was apparently high on the PCLU's list of priority cases. It remains to be seen whether these brutal attacks on unarmed civilians will indeed be prosecuted. However, since the targets of the attack were totally defenceless civilians, the case must be considered as being egregious and of high priority.

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[215] Ibid.

[216] Decision no. AC/1998/018.

[217] *TRC Report*, vol. 2, chap. 7, para. 475.

[218] F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 275.

[219] *TRC Report*, vol. 6, s. 3, chap. 4, para. 125.

[220] See *TRC Report*, vol. 2, chap. 7, paras. 466–96; *TRC Report*, vol. 6, s. 3, chap. 4, paras. 89–167.

[221] See *PAC elects new president* SAPA, Sep. 26, 2006.

224 *Chapter Four*

5.4 *Cases involving former security police leaders*

In the Chikane case further proceedings are apparently envisaged concerning a very high-ranking former security force official. As such there are obviously plans to charge the former head of the apartheid security police, General Sebastiaan "Basie" Smit, since part of the plea agreement in the case was that the accused undertook to act as state witnesses in the event of a prosecution of General Smit.[222] As mentioned above, Smit eventually issued the order to murder Chikane.[223] The plea bargain also clearly indicated that other figures from the higher echelons of authority, probably including the highest levels of the apartheid government and the command of the SADF, were involved. It remains to be seen if the PCLU will follow up on such leads and charge these persons who may have been behind Chikane's assassination.

One of those concerned in the Chikane case, General Johan van der Merwe, could be a focus point for the PCLU, also with regard to at least one other case.[224] He was refused amnesty for a failure to make full disclosure concerning his involvement in organising a cross-border raid into Lesotho.[225] In December 1985 a group of security police operatives secretly entered Lesotho with the aim of executing various MK members who had planned to enter South Africa. During the attack nine people were murdered, among them uninvolved civilians.[226] However, it must be remembered that van der Merwe was one of the very few high-ranking security force officials who cooperated with the TRC extensively. His general openness to cooperate with the state in clarifying apartheid atrocities has also been shown in the Chikane case. The focus should rather be on those leaders, who, thus far, have yet to cooperate.

Another possible prosecution could again target General Smit and

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[222] See *supra* Chapter 2(9.3).

[223] Ibid.

[224] As a leading security police official during the 1980s, van der Merwe was probably involved in or must have had knowledge of a number of criminal security police operations (see various mentioning of van der Merwe in *TRC Report*, vol. 6).

[225] Decision no. AC/2001/231.

[226] Decision no. AC/2001/231.

a further former high-ranking officer of the security police, General "Krappies" Engelbrecht, for their involvement in instigating "third force" violence during the early 1990s. Engelbrecht had been the last head of the notorious C section of the security police, which the Vlakplaas unit was a part of, and was, as such, also the direct superior of Eugene de Kock.[227] In this, he was certainly involved in a number of the criminal activities of Vlakplaas. However, the TRC, specifically, found evidence of Smit and Engelbrecht having been involved in the provision of arms to Inkatha fighters to support their attacks on ANC sympathisers during the bloody conflicts raging during the early 1990s.[228] The Goldstone Commission had in 1994 found indications of the two generals having initiated, authorised and supervised a project, which involved the production of home-made guns as well as the importing of large amounts of weapons from Namibia.[229] Allegedly the arms were directly provided to senior members of the IFP, such as Themba Khosa, to be used in their brutal slaying of ANC supporters.[230] A central figure in these activities was Eugene de Kock, who testified against the two at the TRC.[231] The involvement of Engelbrecht and Smit could merit, to say the least, a charge of incitement and/or aiding and abetting the murder of thousands of ANC supporters.

An investigation against Engelbrecht was already completed by the D'Oliveira team in 1999 and there were plans to charge Engelbrecht by April 2000.[232] However, strangely nothing has happened thus far, which might be due to the overall pattern of delay and the flaws in providing for proper continuity between the prosecution teams. Whether a trial of Engelbrecht is still planned is unknown.

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[227] *TRC Report*, vol. 2, chap. 3, appendix, para. 19.

[228] *TRC Report*, vol. 6, s. 3, chap. 1, para. 132. See especially *TRC Report*, vol. 2, chap. 7, paras. 100–123.

[229] *TRC Report*, vol. 3, chap. 6, para. 546.

[230] Ibid.

[231] Ibid.

[232] V. Nerlich *Apartheidkriminalität vor Gericht* (2002) 155 and 220. It cannot be said, however, which conduct was planned to be concerned by the charges.

5.5 *The State Security Council and the apartheid government*

In public debates on the topic many human rights activists and victim representatives have called for more prosecutions of figures from the higher ranks of the apartheid regime and political leaders of the former governments, notwithstanding the practical challenges in targeting the command and political level of the former apartheid regime. Many have claimed that it would be necessary to investigate the involvement of former President F.W. de Klerk in apartheid atrocities.[233] Whereas the former Director-General of de Klerk's presidential office, Dave Steward, maintained that de Klerk could not be prosecuted since he had not been aware of any crimes committed by the security forces during his tenure, human rights activists claimed that his accountability could be established on the basis of his involvement in the State Security Council (hereinafter SSC).[234]

The SSC was a board of leading security force members and politicians, including de Klerk from the late 1980s, which was established to advise the government and security forces on security issues.[235] The TRC expressed great surprise that members of the SSC, who always maintained that they had no knowledge of criminal conduct, had never investigated or followed up the clear indications of crimes committed within the security structure they commanded.[236] Former leading NP member Leon Wessels, himself a member of the SSC, doubted the argument that SSC members could not have known of the crimes, which at least indirectly resulted from its policy directives.[237] With regard to former President F.W. de Klerk, the TRC had lamented that during his testimony before the TRC he did not give a truthful and full account of his knowledge of gross human rights violations committed by senior

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[233] Interview with Yasmin Sooka in Pretoria (May 3, 2006); Interview with Howard Varney in Johannesburg (May 6, 2006); Interview with Marjorie Jobson in Pretoria (May 9, 2006).

[234] H. Varney *De Klerk and the Truth Commission* The Guardian, Aug. 17, 2007.

[235] See *TRC Report*, vol. 2, chap. 3, appendix, paras. 1–6.

[236] *TRC Report*, vol. 6, s. 3, chap. 1, para. 357.

[237] *TRC Report*, vol. 5, chap. 6, para. 77.

government members and the SAP.[238] As such, the Commission proposed to make a finding that he had known of the bombing of Khotso house in Johannesburg, the headquarters of the South African Council of Churches which was very active in anti-apartheid opposition, through the security police in 1988.[239]

The TRC also found that 22 members of the SSC were accountable for the violence of Inkatha groups against anti-apartheid organisations, especially the ANC, as the government had provided equipment, training and financial resources to IFP hit-squads.[240] It further found that the SSC, among others, pressured the security forces to act robustly against the liberation movement, used language that could easily be understood as orders to eliminate anti-apartheid activists and failed to prevent the commission of crimes by security force operatives.[241] Such conduct could possibly constitute criminal liability, such as incitement to commit the political crimes in question or make the involved politicians accessories to the fact. However, the exact scope of involvement of apartheid politicians in criminal acts cannot be determined here.

5.6 *The Steyn-Report concerning criminal SADF activities*

The potential to investigate cases of criminal SADF activities was again highlighted by the declassification of a report on alleged dangerous activities of SADF components in early 2006.[242] SADF general Pierre Steyn had in the early 1990s been assigned by former President de Klerk with the task of following up and investigating allegations that SADF

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[238] The respective paragraph of *TRC Report*, vol. 5, chap. 6, para. 104 containing these findings on de Klerk had to be blacked out before publication following a court order de Klerk had applied for.

[239] *TRC Report*, vol. 6, s. 1, chap. 4, para. 29. See further *TRC Report*, vol. 2, chap. 3, paras. 521–29.

[240] *TRC Report*, vol. 2, chap. 5, para. 249.

[241] *TRC Report*, vol. 5, chap. 6, paras. 99 and 102.

[242] Staff paper prepared for the Steyn commission on alleged dangerous activities of SADF components, December 1992 (on file with author).

elements attempted to thwart the negotiations in the early 1990s and destabilise the country. During the mid-1990s, the report was handed to the TRC from which it was, after being considered highly sensitive, moved to the Department of Justice. It had only been declassified after the South African History Archives had lodged a legal challenge for its release against the Department of Justice.

The report outlines detailed yet uncorroborated indications of far-reaching and intense involvement of the SADF in third force violence, such as provision of weapons to IFP members, instigation of the so-called train murders and hostel violence in the Witwatersrand area, setting up of weapon caches, incitement to kill ANC members and various murders. The report also alleges that there had been plans for a right wing *coup d'État* as well as that support had been given to opposition movements in neighbouring countries. It details a wide range of names of officials and their specific alleged conduct.[243]

Criminal investigations concerning the SADF activities interrogated by Steyn had allegedly already been conducted in the early 1990s, apparently without results.[244] However, the concrete indications of intense and far reaching involvement of some very high-ranking SADF officials in high profile political crimes, which emerged through the Steyn report, appear to offer grounds on which the PCLU can initiate further investigations.[245]

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[243] Strangely and apparently due to a lapse the names had not, at least in the English version, been masked by the NPA which eventually released the document.

[244] C. Carter *Apartheid army's deadly secrets* The Sunday Independent, April 30, 2006.

[245] However, the report itself points out that criminal proceedings might be difficult due to destroyed evidence and the role players protecting each other.

Chapter Five

Conclusion

This book was written to document and evaluate the progress, and lack thereof, which has been made in establishing criminal accountability for politically motivated gross human rights violations of the apartheid era, for which amnesty was not granted by the TRC. This process of establishing accountability is not isolated. Post-TRC prosecutions are part of South Africa's model of dealing with crimes committed during the apartheid conflict and, thus, must be put in context with the TRC's conceptual and legal regime on amnesty. Such prosecutions potentially impact on South Africans' attitude towards the TRC process and reconciliation generally, since many expect trials as part of this process. On the other hand, the former apartheid establishment and parts of the white population may see trials as yet another confirmation of their perception of victor's justice. The following will summarise the main conclusions and results reached in this book and will comment on the conduct of post-TRC prosecutions and their impact on the process of dealing with the past.

1. *Summary of Results*

The deadline to apply for amnesty was 30 September 1997. On the release of the TRC Report in 1998, the TRC and President Mandela made strong recommendations for criminal proceedings to be instituted where there was evidence of gross human rights violations (Chapter 1).

However, the government and the NPA implemented the recommendations very reluctantly (Chapter 2). In 1999 the Human Rights Investigative Unit was established to oversee investigations into and

the prosecution of TRC-related cases. Thereafter matters were moved to the DSO ("Scorpions"). Not one prosecution was instituted by these units. Only when the last volumes of the TRC Report were issued in 2003 was a more appropriate unit, the PCLU, established.

The PCLU nevertheless only concluded three criminal proceedings during its five years of existence. In all, during almost one decade after the conclusion of the TRC, prosecutions have been initiated in only eight cases. Seven proceedings were finalised in court, four of which resulted in the conviction of all accused parties. Four of the finalised cases were conducted by regional prosecution offices.

There has, therefore, been a minimal number of criminal proceedings conducted after the conclusion of the TRC. Provisions for the appropriate conditions for the units to perform the necessary tasks involved in prosecutions were totally insufficient. For the sake of the country to achieve quick closure on the past, as President Mandela had rightly suggested already in 1998, it would have required a clear commitment in 1998, consistent strategic decisions, the definition of priority criteria, the assignment of better and more resources, more continuity and cooperation between the D'Oliveira Unit and possibly only one successor unit instead of various different ones.

The lack of a clear commitment and concentrated efforts after 1998 essentially reveal a lack of political will from the government to properly support post-TRC prosecutions (Chapter 3). This lack of political will has found expression when the government intervened in a specific case and interrupted all proceedings for 13 months by imposing a moratorium without compelling reasons, thereby further delaying trials from taking place. However, most indicative of the lack in political will were the consultations of government and leading ANC representatives with groups of former apartheid security force leaders, which aimed to reach agreement on new indemnity mechanisms to circumvent trials. Eventually, the Prosecution Policy was amended to the effect that specific guidelines, which reproduced the TRC's indemnity mechanism and aimed to avoid large-scale prosecutions, shall govern the discretionary decision on whether to prosecute a TRC-related case. It was found to have potentially negative consequences for the establishment of criminal accountability after the TRC. With the suspension of the amendment

by the High Court of Pretoria, the government suffered a serious blow in its ambitions to introduce new indemnity mechanisms.

The South African handling of post-TRC prosecutions violates the Constitution wherever proceedings are not instituted despite the existence of evidence which would warrant further investigation or prosecution (Chapter 4). By granting *de facto* indemnity to many authors of gross human rights violations, South Africa is also in breach of its obligations under international humanitarian and human rights law, should the crimes in question constitute grave breaches of the Geneva Conventions or crimes against humanity.

There are practical and strategic difficulties in the approach to post-TRC prosecutions, which should be an incentive to explore legally appropriate solutions, allowing prioritisation of cases, embracing the practical needs as well as the interests of victims and that do justice to the Constitution. On this basis, there are sound legal grounds to place higher priority on systematic crimes of state forces.

The prospects for a significant number of cases to be dealt with are bleak. Better progress would require the state to increase resources significantly, which, in the face of a lack of political will, limited resources and a very high present-day crime rate, is unlikely to happen. Among such cases that could already have been tackled, are the St. James church massacre, the Simelane case, the Cradock-Four case and many other cases from the PCLU's priority list of 16 cases, which allegedly are cases that have already been prepared to an advanced stage, as well as the many cases, which had already been prepared for prosecution by the D'Oliveira Unit, such as the case of General Engelbrecht.

Even under the difficult conditions in present-day South Africa, a limited amount of the most egregious cases of gross human rights violations could have been and can still be targeted. Nevertheless, many cases which actually warrant further investigation and provide the prospect of a successful prosecution on the basis of available evidence will remain unpursued. The book has practically been closed on post-TRC accountability.

2. *The Conduct of Prosecutions in the Context of the TRC Process*

While the appropriate course of transitional justice will always depend on the specific circumstances in the country concerned, there are general considerations either speaking for or against prosecutions in transitional societies.[1] However, any academic assessment concerning the advantages or disadvantages of prosecutions in South Africa's transition to democracy is now anachronistic. The course of transitional justice and dealing with the crimes under apartheid, which South Africa chose, means that prosecutions must take place where amnesty was not granted.

The systematic requirement of prosecutions to take place is obvious. However, the question needs to be addressed to what extent the minimal conduct of post-TRC prosecutions impacts on the overall assessment of the TRC and its amnesty proceedings. Some suggest that abandoning the idea of prosecutions would 'make a mockery of the process',[2] and even that the entire TRC might unravel into a farce.[3] Certainly, the granting of amnesty on conditions simply does not make any sense if there are no consequences in terms of criminal proceedings attached to the non-compliance with one or more of the requirements. However, it can hardly follow from this that the entire legitimacy of the TRC would be obliterated. This would mean that the justice of amnesty depends fundamentally on post-TRC prosecutions being implemented. This certainly is not the case. It has been pointed out at the outset that the granting of amnesty was necessitated by the political realities during the negotiation period. Nevertheless, with the conditional model a successful attempt was made to avoid blanket amnesty, which in itself is an achievement. The great strength of the amnesty proceedings above was that they encouraged perpetrators to disclose information about their deeds, which might otherwise not have been forthcoming. Thousands

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[1] See A. Boraine *A country unmasked* (2000) 280–81; E. Hahn-Godeffroy *Die Südafrikanische Truth and Reconciliation Commission* (1998) 39–43.

[2] Interview with Yasmin Sooka in Pretoria (May 3, 2006).

[3] L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 79.

participated in the process. It was often suggested that the model was ideal to meet the demands of the South African transition and even superior to prosecutions.[4] There was, therefore, strong justification for the amnesty proceedings on their own, regardless of the overall context of accountability.

Nevertheless, amnesty and prosecutions were both integral parts of the South African system. The offer of amnesty was fundamentally premised on the fact that, without it, criminal proceedings would be instituted if there was sufficient evidence to support a prosecution. Many relied on this premise. 'Amnesty is not cheap', as former TRC chair Desmond Tutu repeatedly pointed out.[5] Yet this statement only rings true for those who participated in the process. For those who did not participate but who are not prosecuted, indemnity was obtained cheaply. Perpetrators who participated in the process may now ask themselves why they did so at all. Those who scoffed at the TRC are, in contrast, validated in their decision not to cooperate. This makes it clear that failing to institute prosecutions contradicts the system of accountability, which South Africa chose to adopt as a transitional justice scheme. Thus, if it is not the entire legitimacy of amnesty which is at stake, it is certainly the perceived credibility and justice of the process. What is therefore also at stake, is the overall assessment of the success of South Africa's attempt to deal with its past and the perception of many concerned South Africans that a consistent and just way of dealing with the past has been implemented.[6]

Consistency and credibility in the process is especially relevant with regard to victims' position in the legal setup of amnesty. Their sacrifice of retributive justice and redress was meant to be compensated with a concrete claim to the full truth regarding the crimes they had to endure. This benefit of the amnesty procedures for victims was, according to the Constitutional Court, of central relevance for the scheme's legal

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[4] See A. du Bois-Pedain *Transitional amnesty in South Africa* (2007) 344–45.

[5] See G. Werle 'Neue Wege' in P. Bock and R. Wolfrum (eds) *Umkämpfte Vergangenheit* (1999) 269 at 279.

[6] See G. Werle 'Alternativen zur Aufarbeitung von Systemunrecht' in H. Hof and M. Schulte (eds) *Wirkungsforschung zum Recht* vol. III (2001) 291 at 297.

justification.[7] It follows from this logic that should this benefit fail to materialise, either because the full truth was not told or amnesty was not applied for, these victims have a right to call for the normal course of criminal justice to proceed.[8]

In terms of consistency of the process, we must also conclude that the positive international perception of transitional justice in South Africa must be altered. The great international reputation the TRC gained with regard to amnesty was premised on the fact that blanket indemnity was avoided.[9] Especially with regard to the amnesty scheme's legal evaluation in terms of South Africa's international law obligations to prosecute, this structure was considered as the basis for the TRC's legal legitimacy in comparison to other societies in transition.[10] This, however, only rings true if the conditional model is conducted consistently. This is not the case. South Africa does not properly comply with its international law obligations to conduct post-TRC prosecutions properly. Thus, whereas the TRC's scheme on amnesty was seen by many as a role model, which could provide many lessons for transitional societies,[11] South Africa's actual conduct cannot properly function as a role model since it sends out the message that those who refused the offer of amnesty will still not be held accountable for their actions.

Nevertheless, it was often argued in the case against post-TRC prosecutions, that in terms of dealing with the past and promoting reconciliation and nation-building, the achievements of the TRC were

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[7] *The Azanian Peoples Organisation and others v The President of South Africa and others* (CC) Case no. CCT 17/96 25 July 1996 at para. 17.

[8] Ibid., at para. 20.

[9] Interview with Desmond Tutu in Cape Town (March 22, 2006); L. Fernandez 'Post-TRC prosecutions in South Africa' in G. Werle (ed) *Justice in transition* (2006) 65 at 79.

[10] R.A. Wilson *The politics of truth and reconciliation in South Africa* (2001) 23.

[11] S. Garkawe 'The South African Truth and Reconciliation Commission: a suitable model to enhance the role and rights of victims of gross human rights violations?' (2003) 27 *Melbourne University Law Review* 334 at 335; P. Hayner 'Same species, different animal: how South Africa compares to truth commissions worldwide' in W. Verwoerd and C. Villa-Vicencio (eds) *Looking back reaching forward* (2000) 32 at 33.

sufficient.[12] Trials are seen by many as detrimental to these achievements of the TRC. Certainly, prosecutions concentrating on former security police members, who were mostly recruited from the white Afrikaans speaking population, would be perceived by many South Africans of that ethnicity as yet another attack of the new ruling class on their group.[13] However, it would seem that such perceptions, especially among the Afrikaans speaking population, generally stem from affirmative action measures and the feeling that their language and heritage are predominantly pushed away from schools, universities, city names or memorial sites. Prosecutions would rather be a merely insignificant addition to these circumstances.

Furthermore, it fails to take into account what victims are required to do to reconcile the gross human rights violations they, or their family members, had to endure. Their ability to do so is certainly dependent on accountability being established for the crimes,[14] since what was for perpetrators a very generous offer to come clean on their criminal deeds,[15] was hard to accept for victims and often highly contested.[16] Unless proceedings are instituted, a balance cannot be struck between the concessions made by victims and the offers made to perpetrators.[17] To abandon post-TRC trials would, thus, be considered as 'a slap in the face' to victims.[18] Under such circumstances, it is hardly possible to expect victims to reconcile themselves with the past if perpetrators

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[12] G. Bizos *Why prosecutions are necessary* in C. Villa-Vicencio and E. Doxtader (eds) *The provocations of amnesty* (2003) 5 at 7 refers to this notion of many others.

[13] The activities of the predominantly Afrikaans advocacy group "Afriforum", especially around the Chikane litigation, demonstrate the mingling of anti-prosecution with pro-Afrikaans advocacy efforts.

[14] R.C. Slye 'Amnesty, truth and reconciliation' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 170 at 179. See also K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 246.

[15] Interview with Desmond Tutu in Cape Town (March 22, 2006).

[16] A. Gutmann and D. Thompson 'The moral foundations of truth commissions' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 22 at 24.

[17] M.E. Bennun 'Some procedural issues relating to post-TRC prosecutions of human rights offenders' (2003) 16 *South African Journal of Criminal Justice* 17 at 36.

[18] Interview with Desmond Tutu in Cape Town (March 22, 2006).

simply get away with their deeds scot-free without the state making sufficient efforts for prosecutions.[19] The deep divide between the government and apartheid victims, mainly caused by the highly reluctant payout of reparations, will deepen further.

The proposition of prosecutions harming the achievements of the TRC also forgets that the amnesty proceedings had significant gaps, since many perpetrators of politically motivated gross human rights violations did not submit amnesty applications. Prosecutions can function to fill some of these gaps. They can, to some extent, clarify the facts regarding past atrocities[20] and should occur where the TRC has not been successful.

3. *Closing Remarks*

The assessment of the conduct of post-TRC prosecutions in South Africa in this study is negative. However, the moral and/or legal desirability of criminal accountability is certainly restricted by the adverse practical realities and conceptual difficulties that have been acknowledged. Certainly, only a relatively small number of cases could still be tackled under the present circumstances. The question which ultimately needs to be addressed is, whether these practical burdens and theoretical dilemmas can, in terms of this evaluation, trump criminal accountability and justify not instituting more proceedings. Can the fact that the vast majority of crimes cannot be prosecuted lend support to the contention that it would then be better not to prosecute at all? Must one conclude that the prosecution of only a small number of cases is actually not worth the effort, today, fifteen years into the new democracy?

The answer clearly must be, no. Limited resources and strategic demands can, by no means, be a reason not to institute proceedings at all. Many victims still have no answers to what happened to their

[19] R.C. Slye 'Amnesty, truth and reconciliation' in R.I. Rotberg and D. Thompson (eds) *Truth v. justice* (2000) 170 at 179.

[20] See also K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 245.

family members, although in many cases the perpetrators are known to the NPA. What is fundamentally at stake is not only the aforementioned consistency and reputation of the TRC process and, partially, the success of the process of dealing with the past, but also the substance and credibility of South Africa's commitment to the enforcement of a culture of human rights. The new South Africa was, in its renunciation of the politics of apartheid, eager to support international human rights law. Respect for human rights has found expression in the Constitution as a fundamental basis for the new democratic order.[21] The current practice of *de facto* indemnity, however, furthers a disreputable tradition of impunity for state orchestrated gross human rights violations, which was adopted during apartheid.[22] It renders meaningless and undermines the human rights protection in international, as well as constitutional law.

Finally it must be pointed out that to rely on forgetfulness in dealing with the past, which by many is seen as the ideal option in the interest of the country, has hardly ever proved to be successful as many countries provide an example that their violent past refuses to rest until it has sufficiently been dealt with and acknowledged. Reconciliation and closure on the past on an individual and national level are prevented by official forgetting.[23] Thus, avoiding the assignment of criminal accountability serves short term practical interests but in the long run will not be in the interest of the country to leave its past behind effectively. Although South Africa made an important step against total impunity with the TRC, too many crimes yet remain unrevealed and unaccounted for.

Almost 10 years after conclusion of the TRC, post-TRC prosecutions have not been conducted successfully and the South African process of dealing with past gross human rights violations, therefore, cannot be seen as concluded.

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[21] See also T.M. Grupp *Südafrikas neue Verfassung* (1999) 27–28.

[22] See F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 29–63; P. Parker 'The politics of indemnities, truth telling and reconciliation in South Africa' (1996) 17 1–2 *Human Rights Law Journal* 1 at 1.

[23] K. Marxen and G. Werle *Die strafrechtliche Aufarbeitung von DDR-Unrecht* (1999) 255.

Post-TRC Prosecutions in South Africa
Collection of documents

A. The State v. van der Merwe, Vlok, Smith, Otto, van Staden (*Chikane case*)

I. Charge sheet (*Afrikaans*)
II. Plea and Sentence Agreement (*English*)
III. Plea and Sentence Agreement (*Afrikaans*)

B. The State v. Nieuwoudt, van Zyl (*PEBCO-Three case*) charge sheet

C. The State v. Ronnie Blani

I. Charge sheet
II. Judgment

D. Prosecution Policy Amendment (related documents)

I. Prosecution Policy text
II. Minutes Justice Portfolio Committee
III. NPA presentation Justice Portfolio Committee
IV. NPA press statement
V. High Court judgment suspending the amendments

E. Motherwell-Four Case new amnesty hearing

I. New amnesty decision of 29 August 2005
II. Minority decision of 23 June 2005

F. National Party and others v. Truth and Reconciliation Commission

(High Court judgment of 1998 setting aside the granting of amnesty to 37 high ranking ANC officials)

G. NPA Press Statement on non-continuation of Basson prosecution

H. "Steyn Report" on dangerous SADF activities

A.

I.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(Transvaalse Provinsiale Afdeling)

DIE STAAT

teen

1. JOHANNES VELDE VAN DER MERWE
'n volwasse man en 'n Suid-Afrikaanse burger

2. ADRIAAN JOHANNES VLOK
'n volwasse man en 'n Suid-Afrikaanse burger

3. CHRISTOFFEL LODEWIKUS SMITH
'n volwasse man en 'n Suid-Afrikaanse burger

4. GERT JACOBUS LOUIS HOSEA OTTO
'n volwasse man en Suid-Afrikaanse burger en

5. HERMANUS JOHANNES VAN STADEN
'n volwasse man en Suid-Afrikaanse burger

(hierna die beskuldigdes genoem)

AKTE VAN BESKULDIGING

Die Spesiale Direkteur van Openbare Vervolging, wat as sodanig vervolg vir en namens die Staat, stel die hof hiermee in kennis dat die beskuldigdes skuldig is aan die misdade van:

1. **POGING TOT MOORD ALTERNATIEWELIK OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956**

2. **OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956**

AANKLAG 1: POGING TOT MOORD

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby die **destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur sy klere **met 'n gifstof, te wete Paraoxon, te besmet.**

ALTERNATIEWE AANKLAG TOT AANKLAG 1: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE, WET 17 VAN 1956*

DEURDAT die beskuldigdes, **Sebastiaan Smit, Wouter Basson, André Immelman en persone onbekend aan die Staat, gedurende April 1989** en te of naby **Roodeplaat Navorsingslaboratorium en/of Pretoria** in die distrik van **Pretoria** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **Eerwaarde Frank Chikane**, te pleeg en/of by die pleging van die misdaad behulpsaam te wees en/of die pleging daarvan te bewerkstellig.

AANKLAG 2: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE, WET 17 VAN 1956*

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman en persone onbekend aan die Staat, gedurende 1989** en te of naby **Roodeplaat Navorsingslaboratorium, Veiligheidspolisie Hoofkantoor** in die distrik van **Pretoria en/of ander plekke onbekend aan die Staat** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **persone onbekend aan die Staat** te pleeg en/of by die pleging van die misdaad behulpsaam te wees en/of die pleging daarvan te bewerkstellig.

In die geval van skuldigbevinding versoek die genoemde Direkteur vonnis ooreenkomstig die reg teen die beskuldigdes.

AR ACKERMANN SC
SPESIALE DIREKTEUR VAN OPENBARE VERVOLGING
KANTOOR VAN DIE NASIONALE DIREKTEUR VAN OPENBARE VERVOLGING

OPSOMMING VAN WESENLIKE FEITE INGEVOLGE ARTIKEL 144(3)(a) VAN WET 51 VAN 1977

AGTERGROND:

1. Die Suid-Afrikaanse Weermag het gedurende die tydperk 1982-1992 'n hoogs geheime projek bedryf wat as Projek Coast bekend gestaan het. Die hoofdoelstelling van die projek was om 'n defensiewe en beperkte offensiewe chemiese- en biologiese oorlogvermoë daar te stel.

2. Dr Wouter Basson was die projekoffisier.

3. Vanweë die sensitiwiteit van die projek is daar van frontmaatskappye gebruik gemaak om navorsing te doen sowel as om substanse te vervaardig en te verkry.

4. Die frontmaatskappy Delta G Scientific (Edms) Bpk (hierna genoem "Delta G") was vir die navorsing en vervaardiging van die chemiese been van die projek verantwoordelik.

5. Roodeplaat Navorsing Laboratorium (Edms) Bpk (hierna genoem "Roodeplaat") het navorsing op biologiese gebied en tot 'n mindere mate chemiese navorsing gedoen.

6. Dr A Immelman was 'n wetenskaplike wat by Roodeplaat as die hoof van navorsing op toksikologie werksaam was.

7. Dr Basson het ongeveer in die middel tagtigerjare vir Dr Immelman opdrag gegee om *inter alia* navorsing te doen oor die aanwending van toksiese substanse teen individue, die roete van aanwending, sowel as die opspoorbaarheid van die stowwe na die toediening daarvan. Hierdie toksiese substanse (onder andere Paraoxon) is by Roodeplaat vervaardig en sommige daarvan is aan Dr Basson oorhandig.

8. Gedurende ongeveer 1987 is die vermoëns van die projek aan ander afdelings van die Suid-Afrikaanse Veiligheidsmagte tydens 'n vergadering in Kaapstad voorgehou.

9. Na bovermelde vergadering het Dr Basson aan Dr Immelman opdrag gegee om met verteenwoordigers van ander afdelings van die Veiligheidsmagte op 'n klandestiene wyse te ontmoet en aan hul behoeftes te voldoen.

10. Dr Immelman het daarna verskeie klandestiene ontmoetings met lede van die onderskeie veiligheidsmagte gehad. Tydens hierdie ontmoetings is die

behoefte van die besondere afdeling bespreek en is die substanse later aan hulle oorhandig.

11. Ten einde rekord te hou van hierdie toksiese substanse wat aan die buitestaanders oorhandig is, het Dr Immelman 'n lys (aangeheg as **Aanhangsel "A"**) bygehou om die datum van lewering, die naam van die substans, sowel as die volume / hoeveelheid wat gelewer is, aan te dui.

DIE BESKULDIGDES:

12. Beskuldigde no 1 was gedurende die tydperk Januarie 1986 tot September 1988 'n generaal in die Suid-Afrikaanse Polisie (hierna genoem die "Polisie") en in bevel van die Veiligheidstak van die Polisie. Gedurende Oktober 1988 is hy bevorder tot adjunk-kommissaris van die Polisie.

13. Generaal Sebastiaan Smit het hom opgevolg as bevelvoerder van die Veiligheidstak.

14. Beskuldigde no 2 was die Minister van Wet en Orde van die Republiek van Suid-Afrika gedurende die tydperk Desember 1986 tot Augustus 1991.

15. Beskuldigdes no 3 tot 5 was gedurende die relevante tye tot die akte van beskuldiging senior offisiere verbonde aan die Veiligheidstak.

DIE SAMESWERING:

16. Gedurende die tagtigerjare was verskeie persone / organisasies aktief betrokke in Suid-Afrika onder andere met die doel om die afskaffing van die misdaad apartheid en/of die omverwerping van die regering van die dag teweeg te bring.

17. In 1987 was daar 'n besluit deur die leierkorps van die Veiligheidsgemeenskap geneem dat hoë profiel lede van die anti-Apartheids-vryheidstryd in uiterste gevalle om die lewe gebring moes word.

18. 'n Lys met die name van die geïdentifiseerde persone is aan die bevelstruktuur van die Veiligheidsgemeenskap oorhandig.

19. Beskuldigdes no 1 en 2 het die uitvoering van die bovermelde besluit bespreek.

20. Daar was toe besluit dat 'n spesiale eenheid in die Veiligheidstak gestig sou word om die opdrag uit te voer.

21. Beskuldigde no 3 was die bevelvoerder van hierdie eenheid.

22. Beskuldigdes no 4 en 5 was ten alle relevante tye verbonde aan hierdie spesiale eenheid.

23. Nadat Generaal Smit oorgeneem het as bevelvoerder van die Veiligheidstak, is hy ingelig ten aansien van die doelwitte van die spesiale eenheid.

24. Ten alle relevante tye het die beskuldigdes, Smit, Basson, Immelman en ander persone onbekend aan die Staat opgetree ter bevordering van die gemeenskaplike oogmerke vermeld in die akte van beskuldiging.

DIE SLAGOFFERS:

25. Eerwaarde Frank Chikane se naam was op die lys vermeld in paragraaf 18.

26. Eerwaarde Frank Chikane was 'n uitgesproke teenstaander van apartheid en die beleid van die destydse regering. Hy was onder andere sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en die vise-president van die United Democratic Front.

27. Gedurende April / Mei 1989 was Eerwaarde Chikane van voorneme om verskeie lande te besoek om onder andere die toepassing van ekonomiese sanksies teen Suid-Afrika te propageer.

28. Die eerste been van sy toer was 'n besoek aan Namibië. Hy het per vliegtuig vanaf die destydse Jan Smuts Lughawe na Windhoek gereis.

29. Nadat Eerwaarde Chikane op 24 April 1989 van die klere wat in sy tas gepak was, aangetrek het, het hy siek geword. Hy is in 'n hospitaal in Namibië opgeneem, maar is later op dieselfde dag dringend terug na Suid-Afrika vervoer, waar hy weer gehospitaliseer is.

30. Nadat daar 'n verbetering in sy toestand ingetree het, is hy ontslaan. Hy het daarop na die VSA vertrek om daar te gaan aansterk en afsprake na te kom. Sy bagasie, wat intussen vanaf Namibië gearriveer het, is met bykomende klere aangevul.

31. In die Verenigde State van Amerika het Eerwaarde Chikane weer eens siek geword, nadat hy van die klere wat in sy tas was, aangetrek het. Sy toestand het na hospitalisasie verbeter. Hierdie episode het homself op twee verdere geleenthede herhaal, waarop hy gehospitaliseer was.

32. Ekstensiewe mediese toetse is gedurende hospitalisering op Eerwaarde Chikane uitgevoer. P.Nitrophenole is in sy urine geïdentifiseer tesame met spesifieke simptome (onder andere 'n lae anticholienesterase) wat ooreenstem met organofosfaat vergiftiging. P.Nitrophenole is vinnig afbrekende metaboliete van Parathion, waarvan Paraoxon die aktiewe bestanddeel is.

33. Ten aansien van aanklag 2, is die slagoffers waarna daar verwys word, met die uitsondering van Eerwaarde Chikane, onbekend aan die staat.

DIE MISDADE:

34. Nadat Dr Basson die opdrag vermeld in paragraaf 7 aan Dr Immelman gegee het om navorsing te doen oor die aanwending van toksiese substanse, was daar verskeie klandestiene ontmoetings tussen Dr Immelman en beskuldigdes no 3, 4 en 5.

35. Gedurende die ontmoetings het die beskuldigdes inligting oor *inter alia* gifstowwe, bakterieë en kiere as gewenste toedieningsroete verlang. Dr Immelman het die substans, Paraoxon, vir die doel geïdentifiseer en verduidelik dat hierdie tipe gifstof op nousluitende kledingstukke, soos 'n hemp se boordjie en/of op 'n onderbroek, aangewend moet word. Die beskuldigdes het Dr Immelman daarop versoek om Paraoxon aan hulle te verskaf.

36. Paraoxon is 'n dodelike, toksiese substans.

37. Op 4 April 1989 het Dr Immelman die Paraoxon aan die beskuldigdes gelewer, soos in Aanhangsel "A" gereflekteer word.

38. Op 23 April 1989 sou Eerwaarde Chikane vanaf Jan Smuts Lughawe vertrek het na Windhoek.

39. Voor sy vertrek het beskuldigdes no 4 en 5 vir ene Zeelie, wat ook verbonde was aan die Veiligheidspolisie, genader en Zeelie versoek om hulle behulpsaam te wees om Eerwaarde Chikane se bagasie op die lughawe te onderskep en oop te maak, sodat die kiere met 'n gifstof besmet kon word.

40. Die aand van 23 April 1989 was beskuldigdes no 4 en 5 op die lughawe en is Eerwaarde Chikane se tas onderskep en aan hulle oorhandig. Beskuldigdes no 4 en 5 het van die inhoud van Eerwaarde Chikane se tas besmet met die Paraoxon wat Dr Immelman aan hulle verskaf het.

41. Die besmetting van Eerwaarde Chikane se klere het die gebeure soos uiteengesit in paragrawe 29 - 32 tot gevolg gehad.

42. Die Staat beweer dat beskuldigdes ter bevordering van 'n gemeenskaplike oogmerk opgetree het om Eerwaarde Chikane te dood.

43. Ten aansien van aanklag 2 is dit onbekend aan die staat wanneer en ten opsigte van wie die substanse toegedien is. Die staat beweer egter dat daar gedurende die vermelde tydperk 'n sameswering bestaan het om teenstanders van die regering van die dag te elimineer.

LYS VAN GETUIES INGEVOLGE ARTIKEL 144(3)(a) VAN WET 51 VAN 1977

1. Eerwaarde Frank Chikane
2. Dr André Immelman
3. Charles Alfred Zeelie
4. Paul Francis Erasmus
5. Pieter Jacobus Johannes Burger
6. Eugéne Alexander de Kock
7. Superintendent Marthinus Gert Thomas Swart
8. Jacobus Francois Kotze
9. Wynand Johannes Pretorius
10. Dr Daniël J Smith
11. Dr Tomas P Lynch
12. Mary Rook
13. Joan Emmerich

AANHANGSEL "A"

VERKOPE

Datum gelewer		Stof	Volume	Prys
19.03.89	JK	Phensiklidien Thallium asetaat	1 x 500mg 50g	Teruggebring
23.03.89	JK	Phensiklidien	5 x 100mg	
04.04.89	C	Aldicarb – Lemoensap	6 x 200mg	
04.04.89	C	Asied – Whisky	3 x 1,5 g	
04.04.89	C	Paraoxon	10 x 2ml	
07.04.89	C	Vit D	2gr	
15.05.89	C	Vit D	2gr	R300,00
15.05.89	C	Katharidien	70mg	R150,00
15.05.89	C	10ml Spuite	50	
16.05.89	C	Naalde 15Gx10mm	24	R18,00
16.05.89	C	Naalde 17Gx7,5mm	7	R7,00
19.05.89	C	Thallium asetaat	1g	
30.05.89		Fosfied tablette	30	
09.06.89		Spore en Brief	1	
20.06.89	K	Kapsules NaCN	50	
21.06.89		Bierblik Bot	3	
21.06.89		Bierblik Thallium	3	
21.06.89		Bottel bier Bot	1	
21.06.89		Bottel bier Thallium	2	
22.06.89	K	Suiker en Salmonella	200gr	
27.06.89	C	Wiskey en Paraquat	1x75ml	
20.07.89	K	Hg-sianied	4gr	
27.07.89	K	Bobbejaan foetus	1	
04.08.89	K	Vibrio cholera	16 bottels	

DATUM GELEWER		STOF	VOLUME	PRYS
10.08.89	K	Asied 4xgr	Kapsule sianied 7	
11.08.89	C	Sigarette B anthracis	5	
	C	Koffie sjokolade B anthracis	5	
	C	Koffie sjokolade Potulinum	5	
	C	Pepperment sjokolade Aldikarb	3	
	C	Pepperment sjokolade Brodifakum	2	
	C	Pepperment sjokolade Katharidien	3	
	C	Pepperment sjokolade Sianied	3	
16.08.89	K	Vibrio cholera	6 bottels	
16.08.89	K	Kapsules Propan NaCN	7	
16.08.89	K	Formalien en Piridien	50ml x 30	
		Naalde 10cm x no 16	12	
16.08.89	K	Katharidien - poeier in sakkie	100mg	
16.08.89	K	Metanol	3-30ml	
	C	Vibrio cholera	10 bottels	
06.09.89	K	Slange	2	
	K	Mamba toksien	1	Teruggebring
13.09.89	K	Digoksien	5 mg	
18.09.89	C	Whiskey 50ml + colchicines	75mg	
06.10.89	K	B.melitensis c	1 x 50	
		S.typhimurium in deodorant	1	
11.10.89	K	Kulture vanaf briewe	2	
21.10.89	K	B.melitensis c		
		S.typhimurium in deodorant	1	

A.

II.

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO:

In the matter between:

THE STATE

and

1. JOHANNES VELDE VAN DER MERWE

an adult male South African citizen

2. ADRIAAN JOHANNES VLOK

an adult male South African citizen

3. CHRISTOFFEL LODEWIKUS SMITH

an adult male South African citizen

4. GERT JACOBUS LOUIS HOSEA OTTO

an adult male South African citizen AND

5. HERMANUS JOHANNES VAN STADEN

an adult male South African citizen

(hereafter referred to as the accused)

PLEA AND SENTENCING AGREEMENT IN TERMS OF SECTION 105A OF ACT 51 OF 1977 (AS AMENDED)

THE PLEA AGREEMENT:

A. PARTIES TO THE AGREEMENT:

1. The State is the National Prosecuting Authority of South Africa and represents the complainant.

2. There are five accused, namely:

JOHANNES VELDE VAN DER MERWE

ADRIAAN JOHANNES VLOK

CHRISTOFFEL LODEWIKUS SMITH

GERT JACOBUS LOUIS HOSEA OTTO and

HERMANUS JOHANNES VAN STADEN;

B. AUTHORISATION:

3. The prosecutor who represents the Prosecuting Authority in this matter is **Adv AR Ackermann SC,** a Special Director in the Priority Crimes Litigation Unit in the Office of the National Prosecuting Authority, who is duly authorised to enter into this plea agreement on behalf of the State. The relevant authorisation is attached as **Annexure A.**

C. LEGAL REPRESENTATION:

4. At all times during the plea negotiations and these proceedings, the accused have been represented by **Adv Johann Engelbrecht SC** and **Jan Wagener**, of Attorneys Wagener Muller, 833 Church Street, Pretoria, 0001.

D. THE INVESTIGATING OFFICER:

5. The investigating officer was consulted regarding this plea agreement and has indicated that he has no objection to the pleas of guilty as set out in the agreement, or to the proposed sentences.

E. THE COMPLAINANT'S ATTITUDE WITH REGARD TO THE PLEA AGREEMENT:

6. The complainant, the **Reverend Frank Chikane**, has been consulted and has indicated that:

6.1 He does not harbour a grudge against the accused.

6.2 It is extremely important for him to have the true facts surrounding the attempt on his life disclosed.

6.3 He is satisfied with the plea agreement and does not wish to make any further representations in connection with the matter.

F. THE RIGHTS OF THE ACCUSED:

7. Prior to entering into the plea agreement, the accused were duly informed about their constitutional rights..

8. They have been fully informed regarding the rebuttable presumption that they are innocent until guilt has been proved beyond reasonable doubt.

9. They were informed of their right to remain silent.

10. They were also fully informed of their right not to offer self-incriminating testimony.

11. The accused are fully aware of the fact that the Honourable Court is not bound by this plea agreement.

G. THE CHARGES:

12. The accused are charged with the following offences:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

ALTERNATIVE CHARGE TO COUNT 1: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

IN THAT the accused, together with **Wouter Basson**, **André Immelman** and **persons unknown to the State, during April 1989** and at or near **Roodeplaat Research Laboratory and/or Pretoria** in the district of **Pretoria,** unlawfully and intentionally conspired to commit the crime of **murder** against the **Reverend Frank Chikane,** and / or to assist in the commission of this offence and / or to further the commission of the offence.

COUNT 2: CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956

IN THAT the accused, **Wouter Basson**, **André Immelman** and **persons unknown to the State, during 1989** and at or near **Roodeplaat Research Laboratory, Security Branch Headquarters** in the district of **Pretoria and/or other locations unknown to the State,** unlawfully and intentionally conspired to commit the crime of **murder** of **persons unknown to the State** and / or to assist with the commission of such murders and / or to further the commission of such murders.

H. THE PLEA OF THE ACCUSED:

13. The parties to this plea agreement have concurred on the following:

13.1 That all the accused plead guilty to **Count 1,** as set out in the indictment:

COUNT 1: ATTEMPTED MURDER

IN THAT on or about **23 April 1989** and at or in the vicinity of **the then Jan Smuts Airport** in the district of **Kempton Park,** the accused unlawfully and intentionally, and in furtherance of a common purpose, attempted to murder the **Reverend Frank Chikane,** an adult male person, by way of **administering a poison, to wit Paraoxon, to his clothing.**

13.2 That the State will withdraw **Count 2** against all the accused.

1. FACTUAL SUMMARY OF EVENTS:

(i) BACKGROUND:

(For the sole and exclusive purpose of this agreement, the accused admit the contents of paragraphs 14 to 23 as set out hereunder, although at the time the relevant offence referred to in **Count 1** was committed, they had no knowledge whatsoever thereof.)

14. During the period 1982 – 1992, the South African Defence Force ran a Top Secret project, namely Project Coast. The primary objective of this project was to develop a defensive and limited offensive chemical and biological warfare capacity.

15. Dr Wouter Basson was the project officer.

16. Due to the sensitivity of the project, front companies were used to conduct research as well as to manufacture and procure substances.

17. The front company Delta G Scientific (Pty) Ltd (hereafter referred to as "Delta G") was responsible for research and manufacture of chemical substances for the project.

18. Roodeplaat Research Laboratory (Pry) Ltd (hereafter referred to as "Roodeplaat") conducted research in the biological sphere and to a lesser extent, also carried out chemical research.

19. Dr A Immelman was a scientist employed as the head of toxicological research at Roodeplaat.

20. Around the mid-1980s, Dr Basson instructed Dr Immelman to, *inter alia*, carry out research on the use of toxic substances against individuals, methods of application and the traceability of such substances following administration. These toxic substances (including Paraoxon) were manufactured at Roodeplaat and some of them were handed over to Dr Basson.

21. In approximately 1987, Dr Basson ordered Dr Immelman to meet clandestinely with representatives of other branches of the Security Forces and to supply them with whatever substances they needed.

22. As a result of this instruction, Dr Immelman had various clandestine meetings with members of the various Security Force components. During these meetings, the needs of particular components were discussed and toxic substances were in fact later supplied to them.

23. In order to keep a record of the toxic substances that were handed over to these outsiders, Dr Immelman maintained a list (attached to the indictment

as **Annexure "A"**) indicating the date of delivery, the name of the substance and the volume / quantity supplied.

(ii) THE ACCUSED:

24. During the period January 1986 to September 1988, accused No 1 was the commanding officer of the SA Police Special Branch. In October 1988, he was promoted to Deputy Commissioner of Police.

25. General Sebastiaan Smit succeeded him as commander of the Security Police and thereafter, accused No 1 had no further involvement with the project.

26. During the period December 1986 to August 1991, accused No 2 was the Minister of Law and Order in the Republic of South Africa.

27. During the period relevant to the indictment, accused 3 to 5 served as police officers attached to the Security Branch.

(iii) THE VICTIM:

28. The Reverend Frank Chikane was an outspoken opponent of apartheid and the policies of the then lawfully elected government. He was, *inter alia*, the secretary-general of the South African Council of Churches and the vice president of the United Democratic Front. It was the stated policy of the latter organisation to propagate and support countrywide unrest and violence for the direct purpose of rendering the country ungovernable.

29. During April / May 1989, Reverend Chikane was planning to visit various foreign countries with a view to propagating the imposition of economic sanctions against South Africa.

30. The first leg of his trip was a visit to South West Africa, now Namibia. He travelled by air from the former Jan Smuts Airport to Windhoek.

31. After dressing on 24 April 1989 in some of the clothes that had been packed in his suitcase, the Reverend Chikane took ill. He was admitted to a hospital in Namibia, but later the same day, he was transported back to South Africa as a matter of urgency and re-hospitalised on arrival.

32. His condition improved and he was discharged from hospital. He then flew to the USA, both to recuperate and to keep a number of scheduled appointments. Additional clothing was packed in his suitcase, which had arrived from Namibia in the interim.

33. In the United States, Reverend Chikane again fell ill after wearing clothing taken from his suitcase. Again, after being hospitalised, his condition improved. This pattern was repeated twice more.

34. During his third hospitalisation in the USA, extensive medical tests were carried out on Reverend Chikane. P-Nitrophenol was found in his urine and this, together with specific symptoms and other test results, indicated organophosphate poisoning. P-Nitrophenol is a rapidly biodegradable metabolite of Parathion, of which Paraoxon is the active ingredient.

(iv) THE CRIME:

35. During the 1980s, various individuals / organisations were actively involved in efforts to abolish apartheid in South Africa and/or overthrow the government of the day by violent means. Methods used included the promotion of economic sanctions against and the international isolation of South Africa, as well as direct propagation of civil disobedience in order to render the country ungovernable.

36. During 1987, at a meeting arranged by the South African Defence Force, accused No 1 took cognisance of an order to act against high profile members of the anti-apartheid liberation struggle in order to neutralise their influence. He also took note that, in extreme cases and only as a last resort, consideration could be given to killing them.

37. A list containing the names of persons identified in terms of this order was handed to senior members of the security establishment, including accused No 1. Reverend Chikane's name was among those on this list.

38. The execution of the above-mentioned order was discussed by accused No 1 and No 2.

39. Accused No 1 and No 2 then decided that a special unit should be set up within the Security Branch for the purpose of carrying out this order.

40. Accused No 4 and No 5 were attached to this special unit at all relevant times and from January 1989, accused No 3 served as the commander of the unit.

41. After General Smit assumed command of the Security Branch, he was informed about the objectives of the special unit.

42. Acting on the orders of General Smit, accused No 3 made contact with Dr Basson and requested him to assist the special unit in acquiring substances that could be applied against the enemy. Dr Basson arranged for contact to be made with Dr Immelman.

43. A number of clandestine meetings took place thereafter between Dr Immelman and accused No 3, 4 and 5. At these meetings, these three accused discussed the details of substances that could be used against the enemy. In respect of Reverend Chikane, a substance that would specifically lead to his death was required. Dr Immelman identified a certain substance for this purpose and explained that it should be applied to close-fitting clothing items, such as a shirt collar and/or underpants. The toxic substance, which was subsequently identified as Paraoxon, was supplied to them by Dr Immelman.

44. Paraoxon is a lethal toxic substance.

45. On 4 April 1989, Dr Immelman delivered the Paraoxon to the accused, as reflected in **Annexure "A" of the Indictment.**

46. Reverend Chikane was due to depart for Windhoek from Jan Smuts Airport on 23 April 1989.

47. On the evening of 23 April 1989, accused No 3 and No 4 were at the airport and Reverend Chikane's suitcase was intercepted. They then applied the Paraoxon supplied to them by Dr Immelman, to the contents of Reverend Chikane's suitcase.

48. The poisoning of Reverend Chikane's clothing resulted in the series of events set out in paragraphs 31-34.

49. The order to kill Reverend Chikane was issued by General Smit to accused No 3 in terms of an order conveyed to accused No 1 and No 2. The accused acted in pursuance of a common purpose to murder Reverend Chikane. At all relevant times, the accused acted unlawfully and with the necessary intent.

AGREEMENT REGARDING A JUST SENTENCE:

J. AGGRAVATING CIRCUMSTANCES:

50. The administration of poison in order to secretly eliminate opponents is an egregious, reprehensible and universally abhorrent act.

51. Accused No 1 was the Deputy Chief of the Republic of South Africa's Police at the time of commission of this crime.

52. Accused No 2 was a prominent political leader and member of the ruling party of the day.

53. Reverend Chikane was a religious leader.

54. The motive for the planned murder of Reverend Chikane was to prevent him from lobbying abroad for economic sanctions against South Africa and to deprive him of his role in promoting internal résistance against the government..

55. The **Promotion of National Unity and Reconciliation Act, No 34 of 1995,** made provision for persons who were guilty of committing gross human rights violations for political purposes, to apply for amnesty.

56. On several occasions, accused No 1 and 2 availed themselves of this right and testified before the Truth and Reconciliation Committee, each time under oath.

57. The accused did not apply for amnesty in respect of the charge to which they have now pleaded guilty.

58. On 10 July 1997, accused No 1 testified before the TRC that he was not aware of the existence of a so-called "internal hit list" that was circulated within the security community.

59. Acts of reconciliation towards Reverend Chikane by accused No 2 took place only after the National Prosecuting Authority had indicated that it had a *prima facie* case against accused No 3, 4 and 5 in respect of the poisoning of Reverend Chikane.

60. During the trial of Dr Wouter Basson, who was charged, *inter alia,* with the poisoning of Reverend Chikane, the accused, and in particular accused No 2, remained silent about their role in the attempted murder and avoided any suggestion of attempted reconciliation.

61. During the prosecution of Dr Basson, accused No 3, 4 and 5 were approached on several occasions by members of the prosecution team with a view to giving evidence as State witnesses. They were offered indemnity from prosecution in terms of Section 204 of Act 51 of 1977 in this regard. The accused consistently refused to offer their cooperation and persisted in furnishing the State with a false version of events. The accused offered instead to cooperate with Dr Basson's legal defence team.

62. After conclusion of Dr Basson's trial, Reverend Chikane wrote to accused No 3, 4 and 5 several times, pleading with them to reconcile with him. The accused consistently ignored all his requests.

K. MITIGATING CIRCUMSTANCES:

63. None of the accused has any previous convictions. Their respective ages are 71 (accused No 1), 70 (accused No 2), 69 accused No 3), 60 (accused No 4) and 63 (accused No 5).

64. The accused are all married.

65. The accused have all pleaded guilty.

66. Disposal of this case in terms of Section 105A of Act 51 of 1977 saves both the court and the State the cost and inconvenience of a protracted trial.

67. The accused have assisted the State by pleading guilty, in so far as it would otherwise have been difficult for the State to prove its case, since the State is not in possession of any evidence regarding the involvement of accused No 1 and No 2 and has been able to establish their role only as the result of their cooperation. In addition, accused No 3 and No 4 came forward to disclose their roles.

68. The accused have shown remorse for their deeds and have undertaken to act as State witnesses in the event of a prosecution being instituted against General Sebastiaan Smit.

69. Accused No 2 publicly washed Reverend Chikane's feet as a gesture of reconciliation. This act of contrition must be seen against the background that it was performed voluntarily by accused No 2.

70. The sincere remorse of accused No 2 in regard to past deeds is further illustrated by his act of reconciliation towards the mothers of 9 of the 10 Nietverdiend victims killed by the Security Forces, despite the fact that accused No 2 had no knowledge of this operation at the time and nor was it sanctioned by him.

71. At all relevant times, the accused were acting by virtue of their official positions and posts, in defence of the lawfully elected government of the day, to which they had sworn an oath of allegiance.

72. The offence was committed during a period of intense conflict and division between the various communities and structures in South Africa. On the one hand, the ANC and other anti-apartheid organisations that wished to overthrow the government by violent means, had thrown everything into the struggle to achieve their objectives. All members and spheres of society were drawn into the struggle in order to foment résistance in a variety of forms. On the other hand, the then lawfully elected government, in turn, used all the methods and powers at its disposal. The Security Forces, and in particular the SA Police, played a key role in combating the onslaught. Amid the violence raging countrywide as well as in Namibia, the SA Police were increasingly required to act against trained military operatives, which had a significant influence on normal policing. At times,

they were forced to sacrifice the principle of minimum force and, amid the violence and bloodletting, the distinction between lawful and unlawful action became blurred.

73. At the time of commission of the offence outlined in Count 1, accused No 1 was no longer head of the Security Police and was also no longer involved in the project.

74. Neither accused No 1 nor No 2 had knowledge of the specific attempt on Reverend Chikane's life. Notwithstanding the fact that accused No 2 had made it clear that he wished to be informed in advance if consideration was being given to killing a specific individual, he was not informed in this particular case.

75. Accused No 3 and No 4 were subordinates who acted in terms of a direct order issued by the Security Branch chief, General Smit.

76. The original project aimed at neutralising the influence of high profile members of the anti-apartheid liberation struggle, was not initiated by the accused, but by the SA Defence Force, which itself was acting on higher authority.

77. As secretary-general of the South African Council of Churches and vice president of the United Democratic Front, Reverend Chikane played a key role in fomenting resistance to the former government. The United Democratic Front succeeded in mobilising the masses countrywide, resulting in widespread unrest and violence.

78. In the run-up to the TRC process, accused No 1 did everything possible to encourage members and former members of the SA Police to participate in the process. When the incident involving Reverend Chikane came to his notice, he held discussions with former chiefs and generals of the SA Defence Force in an attempt to persuade them to take part in the process as well. Because members of the defence force were involved in the incident, any attempt to seek amnesty would necessarily have been unsuccessful without their cooperation. The military generals were of the opinion, however, that the **Promotion of National Unity and Reconciliation Act, No 34 of 1995,** contained one-sided provisions that rendered the process unacceptable to them.

79. After conclusion of the TRC process, accused No 1 and No 2 did everything they could to promote creation of a further process that could address shortcomings exposed by the TRC process. Following the decision to prosecute accused No 3, 4 and 5, accused No 1 and No 2 also held discussions with Reverend Chikane with a view to the institution of such a process. He showed empathy for the problems with which accused No 1 and No 2 were wrestling.

80. With the formulation of the National Prosecuting Authority's prosecutorial guidelines entitled "*Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994*" (see **Annexure "B"**), a process was created that offered built-in protection for individuals who wished to make use of it, and the accused lost no time in coming forward and making full disclosure regarding this incident, which they had not been able to do in response to the letters from Reverend Chikane referred to in paragraph 62 above.

L. SENTENCE AGREEMENT:

81. In the light of the circumstances set out above, agreement has been reached on the following as appropriate sentences in respect of count 1:

Accused No 1 and No 2:

Each of the accused is sentenced as follows:

> "**10 (ten)** years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

Accused No 3, 4 and 5:

Each accused is sentenced as follows:

> "**5** (five) years' imprisonment, wholly suspended for 5 (five) years on condition that the accused are not convicted of a crime in which assault or the administration of poison or other hazardous substances form an element, or of conspiracy to commit such a crime, committed during the period of suspension and in respect of which a sentence of imprisonment without the option of a fine is imposed."

SIGNED AT **PRETORIA** ON THIS DAY OF JUNE 2007.

_____

AR ACKERMANN SC
Director of Public Prosecutions
Priority Crime Litigation Unit.

_____

1. JOHANNES VELDE VAN DER MERWE

_____

2. ADRIAAN JOHANNES VLOK

_____

3. CHRISTOFFEL LODEWIKUS SMITH

_____

4. GERT JACOBUS LOUIS HOSEA OTTO

_____

5. HERMANUS JOHANNES VAN STADEN

_____

JAN WAGENER
ATTORNEY FOR THE ACCUSED
WAGENER MULLER
833 CHURCH STREET
ARCADIA, PRETORIA
TEL: (012) 342-3525
DOCEX 321 PRETORIA
REF: JW0423

A.

III.

IN DIE HOOGGEREGSHOF VAN SUID AFRIKA

(TRANSVAALSE PROVINSIALE AFDELING)

SAAK NR:

In die saak tussen:

DIE STAAT

en

1. JOHANNES VELDE VAN DER MERWE

'n volwasse man en 'n Suid-Afrikaanse burger

2. ADRIAAN JOHANNES VLOK

'n volwasse man en 'n Suid-Afrikaanse burger

3. CHRISTOFFEL LODEWIKUS SMITH

'n volwasse man en 'n Suid-Afrikaanse burger

4. GERT JACOBUS LOUIS HOSEA OTTO

'n volwasse man en Suid-Afrikaanse burger en

5. HERMANUS JOHANNES VAN STADEN

'n volwasse man en Suid-Afrikaanse burger

(hierna die beskuldigdes genoem)

PLEIT- EN VONNISOOREENKOMS INGEVOLGE

ARTIKEL 105A VAN WET 51 VAN 1977 (SOOS GEWYSIG)

DIE PLEIT-OOREENKOMS:

A. PARTYE TOT OOREENKOMS:

1. Die Staat is die vervolgingsgesag en verteenwoordig die klaer;

2. Daar is vyf beskuldigdes, naamlik:

JOHANNES VELDE VAN DER MERWE

ADRIAAN JOHANNES VLOK

CHRISTOFFEL LODEWIKUS SMITH

GERT JACOBUS LOUIS HOSEA OTTO en

HERMANUS JOHANNES VAN STADEN;

B. MAGTIGING:

3. Die aanklaer wat die Vervolgingsgesag hierin verteenwoordig, is **Adv. Anton R Ackermann SC**, 'n Spesiale Direkteur verbonde aan die Prioriteits Misdaad Litigasie Eenheid van die Nasionale Vervolgingsgesag en het die pleit-onderhandelinge in hierdie saak behartig, waartoe hy behoorlik gemagtig is. Die betrokke magtiging word hierby aangeheg as **Aanhangsel A**.

C. REGSVERTEENWOORDIGING:

4. Die beskuldigdes is gedurende die pleit-onderhandelinge en voer van die verrigtinge deurentyd verteenwoordig deur **Adv Johann Engelbrecht SC** en **Jan Wagener**, van Prokureurs Wagener Muller, Kerkstraat 833, Pretoria, 0001.

D. DIE ONDERSOEKBEAMPTE:

5. Die ondersoekbeampte is geraadpleeg in hierdie aangeleentheid en het geen beswaar teen die verrigtinge en die voorgestelde vonnisse nie.

E. DIE KLAER SE HOUDING TEN OPSIGTE VAN DIE PLEIT-OOREENKOMS:

6. Die klaer, **Eerwaarde Frank Chikane**, is gespreek.

6.1 Hy het te kenne gegee dat hy nie 'n wrok teen die beskuldigdes koester nie;

6.2 Dat dit baie belangrik vir hom is dat die ware feite aan die lig kom; en

6.3 Dat hy tevrede is met die pleit-ooreenkoms en geen verdere vertoë in verband met hierdie aangeleentheid wil rig nie.

F. DIE BESKULDIGDES SE REGTE:

7. Alvorens hierdie verrigtinge 'n aanvang geneem het, is die beskuldigdes behoorlik oor hul fundamentele regte ingelig.

8. Hulle is volledig ingelig oor die weerlegbare vermoede dat hulle onskuldig is totdat hul bo redelike twyfel skuldig bewys word.

9. Hulle is ingelig oor hul reg om te kan swyg.

10. Hulle is ook volledig ingelig oor die reg om nie inkriminerende getuienis teen hulself af te lê nie.

11. Die beskuldigdes is verder bewus van die feit dat die Agbare Hof nie gebonde is aan hierdie ooreenkoms nie.

G. DIE AANKLAGTE:

12. Die beskuldigdes word aangekla van die volgende aanklagte:

AANKLAG 1: POGING TOT MOORD

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby **die destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur **sy klere met 'n gifstof, te wete Paraoxon, te besmet**.

ALTERNATIEWE AANKLAG TOT AANKLAG 1: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman** en **persone onbekend aan die Staat, gedurende April 1989** en te of naby **Roodeplaat Navorsings Laboratorium en of Pretoria** in die distrik van **Pretoria** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **Eerwaarde Frank Chikane**, te pleeg en / of by die pleging van die misdaad behulpsaam te wees en / of die pleging daarvan te bewerkstellig.

AANKLAG 2: OORTREDING VAN ARTIKEL 18(2)(a) VAN DIE *WET OP OPROERIGE BYEENKOMSTE*, WET 17 VAN 1956

DEURDAT die beskuldigdes, **Wouter Basson, André Immelman** en **persone onbekend aan die Staat, gedurende 1989** en te of naby **Roodeplaat Navorsings Laboratorium, Veiligheidspolisie Hoofkantoor** in die distrik van **Pretoria en of ander plekke onbekend aan die Staat** wederregtelik en opsetlik saamgesweer het om die misdaad van **moord** ten aansien van **persone onbekend aan die Staat** te pleeg en / of by die pleging van die misdaad behulpsaam te wees en / of die pleging daarvan te bewerkstellig.

H. DIE BESKULDIGDES SE PLEIT:

13. Die partye tot hierdie ooreenkoms het tot die volgende ooreengekom:

13.1 Dat die beskuldigdes skuldig pleit op **aanklag 1**, soos vervat in die akte van beskuldiging:

Aanklag 1:

DEURDAT die beskuldigdes op of omtrent **23 April 1989** en te of naby **die destydse Jan Smuts Lughawe** in die distrik van **Kempton Park** wederregtelik en opsetlik ter bevordering van 'n gemeenskaplike oogmerk gepoog het om vir **Eerwaarde Frank Chikane**, 'n volwasse manlike persoon, te dood deur **sy klere met 'n gifstof, te wete Paraoxon, te besmet.**

13.2 Dat die Staat **aanklag 2**, soos vervat in die akte van beskuldiging, terugtrek teen al die beskuldigdes.

I. FEITLIKE UITEENSETTING VAN DIE VOORVALLE:

(i) AGTERGROND:

(Vir doeleindes van hierdie ooreenkoms alleen erken die beskuldigdes die inhoud van paragrawe 14 tot 23 wat direk hierna volg, alhoewel hulle ten tye van die pleeg van die betrokke misdryf geen kennis van enige aard daarvan gedra het nie.)

14. Die Suid-Afrikaanse Weermag het gedurende die tydperk 1982-1992 'n hoogs geheime projek bedryf wat as Projek Coast bekend gestaan het. Die hoofdoelstelling van die projek was om 'n defensiewe en beperkte offensiewe chemiese- en biologiese oorlogvermoë daar te stel.

15. Dr Wouter Basson was die projekoffisier.

16. Vanweë die sensitiwiteit van die projek is daar van frontmaatskappye gebruik gemaak om navorsing te doen sowel as om substanse te vervaardig en te verkry.

17. Die frontmaatskappy Delta G Scientific (Edms) Bpk (hierna genoem "Delta G") was vir die navorsing en vervaardiging van die chemiese been van die projek verantwoordelik.

18. Roodeplaat Navorsing Laboratorium (Edms) Bpk (hierna genoem "Roodeplaat") het navorsing op biologiese gebied en tot 'n mindere mate chemiese navorsing gedoen.

19. Dr A Immelman was 'n wetenskaplike wat by Roodeplaat as die hoof van navorsing op toksikologie werksaam was.

20. Dr Basson het ongeveer in die middel tagtigerjare vir Dr Immelman opdrag gegee om *inter alia* navorsing te doen oor die aanwending van toksiese substanse teen individue, die roete van aanwending, sowel as die opspoorbaarheid van die stowwe na die toediening daarvan. Hierdie toksiese substanse (onder andere Paraoxon) is by Roodeplaat vervaardig en sommige daarvan is aan Dr Basson oorhandig.

21. Gedurende ongeveer 1987 het Dr Basson aan Dr Immelman opdrag gegee om met verteenwoordigers van ander afdelings van die Veiligheidsmagte op 'n klandestiene wyse te ontmoet en aan hul behoeftes te voldoen.

22. Dr Immelman het daarna verskeie klandestiene ontmoetings met lede van die onderskeie veiligheidsmagte gehad. Tydens hierdie ontmoetings is die behoefte van die besondere afdeling bespreek en is die substanse later

23. Ten einde rekord te hou van hierdie toksiese substanse wat aan die buitestaanders oorhandig is, het Dr Immelman 'n lys (aangeheg as **Aanhangsel "A" tot die Akte van Beskuldiging**) bygehou om die datum van lewering, die naam van die substans, sowel as die volume / hoeveelheid wat gelewer is, aan te dui.

(ii) DIE BESKULDIGDES:

24. Beskuldigde no 1 was gedurende die tydperk Januarie1986 tot September1988 die bevelvoerende offisier van die Veiligheidstak van die SA Polisie. Gedurende Oktober 1988 is hy bevorder tot adjunk-kommissaris van die Polisie.

25. Generaal Sebastiaan Smit het hom opgevolg as bevelvoerder van die Veiligheidstak en beskuldigde no 1 was daarna nie meer betrokke by die projek nie.

26. Beskuldigde no 2 was die Minister van Wet en Orde van die Republiek van Suid-Afrika gedurende die tydperk Desember 1986 tot Augustus 1991.

27. Beskuldigdes no 3 tot 5 was gedurende die relevante tye tot die akte van beskuldiging offisiere verbonde aan die Veilgheidstak.

(iii) DIE SLAGOFFER:

28. Eerwaarde Chikane was 'n uitgesproke teenstaander van apartheid en die beleid van die destydse wettige verkose regering. Hy was onder andere die sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en die vise-president van die United Democratic Front. Laasgenoemde organisasie het as verklaarde beleid gehad die propagering en ondersteuning van landswye onrus en geweld met as direkte doelstelling om die land onregeerbaar te maak.

29. Gedurende April / Mei 1989 was Eerwaarde Chikane van voorneme om verskele lande te besoek om onder andere die toepassing van ekonomiese sanksies teen Suid-Afrika te propageer.

30. Die eerste been van sy toer was 'n besoek aan Suidwes-Afrika, tans Namibië. Hy het per vliegtuig vanaf die destydse Jan Smuts Lughawe na Windhoek gereis.

31. Nadat Eerwaarde Chikane op 24 April 1989 van die klere wat in sy tas gepak was, aangetrek het, het hy siek geword. Hy is in 'n hospitaal in Namibië opgeneem, maar is later op dieselfde dag dringend terug na Suid-Afrika vervoer, waar hy weer gehospitaliseer is.

32. Nadat daar 'n verbetering in sy toestand ingetree het, is hy ontslaan. Hy het daarop na die VSA vertrek om daar te gaan aansterk en afsprake na te kom. Sy bagasie, wat intussen vanaf Namibië gearriveer het, is met bykomende klere aangevul.

33. In die Verenigde State van Amerika het Eerwaarde Chikane weer eens siek geword, nadat hy van die klere wat in sy tas was, aangetrek het. Sy toestand het na hospitalisasie verbeter. Hierdie episode het homself op twee verdere geleenthede herhaal, waarop hy gehospitaliseer was.

34. Ekstensiewe mediese toetse is gedurende hospitalisering op Eerwaarde Chikane uitgevoer. P.Nitrophenole is in sy urine geïdentifiseer tesame met spesifieke simptome (onder andere 'n lae anticholienesterase) wat ooreenstem met organofosfaat vergiftiging. P.Nitrophenole is vinnig afbrekende metaboliete van Parathion, waarvan Paraoxon die aktiewe bestanddeel is.

(iv) DIE MISDAAD:

35. Gedurende die tagtigerjare was verskeie persone / organisasies aktief betrokke in Suid-Afrika onder andere met die doel om die afskaffing van apartheid en/of die omverwerping van die regering van die dag met geweld teweeg te bring. Dit is onder andere gedoen deur die bevordering van ekonomiese sanksies teen en die internasionale isolasie van Suid-Afrika, asook die regstreekse bevordering van burgerlike ongehoorsaamheid ten einde die land onregeerbaar te maak.

36. Gedurende 1987 het beskuldigde no 1 op 'n vergadering, wat deur die Suid-Afrikaanse Weermag gereël is, verneem van 'n opdrag om teen hoë profiel lede van die anti-Apartheids-vryheidstryd op te tree ten einde hul invloed te neutraliseer en dat, slegs in uiterste gevalle, as 'n laaste uitweg, oorweeg kon word om hulle om die lewe te bring.

37. 'n Lys met die name van die geïdentifiseerde persone is aan senior lede van die Veiligheidsgemeenskap, insluitende beskuldigde no 1, oorhandig. Eerwaarde Chikane se naam het op hierdie lys verskyn.

38. Beskuldigdes nos 1 en 2 het die uitvoering van die bovermelde opdrag bespreek.

39. Daar was toe deur beskuldigdes nos 1 en 2 besluit dat 'n spesiale eenheid in die Veiligheidstak gestig sou word om die opdrag uit te voer.

40. Beskuldigdes nos 4 en 5 was ten alle relevante tye verbonde aan hierdie spesiale eenheid en vanaf Januarie 1989 het beskuldigde no 3 gedien as die bevelvoerder van die eenheid.

41. Nadat Generaal Smit oorgeneem het as bevelvoerder van die Veiligheidstak, is hy ingelig ten aansien van die doelwitte van die spesiale eenheid.

42. In opdrag van Generaal Smit het beskuldigde no 3 kontak met Dr Basson gemaak en hom versoek om hulle spesiale eenheid behulpsaam te wees om middels te bekom wat aangewend kon word teen die vyand. Dr Basson het reëlings getref dat kontak gemaak word met Dr Immelman.

43. Verskeie klandestiene ontmoetings het daarna tussen Dr Immelman en beskuldigdes nos 3, 4 en 5 plaasgevind. Gedurende die ontmoetings het die gemelde beskuldigdes inligting oor middels wat teen die vyand aangewend kon word, bespreek, en wat Eerwaarde Chikane betref, spesifiek 'n middel verlang wat tot sy dood sou lei. Dr Immelman het 'n bepaalde substans vir die doel geïdentifiseer en verduidelik dat dit op nousluitende kledingstukke, soos 'n hemp se boordjie en/of op 'n onderbroek, aangewend moet word. Die betrokke substans, wat nou blyk Paraoxon te gewees het, is deur Dr Immelman aan hulle verskaf.

44. Paraoxon is 'n dodelike, toksiese substans.

45. Op 4 April 1989 het Dr Immelman die Paraoxon aan die beskuldigdes gelewer, soos in **Aanhangsel "A" tot die Akte van Beskuldiging** gereflekteer word.

46. Op 23 April 1989 sou Eerwaarde Chikane vanaf Jan Smuts Lughawe vertrek het na Windhoek.

47. Die aand van 23 April 1989 was beskuldigdes nos 3 en 4 op die lughawe en is Eerwaarde Chikane se tas onderskep. Daarna het hulle van die inhoud van Eerwaarde Chikane se tas besmet met die Paraoxon wat Dr Immelman aan hulle verskaf het.

48. Die besmetting van Eerwaarde Chikane se klere het die gebeure soos uiteengesit in paragrawe 31-34 tot gevolg gehad.

49. Die opdrag om Eerwaarde Chikane te dood is deur Generaal Smit aan beskuldigde no 3 gegee in navolging van 'n opdrag van beskuldigdes nos 1 en 2. Die beskuldigdes het ter bevordering van 'n gemeenskaplike oogmerk opgetree om Eerwaarde Chikane te dood. Te alle relevante tye het die beskuldigdes met die nodige opset en wederregtelikheid opgetree.

OOREENKOMS TEN OPSIGTE VAN 'N REGVERDIGE VONNIS:

J. VERSWARENDE OMSTANDIGHEDE:

50. Die aanwending van gifstowwe om opponente heimlik te vermoor, is 'n uiters laakbare daad wat universeel verag word.

51. Beskuldigde no 1 was die Adjunk-Polisiehoof van die Republiek van Suid-Afrika tydens die pleeg van die misdryf.

52. Beskuldigde no 2 was 'n prominente politieke leier van die regerende party van die dag.

53. Eerwaarde Chikane was 'n geestelike leier.

54. Die motief vir die beplande moord op Eerwaarde Chikane was om hom te verhoed om ekonomiese sanksies teen Suid-Afrika in die buiteland te propageer en om sy rol om in die binneland verset teen die regering aan te wakker, aan bande te lê.

55. Die **Wet op die Bevordering van Nasionale Eenheid en Versoening 34 van 1995**, het daarvoor voorsiening gemaak dat persone wat hulle skuldig gemaak het aan die growwe skending van menseregte vir 'n politieke oogmerk, aansoek kon doen vir amnestie.

56. Beskuldigdes nos 1 en 2 het op verskeie geleenthede gebruik gemaak van hierdie reg deur te getuig voor die Komitee, welke getuienis elke keer onder eed gelewer is.

57. Die beskuldigdes het nie aansoek gedoen vir amnestie ten opsigte van die aanklag waarop hulle skuldig pleit nie.

58. Beskuldigde no 1 het *inter alia* op 10 Julie 1997 voor die WVK getuig dat hy nie bewus was van die bestaan van 'n sogenaamde "internal hit list" wat onder die Veiligheidsgemeenskap gesirkuleer is nie.

59. Beskuldigde no 2 se versoenende optrede teenoor Eerwaarde Chikane het eers plaasgevind nadat die Vervolgingsgesag aangedui het dat hy 'n *prima facie* saak ten aansien van die vergiftiging van Eerwaarde Chikane teen beskuldigdes nos 3, 4 en 5 het.

60. Gedurende die verhoor van Dr Wouter Basson wat *inter alia* tereg gestaan het op die vergiftiging van Eerwaarde Chikane, het die beskuldigdes, en in die besonder beskuldigde no 2, geswyg oor sy rol in die poging tot moord en was daar ook geen sprake van enige versoenende optrede nie.

61. Gedurende die verhoor van Dr Basson is Beskuldigdes nos 3, 4 en 5 verskeie kere deur lede van die vervolgingspan genader om as Staatsgetuies op te tree. Vrywaring ingevolge Artikel 204 van Wet 51 van 1977 is vir hulle aangebied. Die beskuldigdes het geweier om enigsins hulle samewerking te gee en het voortgegaan om 'n valse weergawe aan die Staat te verskaf. Beskuldigdes het hulle samewerking aan die verdedigingspan van Dr Basson aangebied.

62. Na afloop van die verhoor van Dr Basson het Eerwaarde Chikane verskeie skrywes aan Beskuldigdes nos 3, 4 en 5 gerig, waarin hy om versoening gepleit het. Die beskuldigdes het nie op hierdie skrywes gereageer nie.

K. VERSAGTENDE OMSTANDIGHEDE:

63. Beskuldigdes het geen vorige veroordelings nie en is onderskeidelik 71 (beskuldigde no 1), 70 (beskuldigde no 2), 69 (beskuldigde no 3), 60 (beskuldigde no 4) en 63 (beskuldigde no 5) jaar oud.

64. Die beskuldigdes is tans getroud.

65. Die beskuldigdes pleit skuldig.

66. Die afhandeling van die huidige saak by wyse van artikel 105A van Wet 51 van 1977 het die hof en die Staat die onkoste en die ongerief van 'n uitgerekte verhoor gespaar.

67. Die beskuldigdes het die Staat gehelp deur skuldig te pleit, deurdat die Staat andersins moeilik die aanklag sou kon bewys het, aangesien die Staat oor geen getuienis beskik het rakende die aandeel van beskuldigdes no 1 en 2 en slegs met hul eie samewerking bewus geraak het van hulle aandeel. Verder het beskuldigdes no 3 en 4 na vore gekom met die feite rakende hulle aandeel.

68. Die beskuldigdes het berou getoon vir hulle dade en onderneem om as staatsgetuies op te tree indien daar 'n vervolging teen generaal Sebastiaan Smit ingestel word.

69. Beskuldigde no 2 het sonder geheimhouding en as versoeningsdaad Eerwaarde Chikane se voete gewas. Hierdie versoeningsdaad moet beoordeel word teen die agtergrond dat beskuldigde no 2 self na vore gekom het vir soverre dit hierdie saak aangaan.

70. Dat beskuldigde no 2 opregte berou het oor optredes in die verlede word verder geïllustreer deur sy versoeningsdaad geopenbaar teenoor die moeders van 9 van die 10 Nietverdiend-slagoffers wat deur die veiligheidsmagte gedood is, dit ten spyte van die feit dat beskuldigde no 2

destyds nie enige kennis van hierdie optrede gedra het nie en dit ook nie gemagtig het nie.

71. Die beskuldigdes het uit hoofde van hulle ampte en poste te alle relevante tye opgetree ter beskerming van die wettige verkose regering van die dag, teenoor wie hulle 'n eed van getrouheid afgelê het.

72. Die voorval het plaasgevind tydens 'n tydperk toe daar intense konflik en verdeeldheid tussen die verskillende gemeenskappe en strukture in Suid-Afrika geheers het. Enersyds het die ANC en ander organisasies wat apartheid teëgestaan het en die vorige regering met geweld omver wou werp, alles in die stryd gewerp om hulle doelstellings te bereik. Alle lede en sfere van die samelewing is by die stryd betrek om verset in 'n verskeidenheid van vorme aan te wakker. Andersyds het die destydse wettige verkose regering op sy beurt al die middele en kragte tot sy beskikking gebruik. Die veiligheidsmagte, in besonder die SA Polisie, het 'n sleutel rol gespeel om die aanslag af te weer. Te midde van die geweld wat landwyd asook in Namibië gewoed het moes die SA Polisie al hoe meer teen militêr opgeleide aanvallers optree, wat normale polisiëring wesentlik beïnvloed het. Hulle was soms genope om die beginsel van minimum geweld prys te gee en te midde van die geweld en bloedvergieting het die skeidslyn tussen regmatig en onregmatig vervaag.

73. Ten tyde van die handeling vermeld in aanklag 1 was beskuldigde no 1 nie meer die Veiligheidshoof van die polisie nie en ook nie meer betrokke by die projek nie.

74. Nóg beskuldigde no 1 nóg beskuldigde no 2 het kennis gedra van hierdie spesifieke aanslag op Eerwaarde Chikane se lewe. Ten spyte van die feit dat beskuldigde no 2 in elk geval vereis het om vooraf ingelig te word, indien dit oorweeg sou word om iemand spesifiek te dood, het dit in hierdie geval nie gebeur nie.

75. Wat betref beskuldigdes nos 3 en 4, was hulle ondergeskiktes wat gehandel het in terme van 'n direkte opdrag van die Veiligheidshoof, Generaal Smit.

76. Die oorspronklike projek om die invloed van hoë profiel lede van die anti-apartheids-vryheidstryd te neutraliseer, is nie deur die beskuldigdes geïnisieer nie, maar is deur die SA Weermag van stapel gestuur in opdrag van hoër gesag.

77. Eerwaarde Chikane het as sekretaris-generaal van die Suid-Afrikaanse Raad van Kerke en vise-president van die United Democratic Front 'n belangrike rol gespeel om verset teen die vorige regering aan te wakker. Die United Democratic Front het daarin geslaag om die massas landwyd te mobiliseer en burgerlike ongehoorsaamheid op groot skaal te weeg te bring, wat weer tot grootskaalse onrus en geweld gelei het.

78. Tydens die aanvang van die WVK-proses het beskuldigde no 1 alles moontlik gedoen om lede en voormalige lede van die SA Polisie aan te moedig om aan die proses deel te neem. Toe die geval van Eerwaarde Chikane onder sy aandag gekom het, het hy met voormalige hoofde en generaals van die SA Weermag samesprekings gevoer om hulle te probeer oorreed om ook aan die proses deel te neem. Omdat lede van die weermag by die voorval betrokke was, sou enige poging om amnestie te vra sonder hulle samewerking noodwendig misluk het. Die generaals van die weermag was egter van mening dat die **Wet op die Bevordering van Nasionale Eenheid en Versoening 34 van 1995**, eensydige bepalings bevat het wat dit vir hulle onaanvaarbaar gemaak het.

79. Beskuldigdes nos 1 en 2 het na afloop van die WVK-werksaamhede alles moontlik gedoen om 'n verdere proses tot stand te bring om die leemtes wat tydens die WVK-proses ontstaan het, uit te skakel. Na die besluit om beskuldigdes nos 3, 4 en 5 te vervolg, het beskuldigdes no 1 en 2 ook met Eerwaarde Chikane samesprekings gevoer met die oog op so 'n proses en het laasgenoemde begrip gehad vir die probleme waarmee beskuldigdes nos 1 en 2 geworstel het.

80. Met die daarstel van die Nasionale Direkteur van Openbare Vervolging se vervolgingsdirektief met die opskrif "*Prosecuting policy and directives relating to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994*" (sien **Aanhangsel "B"**), is 'n proses geskep wat ingeboude beskerming verleen aan persone wat daarvan gebruik maak en het die beskuldigdes onverwyld na vore gekom en oop kaarte gespeel met die Vervolgingsgesag ten aansien van die hierdie aangeleentheid, iets wat hulle nie kon doen in reaksie op die briewe van Eerwaarde Chikane na verwys in paragraaf 62 hierbo nie.

L. VONNIS-OOREENKOMS:

81. Dit word ooreengekom dat wat betref aanklag 1, die volgende 'n regverdige vonnis daarstel in die omstandighede hierbo uiteengesit:

<u>Beskuldigdes nos 1 en 2:</u>

Elke beskuldigde word soos volg gevonnis:

> "**10 (tien)** jaar gevangenisstraf wat in die geheel opgeskort word vir 5 (vyf) jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan 'n misdaad waarvan aanranding of die toediening van gif of ander skadelike stowwe 'n element is nie, of aan sameswering om so 'n misdaad te pleeg, gepleeg gedurende die periode van

Beskuldigdes nos 3, 4 en 5:

Elke beskuldigde word soos volg gevonnis:

> "**5 (vyf)** jaar gevangenisstraf wat in die geheel opgeskort word vir 5 (vyf) jaar op voorwaarde dat die beskuldigde nie skuldig bevind word aan 'n misdaad waarvan aanranding of die toediening van gif of ander skadelike stowwe 'n element is nie, of aan sameswering om so 'n misdaad te pleeg, gepleeg gedurende die periode van opskorting en ten opsigte waarvan gevangenisstraf sonder die keuse van 'n boete opgelê word."

GETEKEN TE **PRETORIA**, OP HIERDIE 15 DAG VAN AUGUSTUS 2007.

AR ACKERMANN SC
Direkteur van Openbare Vervolging,
Prioriteits Misdade Litigasie Eenheid.

1. JOHANNES VELDE VAN DER MERWE

2. ADRIAAN JOHANNES VLOK

3. CHRISTOFFEL LODEWIKUS SMITH

4. GERT JACOBUS LOUIS HOSEA OTTO

5. HERMANUS JOHANNES VAN STADEN

JAN WAGENER
PROKUREUR VIR BESKULDIGDES
WAGENER MULLER
KERKSTRAAT 833
ARCADIA, PRETORIA
TEL: (012) 342-3525
DOCEX 321 PRETORIA
VERW: JW0423

B.

KONSEP AKTE VAN BESKULDIGING

IN DIE OOS KAAPSE PROVINSIALE AFDELING

Saakno: .....

Die Staat

teen

1. **Gideon Nieuwoudt**
2. **Johannes Martin Van Zyl**

(Hierna vermeld as die beskuldigdes)

Akte van Beskuldigding

AANKLAGTE 1 TOT 3 – MENSEROOF (3 AANKLAGTE)

Deurdat die beskuldigdes en die volgende persone:

(i) Roelf Venter;
(ii) Gert Beeslaar;
(iii) Johannes Koole
(iv) Joe Mamasela;
(v) Peter Mogai;
(vi) Onbekende lede verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth,

ter bevordering van 'n gemeenskaplike oogmerk op of omtrent 8 - 10 Mei 1985 te of naby die Port Elizabeth lughawe en Post Chalmers in die regsgebied van die Oos-Kaapse Provinsiale Afdeling wederregtelik en opsetlik die vryheid en beweging van:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

ontneem het.

AANKLAGTE 4 TOT 6 – MOORD (3 AANKLAGTE)

Deurdat die beskuldigdes en die volgende persone:

(i) Roelf Venter;
(ii) Gert Beeslaar;
(iii) Johannes Koole
(iv) Joe Mamasela;
(v) Peter Mogai;
(vi) Onbekende lede verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth,

Ter bevordering van 'n gemeenskaplike oogmerk op of omtrent 10 Mei 1985 te of naby Post Chalmers in die regsgebied van die Oos-Kaapse Provinsiale Afdeling wederregtelik en opsetlik die volgende persone:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

gedood het.

AANKLAGTE 7 – 9 : AANRANDING MET DIE OPSET OM ERNSTIG TE BESEER (23 AANKLAGTE)

Deurdat die beskuldigdes en persone vermeld in aanklag 1, ter bevordering van 'n gemeenskaplike oogmerk op of omtrent die 8 – 9 Mei 1985 te Post Chalmers in die regsgebied van die Oos- Kaapse Afdeling wederregtelik en met die opset om ernstig te beseer vir:

(i) Qaquwili Godolozi;
(ii) Champion Galela; en
(iii) Sipho Hashe

aangerand het.

OPSOMMING VAN WESENTLIKE FEITE

1. Die drie oorledenes was lede van 'n politieke organisasie wat bekend gestaan het as "Port Elizabeth Black Civic Organization" hierna genoem PEBCO.

2. Die oorledenes het leidende rolle gespeel in die aktiwiteite van die organisasie en het onderskeidelik die volgende ampte bekleë:

   (i) Qaquwili Godolozi was die President;
   (ii) Champion Galela was Organiserings-Sekretaris; en
   (iii) Sipho Hashe was die Sekretaris.

3. PEBCO was geaffilieer by die "United Democratic Front" en het oorhoofs ten doel gehad die afskaffing van die misdaad apartheid in Suid-Afrika.

4. Die SA Polisie het die standpunt gehuldig dat die "United Democratic Front" en PEBCO bloot verlengingstukke was van die toe verbode "African National Congress" en dat die organisasies verantwoordelik was vir die voortdurende onrus en geweld wat in die Port Elizabeth gebied geheers het.

5. Die beskuldigdes was verbonde aan die Veiligheidstak van die SA Polisie te Port Elizabeth.

6. Die aktiwiteite van die drie oorledenes was deur die bovermelde Veiligheidstak gemonitor.

7. Daar is besluit dat die drie oorledenes gedood moes word.

8. Gedurende die relevante tydperk was lede van die Veiligheidspolisie wat verbonde was aan die Vlakplaas eenheid werksaam in die Port Elizabeth gebied.

9. Ene Roelf Venter het bevel gevoer oor hierdie lede.

10. Beskuldigde 2 wat verbonde was aan die Veiligheidstak Port Elizabeth het Venter versoek om hulle behulpsaam te wees met die ontvoering van die drie oorledenes.

11. Op 8 Mei 1985 is die drie oorledenes onder valse voorwendsels na die Port Elizabeth lughawe gelok.

12. Gedurende die aand van 8 Mei 1985 was die drie oorledenes ontvoer vanaf die lughawe. Die volgende persone was daadwerklik betrokke by hierdie ontvoering:

    (i) Die beskuldigdes;
    (ii) Venter;
    (iii) Lotz;
    (iv) Beeslaar;

(v) Koole;
(vi) Mogai; en
(vii) Mamasela.

13. Die oorledenes is na 'n verlate Polisiestasie, Post Chalmers, in die Cradock distrik geneem waar hulle aangehou is.

14. Die oorledenes is daardie nag ondervra en herhaaldelik aangerand.

15. Die aanranding het die volgende dag voortgeduur.

16. Op 10 Mei 1985 het al die Vlakplaas-lede wat teenwoordig was onttrek vanaf Post Chalmers. Die oorledenes het op daardie stadium nog geleef en was onder die beheer van die beskuldigdes en ander lede van die Port Elizabeth se Veiligheidstak.

17. Die Staat beweer dat die beskuldigdes en ander lede van die Port Elizabeth Veiligheidstak die oorledenes gedood het, in omstandighede wat onbekend is aan die Staat.

18. Die lyke van die oorledenes is nooit gevind nie.

C.

I.

CALENDER

EASTERN CAPE DIVISION

GRAHAMSTOWN A

BEFORE THE HONOURABLE MR. ACTING JUSTICE

D.P.P	Ref. No Registrar or Magistrate	Accused	Charge(s)	District	Witnesses
TUESDAY 12 OCTOBER TO FRIDAY 15 OCTOBER 2004					
CC81/04 1.	9/2/4/1-63/04 KIRKWOOD CR42/8/85	BUYILE RONNIE BLANI	1. MURDER 2. MURDER 3. HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY (with aggravating circumstances as defined in section 1(1)(b) of Act 51 of 1977)	KIRKWOOD	5 WITNESSES
MONDAY 18 OCTOBER TO FRIDAY 29 OCTOBER 2004					
2.			TO BE FINALIZED		

IN THE HIGH COURT OF THE EASTERN CAPE

The Director of Public Prosecutions for the area of jurisdiction of the High Court of the Eastern Cape, who prosecutes for and in the name of the State, informs the Honourable Court that

BUYILE RONNIE BLANI, a 40 year old male of the Military Base, Grahamstown

(hereinafter called the accused)

is guilty of the following crimes:

1. **MURDER**
2. **MURDER**
3. **HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY (with aggravating circumstances as defined in section 1((1)(b) of Act 51 of 1977)**

COUNT 1: MURDER

IN THAT on or about 17 June 1985 and at or near the farm Enhoek in the Kirkwood magisterial district, the accused unlawfully and intentionally killed **KOOS DE JAGER,** a 72 year old male.

COUNT 2: MURDER

IN THAT on or about the date and at or near the place referred to in count 1, the accused unlawfully and intentionally killed **MYRTLE LOUISA DE JAGER,** a 65 year old female.

COUNT 3: } **HOUSEBREAKING WITH INTENT TO COMMIT ROBBERY AND ROBBERY WITH AGGRAVATING CIRCUMSTANCES**

IN THAT on or about the date and at or near the place referred to in count 1, the accused unlawfully and intentionally broke into and entered the house of **KOOS** and **MYRTLE LOUISA DE JAGER** and by intentionally using force and violence to induce submission by the said **KOOS** and **MYRTLE LOUISA DE JAGER** took and stole from out of their care and protection certain property as per the attached annexure, being in their lawful possession and thereby robbing them of same.

In the event of a conviction, the said Director of Public Prosecutions requests sentence against the accused according to law.

In terms of section 144(3) of Act 51 of 1977 a summary of substantial facts and a list of certain state witnesses are attached.

J P M MARAIS
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS: EASTERN CAPE

ANNEXURE TO COUNT THREE

1. One ,22 Rifle (serial number: 210934)
2. One Pellet Gun
3. One long knife
4. One bayonet
5. R180.00 cash
6. One portable radio
7. Two torches
8. One thermos flask
9. One 1976 model Datsun pick-up truck (Registration number: CB 8978)
10. Linen (assorted)
11. Foodstuffs

SUMMARY OF SUBSTANTIAL FACTS

1. The two deceased were an elderly married couple who resided on the farm Enhoek.

2. The accused was associated with an organization known as the "Addo Youth Congress".

3. At a certain stage the accused conspired with other members of the organization to attack the farm of the deceased.

4. On the night of 17 June 1985 the accused and his co-conspirators ("the group") armed themselves and traveled to the farm of the deceased.

5. Upon arrival, the group cut the telephone connection to the farm and proceeded to the farmhouse.

6. The group then broke into the house despite attempts by the deceased in count 1 to defend himself with a firearm.

7. Both deceased were assaulted and killed inside the house. A child who was also present in the house was, however, not harmed.

8. The group ransacked the house and removed the items set out in the annexure to count three.

9. The group then left the scene in a Datsun pick-up truck that was in the possession of the deceased in count 1. The vehicle was driven to Motherwell, near Port Elizabeth where it was set on fire and burnt out.

10. At medico-legal post mortem examinations conducted on the bodies of the two deceased, the cause of death was determined as "Breinbesering" and "Akute bloedverlies" respectively.

11. At all relevant times the group acted in pursuance of a common purpose to break into the house of the two deceased, and to rob and kill them.

LIST OF STATE WITNESSES

1. Insp. G Le Roux
   Serious and Violent Crime Unit
   PORT ELIZABETH

2. Dr. D S Gerber
   District Surgeon
   KIRKWOOD

3. Casper Jonker
   Directorate Special Operations
   VGM Building
   PRETORIA

4. James Ronald Beyl
   C/o Investigating Officer

5. Supt. Victor Leonard Clive Meyer
   SAPS
   PORT ELIZABETH

In terms of section 144(3)(a)(ii) of Act 51 of 1977 the names and addresses of other witnesses have been withheld.

C.

II.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

GRAHAMSTOWN

CASE NO.: CC81/2004

DATE: 25 APRIL 2005

In the matter between:

THE STATE

versus

BUYILE RONNIE BLANI

SENTENCE

LEACH J

The accused is charged with two counts of murder and one count of robbery with aggravating circumstances. Although he initially pleaded not guilty to those charges he amended his plea to one of guilty and explains that his plea of not guilty had been based upon a misconception of the legal position in that although he admitted participation in the events, he was not the person who actually killed the two deceased.

The material facts had been read into the record and the accused has confirmed that he agrees with those facts.

The charges against him arise out of an incident which occurred on 17 June 1985 when the accused and certain companions went to the farm Enhoek in the district of Kirkwood. There entry was gained into the house and the deceased, Mr Koos de Jager and his wife, Mrs Myrtle Louisa de Jager were both overpowered and killed. The accused states that this was done as he was a member of the Youth Congress which was affiliated to the African National Congress and that instructions had

been received to attack farmers to destabilise the country. During the course of the incident I understand that Mr De Jager was shot to death and his wife was stabbed to death. In the course of the incident a number of items were stolen including a rifle, a pellet gun, a knife, a bayonet, cash, a radio, torches, a flask, linen, foodstuffs and a light delivery van. It seems clear that the accused was guilty of the offences of which he was charged on the basis that he participated with a common purpose in all three of these charges.

The parties are agreed that a just sentence in the circumstances, taking the three counts together as one, is one of 5 years' imprisonment of which 4 years is suspended for 5 years on various conditions. At first blush that appears to be an alarmingly light sentence for the predetermined killing of other human beings, especially as section 105A of the Criminal Procedure Act obliges me to take the minimum sentencing legislation into account which, although it would not be of application because the actions in question were committed before the minimum sentencing legislation came into effect, does provide an indication of how severe murders committed with premeditation should be regarded.

However, the parties are agreed that one of the co-perpetrators of these crimes, a person by the name of Malgas, had applied for amnesty to the Truth and Reconciliation Commission and had been granted amnesty for the same crimes. It is further agreed that after the commission of these crimes the accused went into exile and returned to this country only after the Further Indemnity Act of 1992 had been enacted. In terms of that Act, provision was made for any outstanding warrants relating to exiled persons who wished to return to this country

to be stayed on condition that, when they did return, they would then formally apply for amnesty. The accused misunderstood the position and was under the impression that as he had been granted leave to come back to the country, it was not necessary for him to apply for amnesty. It is agreed that if the accused had applied for amnesty and made the confession that he has made to this Court today, his application for amnesty would have been granted. It would seem to me to be an injustice for his misunderstanding of the provisions of the Act to be held against him and for him to go to gaol for a long period of time, whereas if he had understood the legislation properly and applied for amnesty, he would not be in that position at all.

What is also of relevance is that another co-perpetrator who committed these offences and who had been tried and sentenced for his crimes has been granted a Presidential pardon. These are political considerations which normally would not count with the Court, because a Court must, in general, impose whatever sentence it feels appropriate and then leave the political machinations up to the politicians. But in these particular circumstances, bearing in mind that it is an element of justice that people who commit the same offences should be treated more or less the same way, it would seem to me that the sentence which has been agreed upon is in fact a just sentence and I should have regard to what has happened to his two co-perpetrators in deciding in what should happen to him.

I am therefore satisfied, that the accused has admitted all the elements of the offences with which he is charged, that he is guilty of those offences and that the sentence upon which agreement has been

other is just.

The accused is therefore found guilty on all three counts.

Taking all three counts together for the imposition of sentence I impose a sentence of 5 years' imprisonment of which 4 years is suspended for 5 years on the following conditions:

Firstly, that the accused is not found guilty of murder or culpable homicide committed during the period of suspension.

Secondly, that the accused is not found guilty of housebreaking with the intent to commit a crime, committed during the period of suspension.

Thirdly, that the accused is not found guilty of robbery committed during the period of suspension.

LE LEACH

JUDGE OF THE HIGH COURT

D.

I.

TABLE OF CONTENTS

PROSECUTION POLICY

PREFACE

Crime cannot be allowed to undermine the constitutional democracy in South Africa. The efforts of the Prosecuting Authority should therefore be directed at reducing pervasive criminal activities. An efficient Prosecuting Authority will also enhance public confidence in the criminal justice system.

Prosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process.

Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.

Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted and sentenced.

The Prosecution Policy is aimed at promoting the considered exercise of authority by prosecutors and contributing to the fair and even-handed administration of the criminal laws.

This Policy is the end result of a process of intense consultation amongst all prosecutors in the country. It has also been circulated to a number of criminal justice organizations, government departments, academic institutions and community organizations.

The wealth of their combined knowledge and experience has helped significantly to shape the contents of this document.

1. INTRODUCTION

The Constitution of the Republic of South Africa provides for a single National Prosecuting Authority, consisting of—

- the National Director of Public Prosecutions, who is the head of the Prosecuting Authority,
- Deputy National Directors,
- Directors,
- Deputy Directors, and
- Prosecutors.

As an organ of state the Prosecuting Authority must give effect to the laws of the country; as an instrument of justice it must exercise its functions without fear, favour or prejudice.

The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Constitution requires the National Director of Public Prosecutions to determine, with the agreement of the Minister of Justice and after consulting the Directors of Public Prosecutions, a "*prosecution policy which must be observed in the prosecution process*".

This Prosecution Policy must be tabled in Parliament and is binding on the Prosecuting Authority. The *National Prosecuting Authority Act* also requires that the *United Nations Guidelines on the Role of Prosecutors* should be observed.

The Prosecuting Authority is accountable to Parliament and ultimately to the people it serves. Every prosecutor is accountable to the National Director who, in turn, is responsible for the performance of the Prosecuting Authority.

The law gives a discretion to the Prosecuting Authority and individual prosecutors with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within the spirit of the Constitution.

2. PURPOSE OF POLICY PROVISIONS

The aim of this Prosecution Policy is to set out, with due regard to the law, the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they perform their functions, exercise their powers and carry out their duties. This will serve to make the prosecution process more fair, transparent, consistent and predictable.

By promoting greater consistency in prosecutorial practices nationally, these policy provisions will contribute to better training of prosecutors and better coordination of investigative and prosecutorial processes between departments.

Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence.

These principles have been written in general terms to give direction rather than to prescribe. They are meant to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.

3. THE ROLE OF THE PROSECUTOR

Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example:

- the decision whether or not to institute criminal proceedings against an accused;
- the decision whether or not to withdraw charges or stop the prosecution;
- the decision whether or not to oppose an application for bail or release by an accused who is in custody following arrest;
- the decision about which crimes to charge an accused with and in which court the trial should proceed;
- the decision whether or not to accept a plea of guilty tendered by an accused;
- the decision about which evidence to present during the trial;
- the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender. Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system.

4. CRITERIA GOVERNING THE DECISION TO PROSECUTE

(a) General

The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor should consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements.

Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made.

This may occur after having heard and considered the version of the accused and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

(b) Factors to be considered when evaluating evidence

When evaluating the evidence prosecutors should take into account all relevant factors, including—

How strong is the case for the State?

X Is the evidence strong enough to prove all the elements of an offence?

X Is the evidential material sufficient to meet other issues in dispute?

Will the evidence be admissible?

 Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

Will the state witnesses be credible?

 What sort of impression is the witness likely to make?
 Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
 If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

Will the evidence be reliable?

- If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

Is the evidence available?

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

How strong is the case for the defence?

 Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

(c) Prosecution in the public interest

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

There is no rule in law, which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

The nature and seriousness of the offence:

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.

- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.

- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.

- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

The interests of the victim and the broader community:

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.

- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.

- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

The circumstances of the offender:

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.

- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the*

accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).

- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.

- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

5. CASE REVIEW

(a) Stopping of proceedings

Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the State to prove its case or where other exceptional circumstances have arisen which make the continuation of the prosecution undesirable.

If a prosecution is stopped, an accused will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions or his or her delegate has consented thereto. Such decisions should therefore be made with circumspection.

(b) Restarting a prosecution

People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include:

- an indication that the initial decision was clearly wrong and should not be allowed to stand;

- an instance where a case has not been proceeded with in order to allow the police to gather and collate more evidence, in which case the prosecutor should normally have informed the accused that the prosecution might well start again; and

- a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light.

A number of statutes provide that a prosecution for an offence under a particular law cannot be commenced or proceeded with unless the consent of a Director of Public Prosecutions has been obtained.

The inclusion of such requirements in legislation is intended to ensure that prosecutions are not brought in inappropriate circumstances.

Other reasons for these requirements may involve the use of the criminal law in sensitive or controversial areas where important considerations of public policy should be taken into account.

Similarly, rules of practice require that certain matters be referred to a Director of Public Prosecutions before a prosecution is proceeded with.

As a matter of policy, it is important that certain decisions are made at the appropriate level of responsibility to ensure consistency and accountability in decision-making.

6. FORUM OF TRIAL, DETERMINATION OF CHARGES AND ACCEPTANCE OF PLEAS

(a) Forum of trial

The law directs and policy considerations suggest that certain types of prosecutions sometimes be conducted at specified jurisdictional levels.

In practice this results in certain types of cases being heard in the District Court, some in the Regional Court and others in the High Court.

In terms of certain legislation and rules of practice, the instruction of a Director of Public Prosecutions is required to determine the forum in which the trial should proceed.

In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, should be taken into account:

- the nature and complexity of the case and its seriousness in the circumstances;
- the adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect;
- any specific legal provision on, or any implied legislative preference for, a particular forum of trial;
- any delay, cost or adverse effect that witnesses may have to incur if the case is heard in the High Court; and
- the desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

The decision regarding the court in which to prosecute an accused is determined by the complexity and seriousness of an offence, and the need for the Prosecuting Authority to guard against making decisions that will bring the law into disrepute.

(b) Determination of charges

The process by which charges are selected must be compatible with the interests of justice.

Prosecutors should decide upon, and draw up charges based on, available evidence which will—

- reflect adequately the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;
- provide the court with an appropriate basis for sentence; and
- enable the case to be presented in a clear and simple way.

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the amount of evidence and where such charges will significantly enhance the likelihood of a conviction of an accused or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused to plead guilty to some. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one.

(c) Acceptance of pleas

An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that -

- the charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused;
- the plea to be accepted is compatible with the evidential strength of the prosecution case;
- those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
- where appropriate, the views of the complainant and the police as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.

7. THE TRIAL PROCESS AND RELATED MATTERS

Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases should therefore be presented fearlessly, vigorously and skilfully.

At the same time, prosecutors should present the facts of a case to a court fairly. They should disclose information favourable to the defence (*even though it may be adverse to the prosecution case*) and, where necessary, assist in putting the version of an un-represented accused before court.

This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. On the other hand, the prosecutor should not oppose the release from custody of an accused if the interests of justice permit.

Prosecutors should show sensitivity and understanding to victims and witnesses and should assist in providing them with protection where necessary. In suitable cases the prosecutor should advise the victim of the possibility of being compensated for the harm suffered as a result of the crime.

As far as it is practicable and necessary, prosecutors should consult with victims and witnesses before the trial begins. They should assist them by giving them appropriate and useful information on the trial process and reasons for postponements and findings of the court, where necessary.

Prosecutors are not allowed to participate in public discussion of cases still before the court because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.

During the sentencing phase of a criminal case, prosecutors should assist the court by ensuring that the relevant facts are fully and accurately brought to its attention.

They should also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation of offenders.

The Prosecuting Authority should give special attention to the effective and speedy disposal of cases identified as priority matters.

Prosecutors should specialize in the prosecution of certain offences where desirable and practicable.

The Prosecuting Authority should, as far as possible, make its senior trial prosecutors available to conduct the most difficult cases.

8. CO-OPERATION AND INTERACTION WITH POLICE AND OTHER CONSTITUENT AGENCIES

Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it will less likely lead to a prosecution or result in a conviction.

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

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.

Provision is made for Investigating Directors of the Prosecuting Authority to hold inquiries or preparatory investigations in respect of the commission of certain offences brought to their attention.

Prosecutors have the responsibility under the *National Prosecuting Authority Act* to determine whether a prosecution, once started, should proceed.

Such decisions are made independently, but prosecutors should consult the police and other interest groups where required.

It is therefore desirable, wherever practicable, that matters be referred to prosecutors by the police before a prosecution is instituted. In most cases suspected offenders are arrested and charged before the police can consult with prosecutors.

However, in cases where difficult questions of fact or law are likely to arise, it is desirable that the police consult the prosecutors before arresting suspected persons.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession.

Prosecutors should work together with other departments and agencies such as Correctional Services, Welfare, lawyers' organizations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.

8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

The Prosecutorial Policy and Directives, in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, are hereby determined in terms of section 179(5) of the Constitution, with effect from 1 December 2005.

9. CONCLUSION

The Prosecuting Authority is a public, representative service, which should be effective and respected. Prosecutors should adhere to the highest ethical and professional standards in prosecuting crime and should conduct themselves in a manner which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

The Prosecution Policy is not an end in itself.

The challenge which faces the Prosecuting Authority is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:

   (a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

   (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

   (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.

   (d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:

   (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.

   (b) The constitutional right to life.

(c) The non-prescriptivity of the crime of murder.

(d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.

(e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See ***Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC***).

(f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

(g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.

(h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See ***The State v Wouter Basson CCT 30/03.).***

(i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.

(k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court

trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others—

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire prosecution.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.

2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.

3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.

4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.

6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

   (a) The National Intelligence Agency.

   (b) The Detective Division of the South African Police Service.

   (c) The Department of Justice & Constitutional Development.

   (d) The Directorate of Special Operations.

7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.

10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.

11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.

12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.

13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.

14. The NDPP may provide for any additional procedures.

15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.

2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.

3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not:

   (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.

   (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:

      (i) The motive of the person who committed the act, commission or offence.

      (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.

      (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.

      (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—

         (aa) for personal gain; or

         (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular—

(i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;

(v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and

(vi) the degree of indoctrination to which the alleged offender was subjected.

(e) Whether the offence in question is serious.

(f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

(g) Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.

(h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.

(i) Consideration of any views obtained for purposes of reaching a decision.

(j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

D.

II.

JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE
17 January 2006
BRIEFING AND DELIBERATION ON THE AMENDMENT OF THE PROSECUTING POLICY TO PROVIDE FOR DIRECTIVES FOR THE PROSECUTION OF MATTERS BEFORE 11 MAY 1994.

Chairperson: Ms F Chohan-Khota (ANC)

SUMMARY
The National Prosecution Authority (NPA) briefed the Committee on its proposals to amend its Prosecution Policy to allow it to decide whether or not to prosecute cases arising from conflicts of the past and were committed before 11 May 1994. The President had made it clear that there would be no general amnesty as this would fly in the face of the TRC process. The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NPA emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. The NPA recommended that policy be determined in terms of section 179(5)(a).

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. The amended Prosecution Policy came into effect on the 1st of December 2005.

Members of the Committee asked how a prosecution could be triggered, if the NPA had an idea of how many cases were pending and what the effect of the amendments would be on the budget of the NPA.

MINUTES
Adv G Nel, the Deputy Director of Public Prosecutions, said that according to section 179(5)(a) and (b) of the Constitution, the National Director of Public Prosecution with the concurrence with the Minister determine Prosecution Policy. Any amendments to this policy were to be included in the report referred in section 35(2)(a) of the National Prosecution Authority Act. As a matter of public interest, the amendments in question were tabled before Parliament.

Adv Nel said that in his statement to Parliament on the tabling of the Report of the Truth and Reconciliation Commission (TRC) on the 25th of April 2003, the President made it clear that there would be no general amnesty as this would fly in the face of the TRC process. The President said that the matter could not be resolved by setting up another amnesty process which would mean suspending the constitutional rights of those on the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, had been categorically excluded by Government as an option, not least because it was unconstitutional.

The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NDPP would leave its doors open for those willing to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that were standard in the normal execution of justice, and which were accommodated in legislation. Adv Nel emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. The President also said that the involvement of victims was crucial in determining the appropriate course of action.

Section 179(1) of the Constitution stated that there was a single prosecuting authority, and section 179(2) gave the prosecuting authority the power to institute criminal proceedings on behalf of the state and any functions incidental to this. Thus the NPA was independent constitutional institution. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. Adv Nel recommended that policy be determined in terms of section 179(5)(a).

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. All the cases were centralised in the office of the NDPP to ensure consistency in decision-making especially given the complexities in some of these cases. The Priority Crimes Litigation Unit (PCLU) was responsible for

overseeing the investigations and instituting prosecutions. Since this task team was based in Pretoria, it was desirable that the cases be centralised in the office of the NDPP.

The Prosecution Policy was amended by the insertion of a new paragraph 8A. This gave the NDPP power to supplement or amend the Prosecution Policy so as to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest. In line with this amendment, the NDPP determined the criteria in Appendix A relating to the prosecution of cases arising from conflicts of the past and were committed before 11 May 1994. Appendix A had three parts. Paragraph A was an introduction and paragraph B set out the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. Paragraph C set out the criteria governing the decision to prosecute or not. This amended Prosecution Policy came into effect on the 1st of December 2005.

Discussion
Ms S Camerer (DA) asked how a prosecution could be triggered. Now that the guidelines were in place, would the workload of the PCLU greatly increase, and how many people were involved?

Adv Nel replied that a prosecution could be triggered firstly by a complaint being lodged by a victim. The PCLU had already looked at some of the cases from the TRC where amnesty had not been given. Some matters could be brought by the intelligence agency as well as the police. Thus there was a pro-active aspect to the triggering of prosecutions. It was not necessary at present to appoint new personnel given their current workload, but it may become necessary later on. It was hard to predict.

Mr G Solomon (ANC) asked what would happen where the victims did not want to prosecute an accused as the crime may have occurred many years ago.

Adv Nel said that the NDPP looked at all the circumstances of the case, such as the seriousness of the case, and whether there had been full disclosure for instance. It was for the NDPP to decide whether or not it would prosecute, not the victim.

Mr L Joubert (IFP) asked if the NPA had an idea of how many cases were pending. Also, in the case of a private prosecution, what was the situation regarding *locus standi*?

Adv Nel replied that at present it was impossible to know exactly how many cases were pending especially as the amendments were new. With regards to *locus standi,* anyone with an interest in the matter could bring an action.

Adv C Johnson (NNP) asked if looking at the circumstances of the accused created a loophole in the system for example where they claimed to be too old or infirm to stand trial. Could the NDPP be taken on review by an unsatisfied victim if they decided not to prosecute?

Adv Nel replied that it was important to consider things like the health of the accused. The Chairperson added that there was no hierarchy of criteria. Each case had to be decided on its merits. The whole basket of criteria had to be examined in making the determination of whether or not to prosecute. The NDPP could be taken on review.

Mr B Magwanishe (ANC) asked what the effect of the amendments would be on the budget of the NPA.

Adv Nel said that he did not see a major effect on the NPA's budget given the number of cases they were dealing with now. It was hard to predict how many more people would come forward and how this would affect their budget.

The meeting was adjourned.

D.

III.

PROSECUTION POLICY AND DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST

1. In his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003 the President, when dealing with the "issue of amnesty", **made it clear that there shall be no general amnesty.** He argued that such an approach would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.

2. However, the President did not stop there. He went further and stated in respect of any further process of amnesty, as follows:

> "Yet we have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process….This reality cannot be avoided. .."The President then concludes that Government is of the firm conviction that **we cannot resolve this matter by setting up yet another amnesty process,** which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, has been categorically

excluded by Government as a future option, not least because it would be unconstitutional.

3. The President then went on to explain Government's proposal as follows:

"We have therefore, left this matter in the hands of the **National Directorate of Public Prosecutions**, for it to pursue any cases that, as is normal practice, it believes deserve **prosecution** and can be prosecuted. This work is continuing."; and

"However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and **to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.";** and

"…in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the **involvement of the victims** will be crucial in determining the appropriate course of action.". (Emphasis added)

4. It is important for the Prosecuting Authority to deal with these matters on a uniform basis in terms of specifically defined criteria.

5.1 In terms of **section 179(1) of the Constitution** of the Republic of South Africa, 1996, there is a single national prosecuting authority in the Republic consisting of a National Director of Public Prosecutions (NDPP), who is the head of the prosecuting authority, and Directors of Public Prosecutions and prosecutors.

5.2 In terms of **section 179(2) of the Constitution** the prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. This means that the National Prosecuting Authority (NPA) is an independent constitutional institution and that the NDPP has full discretion regarding whether a particular prosecution should or should not be instituted.

5.3 **Section 179(5)(a) of the Constitution** provides that the NDPP must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process. To assist the prosecutors at arriving at a decision whether to prosecute or not, the NDPP has, in terms of the above provision, **issued general criteria governing such a decision**. These general Criteria are set out in paragraph 4 of the Prosecution Policy.

These criteria could be defined as general policy guiding decision makers in arriving at informed decisions in the above regard. The question arises whether these guidelines are sufficient to assist the NDPP in arriving at decisions relating to offences which arise from conflicts of the past as contemplated by the President. The answer is no. Therefore, it is recommended that this process requires specific policy guidelines to facilitate the structured conclusion of the matter. It is therefore recommended that policy be determined in terms of section 179(5)(a) of the Constitution to deal with the matter under discussion.

6. Before dealing with the amendments to the Prosecution Policy, it is important to deal with the requirements for the determination for such Policy as required by section 179(5)(a) of the Constitution.

(a) In the first instance this provision requires that the Policy must be determined **"with the concurrence of the Cabinet member responsible for the administration of justice".** The amendments proposed by the NDPP were submitted and approved by the Minister for Justice and Constitutional Development. In view of the fact that the President requested the NPA to deal with the matter, the Minister also submitted the amendments and guidelines to Cabinet. Cabinet noted the amended Prosecution Policy.

(b) Secondly, section 179(5)(a) of the Constitution requires that the Prosecution Policy must be determined **"after consultation with the Directors of Public Prosecutions"**. The amended Prosecution Policy was submitted to all Directors of Public Prosecutions. All the Directors supported the amended Prosecution Policy.

7. It was decided to centralise all these case in the Office of the NDPP for the following reasons:

(a) A prosecution should not undermine nation building and it is therefore important that all these cases be synchronised in the Office of the NDPP in order to ensure that there is consistency in decision-making.

(b) The decision is consistent with the request of many DPPs to the NDPP, namely, that the National Office should take over these cases, because of the complexities implicit therein.

(c) As indicated in paragraph B4 of the amended Policy, the Priority Crimes Litigation Unit (PCLU) shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA must assist the PCLU in the execution of its duties. Since this Task Team will be based in

Pretoria, it is desirable that the cases be centralised in the Office of the NDPP.

8. The Prosecution Policy is amended by the insertion of a new paragraph 8A. In terms of this amendment the NDPP may supplement or amend the Prosecution Policy so as to **determine prosecutorial policy and directives in respect of specific matters**, for example, in respect of new legislation and matters of national interest. In accordance with this amendment, the NDPP determined the criteria in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994.

9. Appendix A consists of three parts, namely, an introduction part (par A); the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past (par B); and the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past (par C).

10. (a) **Paragraph A1** sketches the background and motivation for the amended Policy and guidelines.

(b) **Paragraph A2** sets out the various factors to be taken into account in developing and applying the prosecuting policy, directives and guidelines. See subparagraphs (a) to (l).

(c) **Paragraph A3** emphasises that Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the application of—

- **section 204 of the Criminal Procedure Act**, 1977 (Act No. 51 of 1977), in terms of which a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution;

- **section 105A of the Criminal Procedure Act**, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

- the processes determined and set out in the current Prosecution Policy, and the fact that such processes would not indemnify a person from private prosecution or civil liability. Therefore, if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court.

11. **Paragraphs A1 to 15** provide for the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. In summary the following process must be followed:

(a) A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, must submit a **written sworn affidavit or solemn affirmation** to the NDPP containing such representations (par 1).

(b) The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations (Par 2).

(c) All representations must contain **a full disclosure of all the facts**, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security (par 3).

(d) The PCLU in the Office of the NDPP is responsible for overseeing investigations and instituting prosecutions in all such matters (par 4).

(e) The regional DPPs must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP (par 5).

(f) The PCLU shall be assisted in the execution of its duties by a senior designated official of the National Intelligence Agency, the Detective Division of the South African Police Service, the Department of Justice & Constitutional Development and the Directorate of Special Operations (par 6).

(g) The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute (par 7). The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the

bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements (par 8).

(h) The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, **and must obtain the views of any victims,** as far as is reasonably possible, before arriving at a decision (par 9).

(i) A decision of the NDPP not to prosecute and the reasons for that decision must be made public and in accordance with section **179(6) of the Constitution**, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past (par 10 and 11).

12. **Paragraphs C1 to C3** set out the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. In the first instance the alleged offence must have been committed on or before 11 May 1994 and secondly the NPA must ascertain whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA. If the answers to these questions are in the affirmative, the further criteria set out in paragraph C3 (a) to (j) must be applied. These criteria are in line with the criteria followed in the TRC process as well as the general criteria laid down for the prosecuting authority.

13. This amended Prosecution Policy came into effect on 1 December 2005.

D.

IV.

Media Statement

DATE: 24th January 2006
EMBARGO: 11H30

AMENDED PROSECUTION POLICY AND DIRECTIVES RELATING TO PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST

In his statement to Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003 the President of the Republic, when dealing with the issue of amnesty, made four very important points regarding the future handling of cases arising from conflicts of the past:

- In the first instance the President made it clear that there shall be no general amnesty.

- Secondly, he pointed out that we have to deal with the reality that many of the participants in the conflict of the past did not take part in the TRC process. However we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending the constitutional rights of those who were at the receiving end of gross human rights violations.

- Thirdly the President directed that any further processes should be left in the hands of the National Prosecuting Authority (NPA), for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. In this regard he further pointed out that, as part of this process and in the national interest, the NPA, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

- In the final instance the President indicated that in each case where any legal arrangements are entered into between the National Director and particular perpetrators as proposed, the involvement of the victims will be crucial in determining the appropriate course of action.

Following the President's announcement, and realising the importance for the NPA to deal with these matters on a uniform basis in terms of

specifically defined criteria, the NPA started a consultation process to determine uniform Prosecuting Policy to deal with criminal matters arising from conflicts of the past.

In the process, the NPA consulted with other law enforcement agencies, relevant departments, the Minister of Justice and Constitutional Development (Minister), the Directors of Public Prosecutions and Unit Heads within the NPA.

These cases will be centralised in the Office of the National Director for the following reasons:

- To ensure that there is consistency in decision-making.
- The complexities implicit in these cases.
- The Priority Crimes Litigation Unit (PCLU), which Unit is based within the Office of the National Director, shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA will assist the PCLU in the execution of its duties.

During the middle of 2005 a draft Amended Prosecution Policy was submitted to the Minister for her approval as required by the provisions of the Constitution and the NPA Act. The Amended Prosecution Policy was submitted to Cabinet for its information and towards the end of last year the Policy was tabled in Parliament by the National Director and the Minister. This amended Prosecution Policy came into effect on 1 December 2005.

The Amended Prosecution Policy gives effect to the proposals of the President. Some of the most important features of the Amended Prosecution Policy are the following:

- It emphasises that Government did not intend to mandate the National Director to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the application of—

(a) **Section 204 of the Criminal Procedure Act,** 1977, in terms of which a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution;

(b) **Section 105A of the Criminal Procedure Act,** 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA

(c) The processes determined and set out in the current Prosecution Policy, and the fact that such processes would not indemnify a person from private prosecution or civil liability. Therefore, if someone feels aggrieved regarding the process followed by the NPA, it can be tested in court.

- The amended policy provides for the procedural arrangements that must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past.

- Furthermore, the policy sets out the criteria governing the decision to prosecute or not to prosecute in cases relating to conflicts of the past. In the first instance the alleged offence must have been committed on or before 11 May 1994. Secondly, the NPA must ascertain whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA. If the answers to these questions are in the affirmative, the further criteria set out in paragraph C3(a) to (j) must be applied. These criteria are in line with the criteria followed in the TRC process as well as the general criteria laid down for the prosecuting authority.

Issued by the National Director of Public Prosecutions, Advocate Vusi Pikoli.

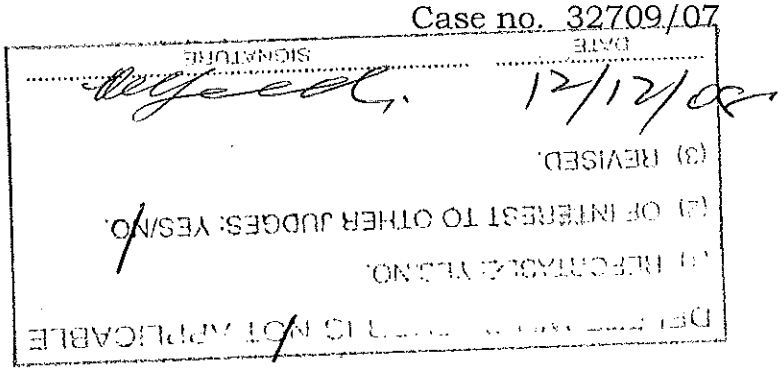
D.

V.

32709/07

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
Held in PRETORIA

Case no. 32709/07



In the matter between:

THEMBISILE PHUMELELE NKADIMENG	1st Applicant
NYAMEKA GONIWE	2nd Applicant
NOMBUYISELO NOLITA MHLAULI	3rd Applicant
SINDISWA ELIZABETH MKHONTO	4th Applicant
NOMONDE CALATA	5th Applicant
KHULUMANI SUPPORT GROUP	6th Applicant
CENTRE FOR STUDY OF VIOLENCE AND RECONCILIATION (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	7th Applicant
INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (AN ASSOCIATION NOT FOR GAIN INCORPORATED UNDER SECTION 21 OF THE COMPANIES ACT 61 OF 1973)	8th Applicant

And

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	1st Respondent

THE MINISTER OF JUSTICE	2nd Respondent
ERIC ALEXANDER TAYLOR	3rd Respondent
GERHARDUS JOHANNES LOTZ	4th Respondent
JOHAN MARTIN VAN ZYL	5th Respondent
HERMANUS BAREND DU PLESSIS	6th Respondent
WILLEM HELM COETZEE	7th Respondent
ANTON PRETORIUS	8th Respondent
FREDERICK BARNARD MONG	9th Respondent
MSEBENZI TIMOTHY RADEBE	10th Respondent

JUDGMENT

Judgment reserved: 24 November 2008
Judgement handed down: 12/12/08.

LEGODI J,

INTRODUCTIONS

1. In this application, the applicants seek relief as follows:

"1. Pending the final outcome of this application, the coming into force and operation of the amendments to the National Prosecution Policy dated 1 December 2005 ("the policy amendments") is suspended and stayed.

2. Declaring the policy amendments to be inconsistent with the Constitution of the Republic of South Africa, 1996 and unlawful and invalid.

3. Alternatively to prayer 2 above

3.1 Reviewing and setting aside the adoption of the policy amendments in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

3.2 To the extent that it is required, condoning the applicants' non-compliance with the time period set out in section 7(1) of PAJA

4. Ordering that such of the respondents as may oppose the matter pay the applicants costs.

5. Granting the applicants further and/or alternative relief.

PARTIES

2. This application was instituted by the first five applicants and other applicants, whose particulars and interests are briefly set out hereunder as follows:

2.1 The first applicant is the sister to one Nokuthula Aurelia Simelane (hereinafter referred to as Nokuthula) who disappeared after being abducted by the then Security Brach. In the early eighties she operated as a courier for Umkhonto We Sizwe, the armed wing of African National Congress).

2.2 During the Truth and Reconciliation Commission (TRC), it was established that Nokuthula disappeared while on a mission in Johannesburg after meeting with one Norman Mkhonza, who was apparently working with the Security Branch.

2.3 It emerged during the TRC proceedings that she was abducted by the Security Branch with the help of Mkhonza. To date, Nokuthula has not been found nor has her remains been found.

2.4 During the TRC, evidence emerged that implicated a number of people in the possible abduction, assault and or killing of Nokuthula. No one has however been charged. The first applicant is challenging the

prosecution policy amendments in question as the sister of Nokuthula.

2.5 The second and fifth applicants are challenging the policy as the widows of what is commonly referred to as the "Cradock four".

2.6 Their husbands were on the 27 June 1985 scheduled to attend a meeting in Port Elizabeth. This was a meeting which was arranged by the United Democratic Front (UDF).

2.7 On the way, they were apparently, intercepted and or stopped by the security branch members. Few days thereafter, their bodies were found burnt, mutilated and spread all over a wide area in the Redhouse or Bluewater Bay, on the outskirts of Port Elizabeth.
Their bodies and especially their faces were deliberately dosed with petrol and set on fire with the intention or rendering them unrecognisable and not identifiable.

2.8 During the TRC, several security branch officials were implicated, some of them are still alive. These people who were implicated many of them have not been prosecuted yet.

2.9 The second to the fifth applicants are challenging the prosecution policy amendments referred to in paragraph 1 above. They are challenging these policy amendments as the widows of the Cradock Four.

3. The sixth to the eighth applicants are non-governmental organizations challenging the prosecution policy and directives concerned as interested parties in the protection of the constitution.

4. In terms of section 179(5) (a)(b) of the Constitution, the first respondent with the concurrence of the second respondent, and after consulting with the Directors of Public Prosecutions, must determine prosecution policy which must be observed in the prosecution.

5. Section 21(2) of the National Prosecuting Authority Act 32 of 1998 provides that the first prosecution policy issued under the Act shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first National Director.

6. The first prosecution policy was issued some time before 2005. The applicants are challenging the amendments to the first prosecution policy issued by the first respondent.

BACKGROUND

7. During or about 2005, the first respondent produced amendments to the prosecution policy. In terms of the amendments paragraph 8A was added to the first prosecution policy.

8. In terms of the addition, the first respondent purporting to act in terms of section 179(5) of the Constitution, introduced prosecution policy and directives in Appendix A (hereinafter referred to as policy amendments), to deal with prosecution of cases arising from conflicts of the past which were

committed before the 11 May 1994. The policy and directives aforesaid in Appendix A are repeated as follows:

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCE EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. *In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy are as follows:*

   (a) *It was recognised that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.*

   (b) *A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take party in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.*

   (c) *As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.*

   (d) *Therefore, persons who had committed crimes before 11 May 1994, which emanate from conflicts of the past, could enter into agreements*

with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these works still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. *In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:*

   (a) *The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.*

   (b) *The constitutional right to life.*

   (c) *The non-prescriptivity of the crime of murder.*

   (d) *The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed political motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.*

   (e) *The dicta of the Constitution justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See* ***Azanian People Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC****).*

   (f) *The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.*

   (g) *Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.*

   (h) *The dicta of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See* ***The State v Wouter Basson CCT 30/03****).*

(i) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations and for them to be dealt with.

(j) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.

(k) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.

3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President include the following:

(a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

(b) Section 105A of the Criminal Procedure Act, 1977, which makes the provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.

(c) Section 179(5) of the Constitution in terms of which the NDPP, among others-

(i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process:

(ii) must issue policy directives to be observed in the prosecution process; and

(iii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a prima facie case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

(a) The fact that the victim does not desire protection.

(b) The severity of the crime in question.

(c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interes.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the

NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994.

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above, (the applicant) must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.

2. The NDPP must confirm receipt of the affidavit or affirmation and my request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The applicant may also mero moto submit further written sworn affidavit or solemn affirmation to the NDPP containing representations.

3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.

4. The Priority Crimes Litigations Unit (PCLU) in the office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.

6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

   (a) The National Intelligence Agency.

   (b) The Detective Division of the South African Police Services.

   (c) The Department of Justice and Constitutional Development.

   (d) The Directorate of Special Operations.

7. *The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.*

8. *The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status a section 204 witness and all section 105A plea and sentence agreements.*

9. *The NDPP may obtain the vies of any private or public or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.*

10. *A decision of the NDPP not to prosecute and the reasons for the decision must be made public.*

11. *In accordance with section 179(6) of the Constitution, the NDPP must inform the Minister of Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this proceeding policy relating to conflicts of the past.*

12. *The NDPP may make public statements on any matter arising from the policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.*

13. *The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representatives, guidelines and established practice. The victims must, as far as reasonably possible be consulted in any such further process and be informed should the accused's representations be successful.*

14. *The NDPP may provide for any additional procedures.*

15. *All stage agencies, in particular those dealing with the prosecution of all alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the*

prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. *CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST*

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past.

1. *The alleged offence must have been committed on or before 11 May 1994.*

2. *Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.*

3. *If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to prosecute or not;*

    (a) *Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.*

    (b) *Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered.*

        (i) *The motive of the person who committed the act, commission or offence.*

        (ii) *The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.*

(iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or supporter.

(iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued but does not include any act, omission or offence committed-

(aa) for personal gain; or

(bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

(c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose-

(i) the truth of the conflicts of the past, including the location of the remains of victims; or

(ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.

(d) The personal circumstances of the alleged offender, in particular-

(i) whether the ill-health of the other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;

(ii) the credibility of the alleged offender;

(iii) the alleged offender's sensitivity to the need for restitution;

(iv) *the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;*

(v) *renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and*

(vi) *the degree of indoctrination to which the alleged offender was subjected.*

(e) *Whether the offence in question is serious.*

(f) *The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.*

(g) *Whether the prosecution may lead to the further or renewed traumatisation of victims and conflicts in areas where reconciliation has already taken place.*

(h) *If relevant, the alleged offender's role during the TRC process, namely in respect of co-operation, full disclosure and assisting the process in general.*

(i) *Consideration of any views obtained for purposes of reaching a decision.*

(j) *Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision*

9. These prosecution policy amendments and directives are challenged by the applicants briefly on the following grounds:

9.1 that the policy amendments introduce a prosecutorial indemnity;

9.2 that such prosecutorial indemnity is in breach of the Constitution on various grounds including:

9.2.1 infringement of the rule of law;

9.2.2 infringement of various constitutional rights,

9.2.3 non-compliance with international law, etc. All of the rights challenged as aforesaid are set out in details in paragraphs 42 and 43 of the applicants' founding affidavit,

9.2.4 that the prosecutorial indemnity is inconsistent with the right to just administrate action contained in section 33 of the Constitution and the requirements of Administrative Justice Act 3 of 2000,

9.2.5 that the applicants seek to review the policy amendments in terms of section 6 of PAJA.

10. The respondents resist these challenges on the basis that the policy amendments do not allow the respondents to make a decision not to prosecute on the basis of the criteria in A, B and C of the policy amendments referred to above, where there is sufficient evidence to support prosecution. Secondly, that even if the policy allows this, it does not amount to an effective indemnity from prosecution, because the perpetrators would still be exposed to private prosecutions and civil remedies.

11. Further, the defence raised by the respondents appears to be that, until such time as a decision not to prosecute is made on the basis of the policy amendments, the challenge is not justifiable at the instance of the applicants. Lastly, the defence is that the applicants' claim is not justified because the first respondent does not intend to ever implement the

policy amendments in the manner complained by the applicants.

12. In the supplementary heads of argument submitted on behalf of the respondents, another issue is raised. It is contended that what the applicants are claiming for, do not relate to resolution of real and concrete controversies involving persons who have interest in the resolution of the disputes. The facts upon which the applicants rely on for the relief sought are said to be totally unconnected to the prosecutorial policy. In short, it is contended that the matter is not ripe for adjudication by the court. The relief sought by the applicants is said to be academic and does not relate to material prejudice.

ISSUES RAISED

13. As I see it, the issues raised narrowed and argued before me are as follows:

- **Whether the application is academic, unripe and having no material effect to the applicants?**

- **Whether the policy amendments allow for an amnesty, indemnity or a re-run of the TRC? Or**

- **Whether the policy amendments in relation to a decision not to prosecute will have the effect of allowing for an amnesty or indemnity equivalent to a re-run of the TRC?**

DISCUSSIONS, SUBMISSIONS & FINDINGS

14. I find if necessary to deal with the two latter issues identified in paragraphs 13 above.

14.1 In a somewhat introduction to the issue, counsel for the respondents in paragraph 30 of his written heads of argument stated as follows:

"30. As stated above, the policy amendments were adopted with the object to achieve the Constitutional mandate placed on the NDPP, which mandate is the prosecution of crime. If the applicants' case is not about the intentions of the NPA, in relation to the application of the policy amendments, or mala fide on the part of the NDPP, then it must be accepted that when the amendments to the prosecution policy were adopted, they were adopted in accordance with constitutional mandate placed on him by the Constitution with the objective of the prosecution of crime. Therefore, the applicants' contention that the policy amendments were adopted for an ulterior purpose is without merit".

14.1.1 Surely, the intention by the first respondent (NDPP) to comply with its constitutional mandate to prosecute crimes is one thing. But the issue as I see it is, whether such intention is implicit in the policy amendment? If not, the next issue is whether the policy amendments should be allowed to exist in their apparent contrast to the intention and constitutional mandate and obligation of the first respondent.

14.1.2 It appears therefore, that one should look closely at the policy amendments, with a view to find in them,

purported intention of the first and second respondents, in having brought about the policy amendments.

14.2 The applicants' contention is that, the purpose of the policy amendments is to allow the first respondent to conduct what is effectively a "re-run" of the Truth and Reconciliation Commission (TRC)'s amnesty process. Remember, TRC was specifically introduced and authorised in terms of the Interim Constitution. The main objective thereof was to deal with political commissions of offences in the past and, in particular the objective being to forge or bring about reconciliation in our country.

14.2.1 The response to this contention by the applicants was disputed and summed up as follows in the respondents' written heads of argument:

"32. It was submitted that the policy amendments correctly considered are not intended to be a process that can become a constitution or a re-run of the amnesty process of the TRC.

33. It must be appreciated that the purpose of the amendment policy is to ensure that the objects for which the Interim Constitution authorised the reconciliation process through the TRC process, should not be undermined.

34. The TRC process was a specific legislative process that authorised amnesty subject to the terms and conditions of that legislation.

35. The policy amendments are conscious that they are not a process in terms of which individuals are to receive any amnesty. The NDPP is not authorised to grant any amnesty.

36. It is therefore denied that the policy amendments can be considered to be re-run of the TRC process or to have an impact of undermining the constitutional compact that the South African society made with the victims of human rights"

14.2.2 What is quoted above, in my view captures the essence of the attack against the applicants' cause of complaint. In addition to this, it is the respondents' case that, as the first respondent exercises its power and obligation to institute prosecution proceedings, it would prosecute and if need be, only conclude agreements as envisaged in sections 204 and 105A of the Criminal Procedure Act.

14.3 The applicants in their heads of argument seek to identify the issue as follows:

"Firstly, the applicants do not allege that the policy amendments allow for an amnesty, indemnity or a re-run of the TRC, as the respondents suggest. Rather, the applicants allege that, the application of the policy amendments in relation to a decision not to prosecute will have this effect. As it will be seen below, the applicants alleged that, in light of the enormous difficulties associated with private prosecutions, a decision not to prosecute (on grounds other than the absence of evidence) on the basis of criteria that are strikingly similar to those applied by the

TRC amnesty committee constitute an effective re-run of the amnesty provisions of the TRC"

15. Before I turn to deal with the documents that contain the policy amendments under attack, I find it necessary to refer to the debate that ensued during the discussion. During the discussion, issues were further raised as follows:

- *Whether the applicants have demonstrated the existence of a prima facie case on which factors enumerated in part C of the policy amendments were relied upon in taking a decision to grant prosecutorial indemnity?*

- *Whether parts A, B and C confer a power not to prosecute where a prima facie case is established? And if so,*

- *Which provisions of the policy amendments empower the first respondent, a power not to prosecute, where prima facie is established?*

15.1 I see the question raised above as refining the issues to be decided. According to Mr Marcus on behalf of the applicants, in a response to an enquiry by the court, whether he understands part C as entitling the first respondent not to prosecute in the face of a prima facie evidence, he stated as follows:
"It says so, much explicitly. It says what it means"

15.2 I must pause for a moment to deal with the documents containing the policy amendments. Such policy amendments are quoted in paragraph 9 of this judgment.

I found it necessary to quote the policy amendments in their entirely for completeness sake and better understanding of the amendments. For this purpose, and in dealing with the interpretation or construction of the policy amendments, I will not repeat the quotation unless it becomes necessary to do so.

15.3 Apart from parts A and B of the policy amendments, the actual amendments are contained in part C. Part A deals with the introduction and the basis for bringing about the policy amendments as contained in part C. Part B deals with the procedure that has to be strictly followed in respect of persons wanting to make representations to the NDPP and in respect of those cases already received by the office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994. Any reference to any provision in parts A, B and C of the policy amendments will be referred to in this judgment as "paragraph".

15.3.1 Two classes of persons can seemingly make representations in terms of Part B paragraph 1 thereof, namely, those who are facing possible prosecution and secondly, those who wish to enter into an arrangement with the NPA as contemplated in paragraph1 of part A. Remember, in terms of section 179 (5)(d) of the Constitution, the first respondent may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the first respondent, from the accused person, the complainant and any other person or party whom the first respondent considers to be relevant.

15.3.1.1 In my view, the representations envisaged in paragraph 1 of part B of the policy amendments are not covered and sanctioned by the Constitution. Such representations as sanctioned in section 179(5)(d), are for a review of a decision, the review being in respect of a decision previously taken to prosecute or not to prosecute. For example, if a decision was previously taken not to prosecute A on a charge of murder of B, but later review such a decision and decide to charge A on the murder of B, A might be required to make representations in terms of section 179(5)(d), as to why the initial decision not to prosecute should not be reviewed.

15.3.1.2 Invitation for representations in terms of paragraph B.1 of the policy amendments are in my view, in respect of those who are facing possible prosecution, where a decision is not taken on their fate. Secondly, the representations relate to those persons in respect of whom their cases have already been received by the first respondent, but a decision is not taken to prosecute or not to prosecute them in respect of offences relating to the conflict of the past and committed before 11 May 1994.

15.3.1.3 In terms of paragraph A1 (c) of the policy amendments as part of the normal legal processes and in the national interest, the first respondent working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements, that are standard in the normal execution of justice and prosecuting mandate and are accommodated in the existing legislations (my own emphasis). During the discussion

Mr Semenya on behalf of the respondents, was quizzed on the reasons for the representations as envisaged in paragraph B1 of the policy amendments. His answer thereto was firstly, that the legislations referred to in paragraph A1 (c) of the policy amendments are sections 204 and 105A of the Criminal Procedure Act. Secondly, he contended that such agreement referred to in A.1.(c) are therefore in terms of the two sections.

15.3.1.4 Mr Semenya obviously had some difficulties in expanding on his submission as referred to in 15.3.1.3 above. His submission cannot be correct, for the following reasons: Firstly, representations in terms of paragraph B1 of the policy amendments are aimed at enabling the first respondent to decide whether or not to prosecute. Secondly, section 105A relates to a situation where a decision to prosecute has already been taken. Thirdly, section 204 can only take place where a decision to prosecute has already been taken against other persons or person and indemnity is granted by the court and not by the prosecution to a witness who testified in the proceedings. Implementation of sections 105A and 204 is therefore subject to judicial consideration, and are entirely matters of discretion by the trial court. The decision to prosecute or not to prosecute in terms of the first respondent's constitutional obligation and also as envisaged in the policy amendments, is entirely a matter falling within the domain of the first respondent.

15.3.2 All of these, in my view, raise another question. If indeed the policy amendments are intended to and or should be understood to be subject to the provisions of section 204 and 105A, why then the need for the amendments? Or to

put it differently, if indeed the policy amendments are not intended to authorise the first respondent to grant indemnity or amnesty, why then the need for the amendments? Remember, when the first prosecution policies were introduced, clear guidelines relating to prosecution of offences were set out. For example, reference is made in paragraph C.2 of the policy amendments to paragraph 4 of the said first prosecuting policy of the first respondent. The first prosecuting policy and directives, in my view, are adequate enough to deal with any decision to prosecute or not to prosecute in respect of any offence whether or not committed in conflicts of the past.

15.4 In my view, there is no need in the light of detailed first prosecuting policy to introduce and adopt a procedure as set out in parts A and B of the policy amendments. Of course, this has to be seen in the light of the ultimate policy amendments as contained in part C thereof. This should then bring me to deal with the interpretation of part C of the policy amendments as fully set out in paragraph 9 of this judgment.

15.4.1 Remember, when Mr Marcus on behalf of the applicants, was quizzed by the court, whether his understanding was that the prosecution can in terms of the policy amendments decline to prosecute in the face of a prima facie case, he stated as follows"

"It says so, much explicitly. It says what it means"

15.4.2 Part C, of the policy amendments sets out criteria that should be followed for the prosecution of cases arising from conflicts of the past. Paragraphs C1 and C2 thereof

in my view, are important, in particular C2 (read paragraph C.2 quoted in paragraph 9 of this judgment).

15.4.3 If the answer to paragraph C 2 of the policy amendments is in the affirmative other criteria set out in paragraph C 3(a) to (L) must still be considered. Immediately the question is "*What else is required for the purpose of taking a decision to prosecute or not to prosecute in the face of the strength of adequate evidence* (my own emphasis). Of course, the question must be seen amongst others in the light of the following criteria which must still be considered in terms of paragraph C 3:

15.4.3.1 the extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society. (**see paragraph C 3 of the policy amendments quoted in paragraph 9 of this judgment**). This should be seen in the light of an introduction to these policy amendments as set out in paragraph A1 quoted in paragraph 9 of this judgment. The respondents wished to seek to deny that there is any reference to consideration of reconciliation and reconstruction in the policy amendments. Of course this is incorrect. The wording of the policy amendments should be seen in context. In my view, they were correctly referred to by Mr Marcus as a copy or duplication of the guidelines set out for and used during the TRC hearings. For example, "Why should the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation have any bearing on the decision to prosecute or not to prosecute, especially in the light of the

strength of adequate evidence? Why should the extent to which the prosecution or non-prosecution of the alleged offender, be dictated by national project of nation-building through transformation, reconciliation, development of our society? (**See paragraph C 3 (f) of the policy amendments**). What is stated in paragraphs C 3 (d) (iv) and C.3 (f) is indeed like a "copy cat" of the TRC's guidelines.

15.4.4 When there is sufficient evidence to prosecute, the first respondent must comply with its obligation. Entitlement by the first respondent, to refuse to prosecute where there is a strong case and adequate evidence to do so, would in my view be unconstitutional. Paragraph C 2 read with paragraph C 3 of the policy amendments, allow the first respondent even where there is a strong case and adequate evidence not to prosecute. This is contrary to the first respondent's constitutional obligation to ensure that those who are alleged to have committed offences are prosecuted.

15.4.4.1 Perhaps Mr Marcus was right in expressing himself, as indicated in paragraphs 15.1 and 15.4.1of this judgment. I am mindful of the first respondent's assertion that, it was not and it is still not its intention not to prosecute where there is a strong case and adequate evidence to backup the prosecution. Surely, this is understandable, because the very existence of the first respondent is to prosecute crimes. The submission as I understood it is that, there is no need for the applicants to panic. That might be so, however, the real issue as I see it is whether the policy amendments which do not properly reflect the

intention of the respondents should be allowed to remain in the book. I do not think so.

15.5 In paragraph 14.3 of this judgment, I quoted paragraph 2.1 of the applicants' written heads of argument. At the risk of repetition, the applicants aver that it is not their case that the policy amendments expressly allow for an amnesty, indemnity or a re-run of the TRC, rather that the application of the policy amendments in relation to a decision not to prosecute will have this effect. This submission should be seen in the light of paragraph C 2 read with C 3 of the policy amendments.

15.5.1 This submission on behalf of the applicants, suggests a broader interpretation or construction of the policy amendments. I do not intend referring to legal principles and case laws dealing with the manner of interpretation, where a literal meaning does not seem to make sense or does not properly reflect the intention of the legislature, in the instant case, the intention of the respondents who produced the policy amendments. The policy amendments have the effect of legal binding.

15.5.2 The many criteria referred to in paragraph C3 are to enable the first respondent in deciding whether or not to prosecute offences committed before 11 May 1994 arising from conflicts of the past. However, many of these criteria in my view, are not relevant in deciding whether or not to prosecute. Remember, these criteria as contained in paragraph C3 are subject to two factors. Firstly, the offence or offences must have been committed on or before 11 May 1994. (**See paragraph C1**). Secondly,

there must be a strong case supported by adequate evidence (**see paragraph C2**).

15.5.2.1 As I said, once criteria C 2 presents itself in a particular case, the first respondent is constitutionally bound to prosecute. The many factors referred to in C3 are factors which in my view, should be considered when the first respondent decides to enter into negotiations or agreement in terms of section 105A. Section 105 A, has nothing to do with the decision to prosecute or not to prosecute. It can only be invoked once a decision to prosecute has been taken and an accused person is on trial. It is a provision which is under judicial consideration. Decision to prosecute or not to prosecute is not. Many factors as set out in C3 in my view, are relevant and important in deciding whether a sentence agreed upon in terms of section 105A is appropriate or not, but not in deciding whether to prosecute or not to prosecute.

15.5.2.2 As I said earlier in this judgment, section 204 is a process which is followed on the strength of a state's case and on whether a particular individual who participated in the commission of the offence is prepared to assist in successfully prosecuting his or her co-perpetrators. The section does not require representations and I do not think it is necessary for such representations to be made. The question again arises, why then representations as envisaged in paragraph B1 of the policy amendments if not to give indemnity other than in terms of section 204?

15.5.3 Looking at what is envisaged in paragraph B 1, one sees a recipe for conflict and absurdity. What is conspicuous in

paragraph B 1 regarding the representation is absence of the status of such representations. Put it differently, how does the first respondent intend dealing with representations in terms of paragraph B1 in a situation where it decides to prosecute a person referred to in C3 after having made such representations in terms of paragraph B 1?

15.5.3.1 If indeed representations in terms of B1 are intended to enable the first respondent to take a decision to prosecute, and not to grant indemnity, how does it hope to have a full disclosure as intended in B1? Surely, unless it intends not to prosecute those who make a full disclosure, in terms of paragraph B1, it cannot hope that any person who runs the risk of being prosecuted by his or her own full disclosure will come forward as envisaged in B1. Remember, this full disclosure as envisaged in B1 is emulation of a full disclosure as it was in terms of the TRC guidelines.

15.5.4 The whole procedure as envisaged in part B1, is a recipe for conflict and absurdity, because on the one hand it does not provide protection for such a disclosure. On the other hand, the first respondent says it is not indemnity or amnesty. It is a recipe for conflict, for example, the first respondent may wish to use the representations once it has decided to prosecute and the person who made such representations is on trial. It is a recipe for absurdity, because the first respondent insists that it does not intend to grant indemnity. The need for the procedure does not prevail, unless the intention is to grant indemnity or amnesty. Broad interpretation or construction of parts A, B, and C of the policy

amendments displays amnesty or indemnity or agreement, contrary to that allowed in terms of section 204 and 105A of the Criminal Procedure Act and also contrary to the intention of the first respondent seen in the light of its insistence that it was never its intention to act other than in terms of its obligation to prosecute and to utilise sections 204 and 105A The result of this is that the policy amendments are not only unconstitutional but absurd and cannot continue to exist.

16. I now turn to deal with the other issue which was intended to be raised as a preliminary issue. The issue was in detail dealt in the respondent's supplementary written heads of argument. The argument was that the applicants' application is not ripe. The issue was introduced as follows in the first respondent' heads of argument:

"1. One of the cardinal policies or principles of judicial function is the adjudication of real and concrete disputes between the parties. Stated differently domestic, foreign, as well as international courts have consistently said that the function of the courts is never to answer abstracts, academic or hypothetical questions"

16.1 Having said this, Mr Semenya then at length dealt in detail with the principles applicable to the issue as raised. Having referred to the applicable principles the submission was concluded as follows on pages 8 to 9 of the respondents' supplementary heads of argument:

"2. The authorities said above, more than amply demonstrate that as a matter of policy, the courts should concern themselves with the resolution of real and concrete controversies involving persons who

have interests in the resolution of those disputes. We submit in the present case, what the applicant call the "stories of five South African families" is totally unconnected to the prosecutorial policy under question. We say so for the following reasons:

2.1 There is no evidence that any one has been arrested in connection with the victims of the cases cited in the applicants' papers (Nokuthula Aurelia Simelane; Mathew Goniwe, Sicelo Stanley Mhlauli; Sparrow Thomas Mkhonto and Fort Calatha).

2.2 The applicants have furnished no evidence indicating that the police have secured sufficient evidence to mount a prima facie case against anyone in respect of the victims on whose behalf the application is launched;

2.3 There is no basis offered by the applicants that the first respondent has taken any decision to grant "prosecutorial indemnity/immunity" to anyone;

2.4 More importantly, the applicants have not shown any concrete facts which meet the facts cited in the prosecutorial policy to inform the decision whether to prosecute or not to prosecute. For instance, whether there is "adequate evidence" whether there has been full disclosure of all relevant factors alleged in the offences; whether the offences were associated with political objectives" the motive of persons who committed the acts; the personal circumstances of the offender" or whether the offences are serious". All of these factors must be first established before the applicants can contend for the "effective indemnity".

4. *The other reason why the application should fail, is that the applicants are seeking a declarator, a power which a court exercises in terms of section 19(1)(a)(iii) of the Supreme Court Act, which courts have a discretion to grant even where a proper case has been made out. The courts have consistently said"*

16.2 I do not intend referring to authorities relied upon for the submission as quoted above. However, I find it necessary to look at the submission closely.

16.2.1 The contention by the first respondent should be seen in the light of its insistence that it intends enforcing the policy amendments as they are. In other words, that, it will continue to require persons who qualify in terms of the policy amendments to make representations in terms of paragraph B1. Secondly, that it will continue to decide whether or not to prosecute and to consider other factors as set out in paragraph C3, once a strong case and adequate evidence are established as envisaged in paragraph C2 in respect of offences referred to in paragraph C1 (**refer to the provisions of the paragraphs as quoted in paragraph 9 of this judgment**).

16.2.2 Coming back to the submission as quoted in 16.1 above, it is necessary to elaborate on the submission.

16.2.2.1 The stories of the first five applicants are described as totally "unconnected to the prosecutorial policy". I do not think so. Firstly, their stories relate to conflicts of the past committed before 11 May 1994. Secondly, the five applicants have direct interest in the prosecution of those

who are connected to the crimes alluded by them in the founding affidavit. Thirdly, some of these persons who were involved or might have been involved have not been granted indemnity, either because they did not apply or they were found not to have given a full disclosure. Lastly, the first respondent is under obligation to prosecute them once a strong case and adequate evidence is established.

16.2.3 The reasoning for the submission as set out in paragraph 2 of the first respondent' supplementary heads of argument quoted above should also be considered closely.

16.2.3.1 I do not think that anyone connected with the commission of the crimes cited in the applicants' papers need to be arrested before the applicants could be entitled to bring the application on the basis that their application would then be ripe or not academic. The essence of the application as I see it is prompted by the introduction of the policy amendments and the desire by the first respondent to enforce the policy amendments complained of. I did not understand counsel for the respondents to suggest that any of the applicants is not a party or persons referred to in section 38 of the Constitution. This concession in my view, should settle the score.

16.2.3.2 Clearly, the second to the fifth applicants are widows of the Cradock four who were killed in gruesome manner during 1985. The killings were politically motivated. Some of the people who were involved or might have been were not granted amnesty during the TRC proceedings. Some did not apply for amnesty and have not been prosecuted yet. If the first respondent was to deal with

these people receive their representations as contemplated in paragraph B1 and receive adequate evidence suggesting a strong case for prosecution as contemplated in paragraph C 2; the first respondent may still decide not to prosecute as contemplated in paragraph C3, after having considered the criteria therein. The applicants' interests lie in the first respondent's obligation to prosecute in circumstances as might prevail under paragraph C 1 and C 2. Paragraph C3 is threatening such interest. Therefore, such people as referred to in B1 in respect of offences referred to in C 1 do not have to be arrested before the applicants could be entitled to bring an application of this nature.

16.2.3.3 The basis of the attack against the policy amendments really is not much of what the applicants can provide to the first respondent regarding possible prosecution of particular persons. The applicants are not asking for prosecution of certain people, that is not part of their prayers. In any event, I do not think that they have to furnish evidence as suggested in paragraph 2.2 of the respondents' supplementary heads of argument. Crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted. Victims of crimes rely on these institutions for investigation and prosecution. As I said, the essence of the complaint is that the policy amendments allow the first respondent not to prosecute even in circumstances where there is a prima facie case seen in the light of paragraphs C 2 and C 3 of the policy amendments.

16.2.3.4 The respondents did not have to take a decision not to prosecute, to grant indemnity, and or immunity to anyone, before the applicants could bring the application. **(See paragraph 2.3 of the respondents' supplementary heads of argument)**. Lastly, the applicants did not have to show any concrete facts which meet the factors cited in paragraph C 3. of the policy amendments as suggested in paragraph 2.4 of the respondents' supplementary heads of argument. At the risk of repeating myself, paragraphs C 2. and C 3 state or suggest that the first respondent may still not prosecute, despite adequate evidence against a particular individual having committed an offence referred to in C 1. Alternatively paragraphs C 2 and C 3 broadly interpreted confer such a power to the prosecution, contrary to its constitutional obligation. This is a real threat to the applicants' constitutional rights. This threat cannot be side stepped by an undertaking that it will not happen. For as long as the first respondent insist that it will enforce the policy amendments, the applicants should be entitled to have the policy amendments impugned on the ground that it is unconstitutional.

COSTS

17. The first to the fifth applicants have direct interest in the institution of the present proceedings. They should therefore be entitled to costs. The first five applicants having decided to institute the present proceedings, I do not think that it was necessary for the other applicants to join forces.

CONCLUSION

18. Consequently I make the order as follows:

18.1 The policy amendments to the National Prosecution Policy dated the 1 December 2005 is hereby declared to be inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.

18.2 The first respondent to pay the costs of the application for the first to fifth applicants.

M F LEGODI
JUDGE OF THE HIGH COURT

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E.

I.

BEFORE THE SPECIAL AMNESTY COMMITTEE OF THE TRUTH AND RECONCILIATION COMMISSION

[HELD AT PORT ELIZABETH]

In the applications of :

NICOLAAS JACOBUS JANSE VAN RENSBURG	FIRST APPLICANT
GIDEON JOHANNES NIEWOUDT	SECOND APPLICANT
WYBRAND ANDREAS LODEWICUS DU TOIT	THIRD APPLICANT
MARTHINUS DAVID RAS	FOURTH APPLICANT

In re:

THE MOTHERWELL INCIDENT ON 14 DECEMBER 1989

DECISION

These are unusual proceedings involving applications for amnesty and launched in terms of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 as amended ("the Act"). This is a special sitting of the Amnesty Committee which falls under the Truth and Reconciliation Commission established under the Act.

The operation of the provisions related to amnesty ceased during December 2000 or January 2001 after being extended a few times prior to that.

During the operation of the Act, the Applicants and others made application for amnesty in respect of the murders of Sergeant Amos Temba Faku, Warrant Officer Mbala Glen Mgoduka, Sergeant Desmond Daliwonga Mapipa and Xolile Shepherd Sakati, alias Charles Jack ("the deceased") on or about 14 December 1989. The applications were refused.

The Applicants were charged together with others for the murders of the deceased and convicted accordingly in the South Eastern Cape Local Division of the High Court during June 1996. The first three deceased were members of the Security Branch of the South African Police in Port Elizabeth and the latter was an informer who was a converted ANC operative. All four Applicants were also members of the Security Branch in the South African Police.

The decisions of the original amnesty committee to refuse amnesty to these applicants were taken on review to the Cape of Good Hope Provincial Division of the High Court of South Africa. The decisions to refuse amnesty to the Third and Fourth Applicants were unanimously

set aside and the majority of that court also set aside the decision to refuse amnesty to the Second Applicant.

The court consequently ordered that the Minister of Justice establish an Amnesty Committee (presumably in terms of the Act) which would consider applications for amnesty by the Second, Third and Fourth Applicants (in respect of the same incident) afresh.

Consequently this committee was established in terms of the Act and the four applicants brought these applications before it. The applications are opposed by the families of the deceased. The family of Sakati were only represented later in the hearing.

Amongst the applications, there was one by Nicholaas Jacobus Janse Van Rensburg who was cited as the First Applicant. The committee was informed that his application was included in anticipation of review proceedings being brought in the Cape of Good Hope Provincial Division of the High Court seeking relief that would allow him to make a fresh application for amnesty as the Second, Third and Fourth Applicants had been allowed to do in terms of the aforementioned court order.

No such order was placed before this committee and it seems that no review proceedings were ever launched by or on behalf of the First

Applicant in the Cape of Good Hope Provincial Division of the High Court. Consequently the application for amnesty on behalf of the First Applicant is not properly, if at all, before this committee. The contents of Van Rensburg's application can therefore not be taken into consideration, especially because it was never tested, even in deciding the applications of the other applicants. However for the sake of convenience, the other Applicants will be referred to in this decision as cited in the papers and in the heading hereof.

When the proceedings commenced, Mr Ntsebeza, counsel for Mrs Faku, Mrs Mgoduka and Mrs Mapipa, wives of the first three deceased, applied for a postponement so that the families of the deceased would have an opportunity to obtain the services of other counsel. He explained that his withdrawal was voluntary and based on a possible perception that he had a conflict of interest in appearing for the families when in fact he was an erstwhile member of the Truth and Reconciliation Commission established in terms of Section 2 of the Act. The postponement was granted.

Upon resumption, Mr Naidoo appeared for the families of Faku, Mgoduka and Mapipa. Later in the course of the proceedings, Mr Naidoo informed the committee that at that stage, he was also representing the family of deceased, Sakati, having been briefed shortly before then. There were no objections in this regard and Mr

Naidoo continued to represent the families of all the deceased for the remainder of the hearing.

There are one or two aspects which need mention at this juncture.

Firstly, during the course of the evidence, there was a suggestion that Mr Carl Edwards, who was a colleague of Mr Niewoudt, knew of the plan to kill the deceased and had had prior knowledge that he would be hosting some of those involved in the plan to do so and/or its implementation. On account of the possibility that he might therefore be implicated in the killings in one way or another, proceedings were adjourned so that he could be informed of the situation as required by law.

Mr Mpshe, the evidence leader, was directed to inform Mr Edwards of the situation and that he should attend the hearing the next morning at 09H30 in order to indicate what his attitude was and in particular to request time to employ representation if he wished to do so.

The next morning, the committee was informed by Mr Mpshe that he had communicated with Mr Edwards as directed and had handed him a written résumé of the situation. Mr Mpshe told the committee that Mr Edwards signed a copy of the written résumé which was handed to him and indicated that he had no interest in the proceedings and did

not wish to attend the hearing. Mr Edwards had no objection to it proceeding without him. The proceedings continued accordingly.

Before any oral evidence was tendered, counsel for the three Applicants sought to amend their applications for amnesty. Written amendments were submitted on behalf of Third and Fourth Applicants and read as follows:

> "Ek doen hiermee aansoek om amnesties (sic) vir moord, sameswering tot die pleging van moord, medepligtigheid tot moord, beginstiging, opsetlike saakbeskadiging, as ook enige ander misdryf en/of delik wat voortspruit of afgelei word uit die voorval waartydens Adjudant-Offisier Glen Mogoduka, Sersant Amos Faku, Sersant Desmond Mapipa en Xolile Sheperd (sic) Sakati (ook bekend as Charles Jack) gedood is te Motherwell".

It must be pointed out that while not specifically referred to, the amendment was clearly intended to include any offence incidental to the commission of the murders and any offence by any of the Applicants in keeping secret the manner in which the deceased were murdered and the identity of those involved in the commission thereof. The Second Applicant made the same application.

There was no objection to the amendment(s) and the applications, including that of the Second Applicant. It follows in any event that should amnesty be granted in respect of the murders which are the

focal offences, then amnesty for any other offence incidental to the commission or concealment thereof should also be granted. The converse of this also applies.

We were informed that the parties had agreed that the committee would not be presented with certain relevant records or portions thereof. These included the record of the criminal trial related to this incident and the record of the previous amnesty application. Despite them being informed that the committee did not consider itself bound by their agreement, the committee did not refer to any of these records in considering these applications.

It is common cause that the deceased were all killed while travelling in a motor vehicle in which explosives were installed by Third Applicant and others. The Second Applicant was the source of information in terms of which the decision to kill the deceased was made and he activated the explosives which caused the deaths of the deceased. The Fourth Applicant was party to the said operation and attended in order to put into operation an alternative operation should the death of any of them not have ensued in the first instance.

The Third and Fourth Applicants merely acted on the instructions of their superiors in this regard.

The Second Applicant's written application is contained in two–hundred and eleven pages. Much of the written part of his application deals with his personal circumstances, and his connection with the Security Police of the time. He proceeded with his oral evidence and confirmed, in very general terms, the correctness thereof.

His written application also contained an attached document entitled "Submission to the Truth and Reconciliation Commission", dated 21 October 1996 and authored by General J. van der Merwe. Attached thereto is a document titled "The role of the South African Police in the conflict of the past" and authored by Generals Geldenhuys, Coetzee, De Wit and van der Merwe, all of whom were Commissioners of the South African Police at various times in the past.

The Second Applicant also associated himself with the contents of both documents and sought them to be read into his application and within the context thereof.

He explained that he became a member of the Security Branch of the Police on 1 April 1975. He was stationed at Port Elizabeth. Previously he was a member of the South African Police stationed at Johannesburg and Transkei before being transferred to the Security Branch in Port Elizabeth where he was always stationed until he left the force.

His application also contained a general background of his experiences and evaluation of circumstances which led to this specific incident. He broadly confirmed the allegations in this regard as contained in his written application.

While the written application was broadly referred to, he was specifically led by his counsel on the material aspects related to the relevant incident(s).

The committee was informed that while he would not be led on all the details save for what he and his representatives considered important, he was nonetheless also willing to answer specific questions about the allegations contained in his written application. Counsel was informed that the application should be placed before the committee as Second Applicant and his representatives thought fit.

In dealing with the events, the Second Applicant explained that from 1983 he was in charge of the Intelligence Component of operations within the Port Elizabeth Security Branch. In 1986, during the State of Emergency, he was transferred to the investigation unit and in 1989 he became the Head of the Regional Intelligence Component of the Security Police in the region.

He testified that during 1989, Brigadier Gilbert was Head of the Security Police in Port Elizabeth and Colonel Isaac Nel was second in command. Under them, the hierarchy consisted of the administrative component, the black component, the white component, and the coloured and Asiatic component. He explained that these components were administrative sections of the Security Police all of which investigated what was termed 'black organisations'.

The Second Applicant explained that part of his duties in the intelligence component during 1989 was to establish covert intelligence capacity. This included the assessment of the political climate of the time, the development of an effective database in regard to organisations and individuals, groups and institutions who were responsible for what he referred to as the anarchy of the time. This clearly referred to organisations, individuals, groups and institutions that opposed the system of apartheid. This information was used for *inter alia* counter espionage operations.

The Second Applicant then proceeded to testify about the deceased. He testified that Warrant Officer Mgoduka joined the Security Branch in 1977, when he shared an office with the Second Applicant in the aforementioned black component.

Sergeant Amos Faku joined the Security Branch in 1980 also as part of the black component. Sergeant Desmond Mapipa was transferred to the Security Police in 1986 and attached to the investigation component which was part of the black component.

He described the deceased Xolile Shepperd (sic) Sakati alias Charles Jack as a 'trained terrorist' who was arrested in 1983, and later testified on behalf of the state in criminal prosecutions against those accused of subversive activities. Ultimately he was placed within the black component. He also provided information to the Security Police.

The Second Applicant stated that on one occasion he was interrogating a 'trained terrorist' in the company of the four deceased. He explained that because of the situation prevailing at the time, he used the opportunity to enhance his employment goals broadening the network and database. In pursuance thereof he managed to get the interrogatee to write a letter for him and wherein he (the interrogatee) requested from an ANC operative in Swaziland, weapons and the establishment of a Dead Letter Box (DLB) within South Africa. He explained that a DLB is a safe place where weapons within South Africa could be kept.

The letter was sent to Swaziland with an agent who was incarcerated a short while later at Quattro Camp, a detention camp in Angola, where

people who were suspected of being untrustworthy were held by the ANC.

The Second Applicant then went on to testify about the killing of a person in Lesotho. It was clearly not the agent with whom the aforementioned letter was sent but everything points to the fact that it was one Toto Mbali.

It is quite apparent from the evidence of the Second Applicant that only he and Warrant Officer Mgoduka knew Toto Mbali had been recruited by the Security Branch. This piece of evidence was obviously intended to demonstrate that Warrant Officer Mgoduka was the source of this information to the ANC. No other evidence was tendered in this regard.

The Second Applicant proceeded to explain that he then suspected the four deceased, in particular Warrant Officer Mgoduka, of being the source (s) of the leaking of confidential information to the ANC. He gave no details of the 'confidential information' he referred to and allegedly leaked by all of the deceased.

He testified that as a result thereof, he discussed the issue with Brigadier Gilbert as a matter of urgency because the whole information/ intelligence system was at risk and the names of Security Police and

their agents and certain important addresses where some of the agents and Security Police resided could be revealed to the ANC. This could result in attacks on Security Police and agents as a result of which they could be killed.

He however testified that the late Mr Sakati was only involved in the incident of acquiring the letter sent to Swaziland and that it was only to that extent that he was a potential threat to the system which the second Applicant sought to protect. This was over and above the identity of persons he (Sakati) had got to know over the time he spent with the Security Police.

The Second Applicant however did not believe that the deceased had knowledge of the identity and addresses of all the Security Police agents but certainly some important information in that regard and other important information.

The Second Applicant stated that he told Brigadier Gilbert of the situation in this regard during July 1989. As a result, Gilbert then ordered him to initiate a discreet investigation into the source(s) of the leaks and the role of the four deceased therein.

In pursuance of this order, he arranged the installation of a listening device in the tea room at the offices of the Security Police at Port

Elizabeth. He also intercepted mail. He explained that he arranged with members of the technical division who used to fetch the mail from the post office to intercept certain mail, open it and read it. The operation also included monitoring telephone conversations and following and monitoring the four persons in question.

The Second Applicant said that during the investigation, he discovered that Warrant Officer Mgoduka had registered a post box under a false name at the Korsten Post Office, Port Elizabeth. He stated that this was established from the intercepted mail and the aforementioned observations. The Second Applicant personally established that the false name of 'Thandoxolo' was used. He checked the official form at the Post Office and discovered that it had been completed in Warrant Officer Mgoduka's handwriting, which he recognised. The Second Applicant then arranged for the mail received in that post box to be intercepted and monitored.

According to the Second Applicant the monitoring of the mail revealed that communication in this regard was by means of codified language. Consequently this raised further questions and strengthened the suspicion that Warrant Officer Mgoduka was in contact with the ANC. The foreign addresses were of places such as Lesotho, London and Canada and were known to the Security Branch. This fact

ultimately confirmed to the Second Applicant that Warrant Officer Mgoduka had contact with the ANC.

The Second Applicant also testified that when the four deceased were talking in the tea room, he detected that they had already made contact with an overseas ANC aligned relative of Warrant Officer Mgoduka, Christopher Mgoduka. He also concluded from what he overheard that they had changed allegiance and also that they felt used in protecting the white government and keeping it in power. He interpreted their position as one in which they were dissatisfied with the government and the way they were being treated.

Finally, he referred to a letter sent from a Korsten address to Mr Isaac who, according to the Second Applicant, was known to the Security Police in Port Elizabeth as 'Roje Skenjana', an ANC commander in Lesotho. The content of the letter was encoded, as was customary and referred to as pending wedding. The Second Applicant stated that he recognised the handwriting therein as being that of Warrant Officer Mgoduka. As had become practice, the letters were steamed open, copied, resealed and sent on to its intended destination.

The Second Applicant later testified that this letter was typed and he identified the type as that of the manual typewriter used in Warrant Officer Mgoduka's office.

Second Applicant explained that he was aware of a request by Mr Skenjana for Mr Mgoduka to identify a motor vehicle for the purposes of placing a limpet mine in it.

As a result of all this information, he was convinced that the four deceased, in particular Warrant Officer Mgoduka, were a serious security risk.

The Second Applicant then reported the situation to Brigadier Gilbert during the first half of December 1989. He testified that the options of how to deal with the matter were discussed between them and they arrived at the conclusion that all the deceased should be killed.

While he did not volunteer details of these options, upon being questioned, he explained that amongst the options was that they should be subjected to criminal prosecution. He could not remember why this option was rejected but he was wary that his whole network could have been exposed and that it was not clear to him at the time how criminal charges could be proffered against them.

Nonetheless, he and Brigadier Gilbert parted, and about two days later, Brigadier Gilbert spoke to him directly and gave him an order to go and see General van Rensburg in Pretoria at the Security Police Head Office about this situation. Brigadier Gilbert gave him a ticket to

travel to Johannesburg by air and then on to Pretoria. According to the Second Applicant, he had Head Office authority to carry out the said covert operation.

Second Applicant also testified that Brigadier Gilbert mentioned at that time that Brigadier Strydom, head of detectives in Port Elizabeth, had informed him that Warrant Officer Mgoduka and Shepperd Sakati were suspects in a scam involving the defrauding of what was termed 'anti-government organisations and workers' unions'. This aspect further complicated matters and had the potential of embarrassing the Security Police and exposing the role of the Security Police in serving the political ends of the government of the day, because the two were also involved in other hitherto undisclosed covert criminal offences committed by the Security Police. According to the Second Applicant, though he did not know much about this, he was told that they had threatened to disclose the role of the Security Police in Port Elizabeth in the 'Cradock Four' killings as it is known. He further stated that they were using their knowledge of the Cradock Four incident to negotiate a position for themselves in terms of which they would avoid the risk of being charged for fraud. He, however, did not pay much attention to this. All he was interested in was the plan to kill them.

The Second Applicant then left for Pretoria on 12 December 1989, with instructions to meet General Van Rensburg at his home early the next

morning. He knew General Van Rensburg, who had previously been stationed within the Security Branch at Port Elizabeth.

He met Van Rensburg as arranged and the latter was clearly not fully briefed about the situation. Second Applicant stated that he then tendered further information to Van Rensburg.

He explained that Colonel De Kock later joined them at the invitation of Van Rensburg. He briefly told De Kock what the situation was. He could not remember everything he told De Kock, but stated that he told him that some of the deceased had already made contact with the ANC.

He testified that because Brigadier Gilbert was senior to Van Rensburg and De Kock, neither could change a decision to kill the four deceased. He explained that the purpose of going to Pretoria was to fill in the details and reasons for the proposed elimination of the four deceased so that the logistics in connection with the implementation thereof, could be arranged accordingly. This explanation was tendered after he was constrained to concede that Van Rensburg had the authority to direct that the operation be aborted. I will refer to this aspect presently.

After he had explained to De Kock why the operation had to take place, Van Rensburg instructed De Kock to arrange the technical requirements to ensure the success of the operation. According to Second Applicant, he left Van Rensburg's home with De Kock and they proceeded to the Third Applicant's office where they were introduced to each other. He testified that he briefly explained the situation to the Third Applicant. In particular, he explained that the four deceased had made contact with an anti-apartheid organisation and that the effects of the proposed operation should be made to look like the work of the ANC. He could not remember if he had told the Third Applicant that authority had been obtained to do what was being prepared for. Again he explained that he tendered this brief explanation to the Third Applicant in order to help him understand what was logistically required.

Thereafter De Kock and Second Applicant went to Vlakplaas where they contacted the Fourth Applicant, amongst others. Later the Second and Fourth Applicants and two others, Snyman and Vermeulen, drove to Port Elizabeth in two motor vehicles. Fourth Applicant was not informed of anything by the Second Applicant who seemed to suggest that it must have been De Kock who tendered the details to him, if any.

Second Applicant, without going into any detail, testified that during their journey he explained everything to them including the motivation for what was obviously going to occur.

The Second Applicant then explained that he took the other passenger of the motor vehicle he was travelling in to a safe place in Port Elizabeth and thereafter went home to rest. He had left the others with one of his local colleagues.

He received the expected telephone call from Third Applicant early in the morning. He collected him in a suburb known as Summerstrand and took him to a secret place where they met the other Vlakplaas operatives.

The Second Applicant then left that place to look for a motor vehicle in which explosives would be installed. He succeeded in obtaining a motor vehicle and delivered it to the place where the others were waiting in the area of Greenbushes near Rocklands. The bomb was then installed in the motor vehicle as was planned.

He stated that he was given instructions as to how to detonate the bomb by means of a remote controlled device. He explained that in the late afternoon, they went to a place identified as the Monument Crossing in the Motherwell suburb. He showed Third and Fourth

Applicants and Vermeulen where he intended the said motor vehicle to be when he activated the planted explosives, so that they could ensure that they were out of danger when it happened.

He further confirmed the contents of his written application in respect of the actual detonation and what occurred immediately before then. He explained that he held the relevant motor vehicle in safe keeping at Louis le Grange Square and at about 20H00 that night, he consulted an informant from whom he allegedly received information about a freedom fighter hiding in Motherwell and who intended to commit an offence by installing explosives in a police vehicle on 16 December 1989 and then blowing it up. He used this opportunity to put his plan into operation and at the same time, enhance the impression that it was the work of the ANC because it coincided with its alleged plan to blow up a police vehicle.

He then arranged for the four deceased to come to where he was and explained that they should use a motor vehicle which was not known to be that of the Security Police in order to facilitate the observation and possible arrest and interrogation of the alleged freedom fighter.

Eventually the four deceased boarded the motor vehicle, which was brought to the rendezvous point in Motherwell by Warrant Officer Lotz.

The four deceased then left *en route* to Hintsa Street where the freedom fighter was allegedly hiding.

The remote control was in the possession of the Second Applicant who had insisted that he be the one to activate the explosives when it was opportune to do so. The Vlakplaas members, including Third and Fourth Applicants, were hiding a distance away.

When the motor vehicle had travelled a short distance but still within view, the Second Applicant detonated the explosives in that motor vehicle by means of the remote control. The resultant blast killed all four of the deceased instantly.

The Second Applicant testified that he then went to the scene of the blast and planted a detonator, the use of which was at the time associated with the ANC. This ploy was obviously employed to fortify the impression that the blast was committed by members of the ANC in terms of its offensive against the police and other institutions regarded as supportive or protective of apartheid and in line with its planned attack scheduled for 16 December.

He confirmed that the political aims of his actions, as set out in the written section of his application, were to protect the government of the day.

In summary, this included compliance with his obligation of ensuring the safety of South Africa, protecting the country, protecting the government of the day and the National Party from attack by liberation armies and movements. It was also intended to protect the integrity of South Africa, the government and the National Party as well as its continued existence and control of government. In particular, it was intended to avoid sensitive information related to the aforementioned aims from being divulged to the opposition, in order to protect the lives and property of members of the South African Police, agents, informants and colleagues within the Security Police and to protect the earlier successes in attaining those aims, especially in the light of the trouble it would involve in replacing the system under threat.

The Second Applicant testified that he was unable to say whether all the information he sought to protect had been revealed to the opposition or to what extent this had been done over the period of approximately five months prior to the killing and during which the alleged communication between the deceased and the ANC had continued.

The Second Applicant also conceded that after the blast, he did not follow up the situation in respect of the freedom fighter allegedly hiding in Hintsa Street, Motherwell. He stated that he mentioned the matter to

another section of the Security Police, Port Elizabeth because, as he was in the Intelligence Section, it was not within his formal competency. He was unable to say if anything was done in respect thereof even from an intelligence perspective.

Eugene Alexander De Kock ("De Kock ") was called by the Evidence Leader of the Amnesty Committee, Mr Mpshe, to testify about the events and the subsequent killing of the deceased.

De Kock joined the Uniformed Branch of the police force during January 1968 and was stationed in the East Rand. He stayed there until he was transferred to the then South West Africa and stationed within the Security Unit at Oshakati during 1983. He was a founder member of the Combat Unit known as 'Koevoet' akin to the Selous Scouts, which countered revolutionaries in the mid-African area. Through infiltration they neutralised South West African Peoples Organisation and other opposing structures in South West Africa within two years of formation. Koevoet existed until the end of 1989 / 1990 when there were peace negotiations for Namibia.

In 1983 he was transferred back to South Africa. He became the commander of Vlakplaas on 1 July 1985 and was placed in charge of Section C-1, which was under Brigadier Schoon. Section C-1was entrusted with combating terrorism, and specifically the activities of the

ANC and Pan-Africanist Congress. Members of both organisations who infiltrated the country were either killed or recruited and converted into members known as “Askaris”. The Askaris were a group of converted members of liberation armies used by the Security Police to identify insurgents and generally provide information about their former revolutionary organisations.

De Kock obtained his orders from Brigadier Schoon as to how the ANC and PAC insurgents were to be killed. When attacking the “enemy” and in the field of operation, he had a wide discretion to deal with situations as they unfolded in any given operation. These operations were inside the country as well as outside the borders of South Africa, e.g. Lesotho and Swaziland. Some of the members of the ANC and PAC were identified by Askaris through photographs. These Askaris would also give information about safe places of either the ANC or PAC members inside and outside South Africa.

De Kock is currently serving a sentence of life imprisonment imposed in October 1996.

He stated that he testified in the criminal trial in respect of this incident against the Applicants and others.

He testified that during December 1989 he was instructed by General Van Rensburg, who was then his chief, to consult with him at his Security Branch offices. He was informed that the Second Applicant, of the Port Elizabeth Security Branch, would be arriving the next day and that he should accompany the Second Applicant to Van Rensburg's house, which was situated in a complex for police officials. De Kock was living in the same complex.

At 06H00 Second Applicant came to De Kock. They walked to General Van Rensburg's house. Van Rensburg invited Second Applicant to tell De Kock the purpose of his visit. Second Applicant explained that two Security Branch members and an Askari, a former member of the ANC, were involved in fraud. They intercepted cheques in the post which were destined for the unions, liberation movements and the South African Council of Churches. They exchanged these cheques and utilised the money for their own purposes. The exposure of this scam would put the integrity of the Security Branch in Port Elizabeth at risk. This led one of the members to threaten that should they be charged, he would expose some of the other crimes, such as motor vehicle theft, committed by the Security Branch in Port Elizabeth. He did not identify this person.

A short discussion ensued between the three. General Van Rensburg told De Kock to render assistance to Second Applicant so that these

members should be prevented from making such disclosures. They had to be 'silenced'. This was a euphemism used in the Security Branch for killing people. Thereafter the discussion focused on the methodology of how the deceased should be blown up and killed.

This would also make it appear as if it was an operation carried out by the ANC and that no suspicion could be cast on the Security Branch in that regard. No personnel from Port Elizabeth should be involved, lest for unforeseen reasons they may be recognised.

De Kock would deploy members from Vlakplaas. He would arrange for the Third and Fourth Applicants, together with some other members, to ensure the successful execution of the operation.

This was at the time when the Harms Commission had been appointed to investigate the alleged atrocities perpetrated by Vlakplaas members. De Kock was then on compulsory leave in order to assist General Engelbrecht to cover up the operations of Vlakplaas. De Kock would then not be suspected of any involvement in Vlakplaas operations.

Whilst walking back to his house with Second Applicant, he became concerned about the reasons for the intended killings. He said he questioned why people who worked on the same side with them and

had meted out untold harm on the ANC should be killed for reasons of hiding fraud.

When he reached home he drove to General van Rensburg's office. He does not know what happened to Second Applicant but assumed that he arrived by a motor vehicle since he had flown from Port Elizabeth to Johannesburg and must have left the same way.

His feeling was that if it was only to conceal the fraud, the Port Elizabeth members should themselves kill the deceased as this was not foreign to Second Applicant and his colleagues. All of them had in the past killed without hesitation. The situation here was different. He was prepared to help but not kill for something so minor. The fraud(s) could have been covered up or alternatively they would have been removed from the machinery of the law or in some illegal way, as had often been previously done.

At his office, Van Rensburg, in response to De Kock's query about the reason for the intended killing of the deceased, explained that the members would even disclose the Goniwe killings and other details of the activities of the Security Branch, their safe houses, details of the *modus operandi* and so forth. This was sensitive since it touched on the security of the country. The Cradock Four incident concerned General Van Rensburg and De Kock because they were also involved in it. This

convinced De Kock that they should then be killed since it would reveal the political agenda of the government and the lengths that the security forces would go in order to protect themselves and the Nationalist Party.

According to De Kock, when they were briefed by Second Applicant the discussion did not concern the Cradock Four or the PEPCO three (3) murders or any other murders which were perpetrated by the Security Police members in Port Elizabeth. The discussion only centred around the fraud. The revelation would have put pressure on the state structures. The image of the state would have suffered irreparable harm and it would have involved senior personnel as well as the generals who had always denied their involvement in such atrocities. What had to be borne in mind was that these incidents were secretive and committed to protect the State from these “insurgents”.

De Kock despatched his personnel under the command of the Fourth Applicant. The Third Applicant and others were deployed only in case it became necessary to implement an alternative plan. On his return to Pretoria, the Fourth Applicant reported to him that the operation was successful.

Under cross-examination he stated that it seemed that the decision to kill the deceased had already been taken prior to the discussion

between Van Rensburg, Second Applicant and himself. Second Applicant was sent to Pretoria to elicit expert assistance on how the plan to blow up the deceased should be implemented. De Kock was adamant that this was however not discussed but he conceded that it might have been. He was emphatic though, that when Van Rensburg arranged the meeting, his impression was that Second Applicant was to apprise them of the situation and how to prevent the deceased from making any of these disclosures.

He was resolute that Second Applicant spoke of two members and one Askari. The meeting was called for Second Applicant to inform him of the situation in Port Elizabeth. He was only told of fraud. He used strong language that Second Applicant lied to him about the reason. He believed that he should kill and fraud was not a good enough motivation for such drastic action nor was anything said about the deceased wanting to defect to the ANC. He said the Third and Fourth Applicants were involved because he instructed them to carry out the elimination. Had it not been his instructions, they would not have participated.

Lionel Snyman testified on behalf of the Second Applicant and stated that he had joined the police force in 1971. He subsequently joined the Section C-1 under De Kock. At the time of the incident, he was a Warrant Officer.

During December 1989 Vermeulen, Fourth Applicant and himself were called by De Kock and instructed to accompany Second Applicant to Port Elizabeth. He testified that it was explained that there was a problem because some members within the Security Branch in Port Elizabeth and an Askari wanted to defect to the ANC. They had received information about that from the Security Branch in Port Elizabeth. He was however, not sure who disclosed this information. He was also informed that members from Vlakplaas would have to arrange for the killing of those troublesome persons.

He said that at some stage he also heard about fraud but was not sure from whom. He was furthermore, not sure how many people were to be killed.

After the operation he returned to Pretoria.

Under cross-examination it became quite apparent that Snyman had no independent recollection of whatever happened in regard to this incident either before, during or after it occurred. He said that he only heard of the Cradock Four incident after this operation had been completed. He admitted that his evidence consisted of what he had heard, reconstruction and guesswork. His evidence could not be relied upon to assist the committee in any way.

Third Applicant testified that he prepared his application without any legal assistance.

At the time of the incident he was the Officer Commanding of the Technical Division of the Mechanical Section of the South African Police. He rendered service to the Security Branch and also to the Vlakplaas component.

He further testified that on the morning of 13 December 1989 he was visited by Colonel De Kock and the Second Applicant. They informed him that there were problems in which members of the Port Elizabeth Security Branch were involved. De Kock did most of the talking although he could not remember "who said what".

At a later stage he was told that these people were also involved in fraud. It was also mentioned to him that these people were about to defect to the ANC with all the information regarding networks of the Security Branch which they had at their disposal.

He said that he was informed that the operation to kill these people had been decided upon at Head Office, more particularly by Brigadier Van Rensburg, that it was urgent and that it was necessary for the Technical Division to assist with the execution of the decision. He was not in a position to check the information conveyed to him and he

accepted the version and orders as conveyed to him by De Kock in a *bona fide* manner as correct and properly authorised.

He was further informed that it was decided at Head Office that explosives should be used. He was not involved in the identification of the victims, the planning of the operation or in the decision-making. He was told that the operation was to be conducted in such a way that it should appear that the ANC or a similar organisation was responsible for it.

He immediately proceeded to task Kobus Kock, a member of his staff, to pack all the tools, explosives and radio apparatus needed for the operation.

De Kock had made a vehicle available to him and Kock, who was to accompany him to Port Elizabeth. Since the Technical Division only had marked vehicles, none of them could be used for such a covert operation. He was given a key to an unmarked motor vehicle and an envelope which contained money to cover their expenses. They left for Port Elizabeth that evening.

He testified that they arrived in Port Elizabeth early the next morning, where they were met by Second Applicant and taken to a house

where they found Vermeulen and Snyman. He could not remember whether the Fourth Applicant was present or not.

The Commanding Officer of the Security Branch in Port Elizabeth, Brigadier Gilbert, arrived later and outlined the situation to them. Gilbert told them that the persons were in the process of defecting to the ANC with sensitive information regarding the information networks and other secret operations that were conducted by the Security Branch in the Eastern Cape. He could not remember whether Niewoudt (Second Applicant) was present at the safe house at the time.

He stated that Second Applicant thereafter met up with them in a white Volkswagen Jetta motor vehicle. It was then taken to an uninhabited area where it was equipped with explosives. The explosives were placed under each of the seats of the motor vehicle in such a way that it could be detonated by a remote control, the operation of which was demonstrated to Second Applicant.

After the vehicle had been so prepared, he returned to Pretoria. He had not gained any benefit from the operation and did not harbour any personal feelings of malice or resentment towards any of the victims. He did not know any of the deceased, how many victims

there were to be killed and did not have any problem with any of them.

Fourth Applicant testified that he was a former member of the operational group “Koevoet” and later became a member of the Vlakplaas group. Acts committed by him were acts as a member of the South African Police in the execution of his duties. He was intent on protecting the government of the day. He testified that he supported the system of apartheid, but that he did not have any problem with black people as such. For him the real issue was terrorism against the country.

He met De Kock at Head Office on 13 December 1989 and accompanied him to the office of Brigadier Van Rensburg. De Kock told Van Rensburg that he would be sending him (Ras), Snyman and Vermeulen to Port Elizabeth whereupon Van Rensburg wished him good luck. He then left and De Kock remained behind.

Later on that day he again met up with De Kock at Vlakplaas, where he was given the order to assist the Second Applicant in the operation. He was told that he would fall under the Second Applicant’s command during the trip to and during his stay in Port Elizabeth. He could not remember the details of the discussion with the Second Applicant whilst travelling to Port Elizabeth, but he did remember a

conversation with the Second Applicant about the persons who wanted to defect to the ANC and the dangers thereof.

He did not see the Third Applicant at the safe house the next morning and remembered that he had been out to the shop. On his return, the Third Applicant was not there. They all later departed to the area where the motor vehicle was equipped with explosives and whereafter the Third Applicant and Kock returned to Pretoria. He and his colleagues from Vlakplaas assisted in the installation of the explosives and devices in the said motor vehicle.

They were then taken to the proposed scene of the explosion during the afternoon in order to familiarise themselves with the terrain so that they could keep safe at the time of the explosion. The rest of the afternoon was spent at the beach and at a braai at the home of Security Branch policeman, Carl Edwards. He testified that during this period, Edwards mentioned to him that two of the members were involved in fraud, in that they appropriated money intended for banned organisations for their own benefit. It was explained to him that on the instructions of former State President P W Botha, the said money was meant to be intercepted by the Security Branch. Such intercepted money had to be paid into a secret fund, but there were instances when it was retained by members and not paid into the secret fund.

Later that evening, he and his colleagues, including the Second Applicant, gathered at the scene of the planned explosion and attended to the activation of the ignition device. He and Snyman then hid in the bushes but were unable to observe who arrived or how many persons arrived. He was in any event not in a position to have aborted (even if he wanted to) the operation at that late stage since the Second Applicant was in charge of the operation.

He explained that the primary reason for travelling to Port Elizabeth was that if the main operation did not succeed, he and the other members from Vlakplaas could assist in an alternative operation to kill the deceased.

He testified that the deceased arrived in what is referred to as a 'combi' motor vehicle and, as previously arranged by the Second Applicant, switched vehicles. They drove off in the Jetta motor vehicle. Shortly thereafter, the Second Applicant detonated the explosives in the motor vehicle and as a result, the vehicle exploded and all of the deceased were killed. They then went to the scene where he took the remote control from the Second Applicant, then left for Pretoria with the other Vlakplaas members. He later returned the device to De Kock at Vlakplaas.

In regard to what De Kock told him, he testified that he was told that the intended victims were about to defect to the ANC and that they wanted to disclose Security Branch involvement in the Cradock Four killings.

During the Second Applicant's evidence in chief, an application for postponement was made and granted. It seemed that his representative thought it wise for him to attend a psychiatrist. The postponement was for a substantial period.

On resumption, it turned out that the Second Applicant was indeed seen by Dr Crafford, a qualified psychiatrist who was called to testify before the Second Applicant resumed his evidence. Dr Crafford's qualifications were not challenged and consequently, this need not be dealt with.

Dr Crafford's evidence relates to two distinct aspects of the Second Applicant's case. The first involves the question of the Second Applicant's mental health and secondly, the impact thereof on the testimony he gave during the period prior to seeing Dr Crafford in April 2004, when the hearing was postponed.

It is important to bear in mind that, according to his evidence, Dr Crafford's initial contact with the Second Applicant was in 1995 when

the latter was referred to him by the Old Mutual Insurance Company for an opinion regarding disability. Dr Crafford had then diagnosed that the Second Applicant suffered from post-traumatic stress disorder. There is no reason to doubt that diagnosis as was suggested by counsel for the families, who initially clearly stated that he did not challenge the diagnosis.

However, the more important aspect of Dr Crafford's evidence relates to his opinion of the effect the Second Applicant's state of mind had on that part of his evidence tendered prior to the postponement. He stated *inter alia*, that in cases of post-traumatic stress disorder, *"... there is often a problem with concentration and this had become very bad with Mr Niewoudt when he last went to see me in April. People with post-traumatic stress disorder ... lose track of conversations of what they are saying ... or they might lose track of what is being said to them in a conversation – this was the case with Niewoudt in April 2004. He is certainly a lot better now."*

The import of his evidence is that he saw the Second Applicant in April 2004, after the application for postponement was granted and his opinion was based on the assumption that the Second Application was again suffering from post-traumatic stress disorder. He stated that the Second Applicant has since improved sufficiently and was capable of resuming his testimony free from any negative effect of his condition.

Under cross-examination, however, it turned out that Dr Crafford had not tested the Second Applicant's information by applying any of the customary psychiatric tests which investigates the possibility of feigning symptoms and so forth. He explained that he could confirm his diagnosis as genuine by just looking at the Second Applicant. He could not say how he could make this diagnosis about the mental condition of the Second Applicant during April 2004 in this manner.

In challenging the objectivity of Dr Crafford's report, Mr Naidoo put it to Dr Crafford that he was biased in favour of the Second Applicant and queried his conclusion "... *that prior to the said postponement, the Second Applicant was having difficulty in following what was going on in court, he was having difficulty in getting his thoughts together and answering questions clearly*." Dr Crafford conceded that apart from speaking to his counsel he relied on the Second Applicant for that deduction.

In the light of the above, Dr Crafford's evidence in regard to the impact the Second Applicant's state of mind had on his initial evidence, must be approached with a great deal of circumspection. The lack of any scientific support for his conclusion makes it extremely difficult to accept the evidence of Dr Crafford as reliable, especially in relation to the effect of the Second Applicant's state of mind on his

initial evidence. Clearly, Dr Crafford had not properly established the Second Applicant's mental condition at the material time.

In the circumstances, Dr Crafford's evidence with regard to his conclusion of the Second Applicant's mental condition is tainted, especially, by the lack of objectivity. Dr Crafford's testimony with regard to any negative effect the Second Applicant's mental state might have had on his evidence in this hearing prior to the postponement, can therefore not be relied upon.

George Andre Johannes Steenkamp was called to testify on behalf of the families. He was at the material time a Superintendent in the South African Police Services.

Steenkamp's evidence revolved around a docket that he handed to Colonel Eric Strydom, a former Head of the Murder and Robbery Unit of the Police in Port Elizabeth. He stated that Colonel Strydom had said to him that the Security Branch should sort out their problems. Steenkamp did not elaborate on this.

Steenkamp further testified about an alleged invitation by the Second Applicant to have tea at his office. He stated that the Second Applicant had a criminal docket with him.

Counsel for the Second Applicant then objected to this evidence on the ground that it had not been put to the Second Applicant when he testified.

Counsel for the families conceded that this was an oversight on his part and he subsequently requested that Steenkamp's evidence be disregarded. In the circumstances, it will be disregarded.

It might be well to point out that the process as established by the Act is *sui generis*. As it developed during its relatively short life span, the Act and in particular decisions as to amnesty applications were not subject to the system of precedent. Indeed it could not have been so because, by the very nature of the commission, there was no time to develop precedents. In any event, panels were dealing with Applications at the same time and hence they could not have been subject to any precedent in doing so. There is no reason to deal with these applications differently.

All that is required in terms section 20 (1), is that the [sitting] Committee be satisfied (own emphasis) that the requirements as set out therein have been complied with.

It would be convenient to deal with the applications of the Third and Fourth Applicants first and then with that of the Second Applicant.

Section 20 of the Act is of application and the relevant portions of subsections (1) and (2) provide that:

"(1) If the Committee, after considering an application for amnesty, is satisfied that –

(a) the application complies with the requirements of the Act;

(b) the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and

(c) the applicant has made a full disclosure of all relevant facts,

it shall grant amnesty in respect of that act, omission or offence."

In assessing whether section 20 (1) and in particular subsection (1) (c) has been complied with, it must be noted that human frailties such as forgetfulness can have an impact on the evidence. With the passage of time it is possible to forget details pertaining to certain fundamental aspects. Applicants should not be penalised for forgetting certain details as long as the relevant fundamental aspect(s) are covered in the evidence.

If the relevant fundamental aspects are indeed covered by the evidence, then, I would think that section 20 (1) (c) would have been substantially, and therefore satisfactorily complied with. If these aspects are not properly and acceptably testified to, then section 20

(1) (c) cannot be said to have been complied with, substantially or otherwise.

Section 20 (2) provides that :-

> "(2) In this Act, unless the context otherwise indicates, 'act associated with a political objective' means any act or omission which constitutes an offence or delict which, according to the criteria in subsection (3), is associated with a political objective, and which was advised, planned, directed, commanded, ordered or committed within or outside the Republic during the period 1 March 1960 to the cut-off date by –
>
> (a) any member ... ;
>
> (b) any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly known political organisation or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organisation or movement, and which was committed *bona fide* with the objective of countering or otherwise resisting the said struggle;
>
> (c) any employee ...;
>
> (d) any employee ...;
>
> (e) any person ...;
>
> (f) any person ...;
>
> (g) any person ..."

The Second, Third and Fourth Applicants clearly fall within the category of persons referred to in section 20 (2) (b).

The Third and Fourth Applicants became involved in the killing of the deceased when they were instructed to provide logistical assistance to the Second Applicant by their commander, Colonel De Kock. In the light of such directives emanating from a senior officer, both assumed that proper approval had been secured for the intended operation and hence their participation as members of the Vlakplaas Unit. In the case of the Fourth Applicant, such *bona fide* belief was fortified by a visit to Brigadier Van Rensburg, who had wished him luck on his trip to participate in the operation.

They were both employees of the State and members of the South African Police Services, attached to a unit attending to the security of the country. They both had express authority to act within the course and scope of their duties as such against, as they believed, supporters and intended members of liberation movements engaged in a political struggle against the State and who were about to divulge sensitive information to the self same movement.

Each had the *bona fide* belief that they were acting in the interests of the State and were countering and resisting an attack(s) on the government of the day. The explanation and motivation provided to both were broad and scant. Even on their way to Port Elizabeth, they were merely advised about the broad reasons for the operation. Both accepted what they were told and relied thereon. Neither of them

were furnished with any details which led to the conclusion that the deceased were such threats to the State that they had to be killed.

Viewed in the context that they were given instructions by Colonel De Kock (supplemented by Van Rensburg's good wishes), it is not too difficult to understand that they accepted that their superiors would have sanctioned the operation after having satisfied themselves (superiors) about the appropriateness thereof.

It is understandable therefore, that they did not bother themselves with the underlying details by which the decision to kill the deceased was arrived at.

Their conduct clearly demonstrates that they acted in terms of instructions and did not go further than that. Both did not know any of the deceased and clearly did not participate in the operation for personal gain. There is also no suggestion that either of them acted out of personal malice, ill-will or spite directed at any of the deceased. Given their positions and what they were told and understood, they believed that this operation was urgent and the only solution.

In the circumstances, it is clear that their applications comply with the requirements of the Act, that their specific roles were associated with a political objective and committed within the course of the conflicts

as envisaged in section 20 (1) (b), read with section 20 (3) of the Act. We are satisfied that both have also made a full disclosure of all the relevant facts in so far as they were affected in this regard. Consequently, their applications for amnesty as applied for herein, must be granted.

It is now necessary to deal with the application of the Second Applicant.

The Second Applicant was involved from the beginning of the series of events which culminated in the deaths of the deceased.

It seems that Van Rensburg, as ultimately conceded by the Second Applicant, had the power to veto any planned operation sanctioned by Brigadier Gilbert and/or the Second Applicant. This then acquired much importance in the leading of evidence and so much so that the dispute between De Kock and the Second Applicant as to what the latter told Van Rensburg was focused on for a substantial time during the hearing and in argument.

This is understandable because of the nature of the dispute with regard to this aspect. If the Second Applicant had told Van Rensburg, as testified to by De Kock, that the deceased were to be killed to prevent them from disclosing the common law crimes of fraud, then the deaths

could not be considered to be politically motivated, as required by the Act and amnesty could not then be granted. The application would fail at that point and on that ground alone.

If he did tell Van Rensburg, as he testified, that the planned killings were motivated by the necessity to protect the image of the government, the security network of agents, members of the force and their addresses then the operation would clearly fall within the definition of 'political motivation' and then further enquiry into the application would follow.

Colonel De Kock testified broadly on the secret operation of his unit.

He testified about the conversation between Van Rensburg and the Second Applicant in his presence. It is in this respect that there is a dispute between his evidence and that of the Second Applicant.

However, towards the end of his testimony, De Kock stated that the Second Applicant had lied about the motives for killing the deceased. It is not absolutely clear in what context he alleged that the Second Applicant had lied. It is possible that he referred to the evidence of the Second Applicant in this hearing or he could have been referring to the conversation between the Second Applicant and Van Rensburg.

In this event, such a 'lie' would give rise to a number of interpretations on the import of his evidence.

It is too dangerous to speculate or even second guess De Kock's evidence in this regard. There are a number of other criticisms levelled at Colonel De Kock's evidence and in particular, reference was made to his emotional state and attitude towards his erstwhile superiors and his feeling that he had been betrayed by them. His evidence should therefore be approached with even greater care before accepting it and relying on it.

The argument that he might have a score to settle with certain people who were then his superiors and that, his evidence might therefore be tainted, does not hold water. There is no evidence to support this line of reasoning and is at best, speculative.

It is, however, not necessary to deal with all the other criticisms levelled against him because of the ultimate approach adopted towards his evidence.

In view of the uncertainty of the context in which he stated that the Second Applicant had lied, it would, without making any finding on his credibility, be safer to ignore the evidence of Colonel De Kock in determining the application of the Second Applicant. This approach

would in any event satisfy the argument that his evidence was untrue and unreliable.

Having adopted that approach, the application will then have to be decided on the evidence of the Second Applicant and the other acceptable evidence in so far as it is relevant to his application.

The Second Applicant was the sole source of the relevant information and having provided the information to the authority upon which he relies in his application, it is imperative to examine his evidence as to the reasons for the ultimate decision to kill the deceased in order to establish whether section 20 of the Act has been satisfactorily complied with. Furthermore, other evidence, especially that of the other applicants cannot serve to support the Second Applicant's version since he was the source of the information they were given in this regard. Hence, on the fundamental information, he stands alone.

Section 20 (1) (a) seems to have been complied with, if it is to be interpreted as 'formalities' that had to be complied with. The subsection could not have been intended to refer to requirements of the Act, as there are so many requirements to be found in the Act, many of which would not be of any application in this type of application. e.g. procedures related to certain types of applications by victims of apartheid.

It is subsections 20 (1) (b) and (c) which are of particular relevance in the application of the Second Applicant.

It is necessary to deal with the evidence of the Second Applicant. It must be pointed out that aspects such as demeanour do not play any role in assessing his evidence because of the possibility of his unsound mental state during the first part of his evidence in chief. It must be noted that there is no intention to create any precedent in this approach to his evidence.

Nonetheless, although he carries no onus to provide evidence himself, (such evidence can be received from another source), it so happens that the only person who had first hand information about the events and factors relied upon to arrive at the decision to kill the deceased, is the Second Applicant himself. It is against this backdrop that the success or otherwise of the application must be based.

In examining the evidence of the Second Applicant, there are a number of fundamental and material aspects which must be dealt with.

It must be pointed out that, at this stage, the scrutiny of his evidence is not directed at the wisdom and/or the merits of the decision to kill the

deceased, but at whether section 20 (1) (c) of the Act has been complied with or not.

The Second Applicant relied mostly on the authority of his superiors as the basis to explain the murders. In this regard he referred to his superiors *viz* Gilbert and Van Rensburg. While he relied on this authority, combined or otherwise, it is clear that he was the only source of the information which was relied upon to make this decision and to execute it. The others, particularly the Third and Fourth Applicants, relied on what they were told.

His evidence on the very authority he relies on is unsatisfactory. At first he maintained that it was the authority of Gilbert which was irreversible and upon which he relied. Yet, later in his evidence, he conceded that if Van Rensburg was not satisfied with the reasons for the planned murders, he was able to give instructions that the plans, though authorized by Gilbert, be aborted. The Second Applicant would then have gone back to Gilbert to deal with the issue further. However, he stated that Van Rensburg in fact approved of the proposed killings.

As his evidence proceeded, it became apparent that he began to rely more and more on the hierarchy and rank of his superiors in making the decision to kill the deceased. For example, initially he stated that he fed the information to Gilbert and that they discussed the situation with

one another. It is clear that the Second Applicant did not play an insignificant role in the decision making process and indeed rejected certain less drastic suggestions made by Gilbert. At some stage in his evidence he said that they took the decision together. Yet, later in his evidence he placed such responsibility squarely on the shoulders of Gilbert. While technically this is correct, he clearly tried to minimise his role in the decision towards the latter part of his evidence.

This raises doubt as to what he disclosed to Gilbert and to Van Rensburg for that matter, in order for them to grant authority for the murders.

This in turn raises questions as to what his actual role in the developments really was.

During his evidence it seems that divulging information of Security Police complicity in the Cradock Four incident played a role in the decision making process. As far as the Second Applicant is concerned, and on his own evidence, this did not play a role, as the decision to kill the deceased had already been made by the time mention of the Cradock Four was made.

He furthermore explained that he used the opportunity of the alleged presence of a trained ANC member to lure the deceased into the

motor vehicle which was subsequently blown up. Yet, especially in the light of his position as Head of Intelligence, he did not follow up on what had happened to this ANC member after the incident. He testified that he mentioned it to another section for steps to be taken in that regard. However, he did not find out what transpired in that regard thereafter, and if this person was found and arrested, whether anything important was disclosed during any interrogation. This raises serious doubt as to whether this person, and indeed the circumstances of his presence, ever existed. The Second Applicant's inability to explain why he did not follow this issue to its logical conclusion exacerbates the situation.

When he went to collect his travel documents prior to going to Pretoria, Gilbert told him about the threat by some of the deceased to divulge information regarding offences committed by members of the Port Elizabeth Security Police if charges regarding fraud were not withdrawn or in some way made to disappear. It is strange that Gilbert seemed to mention this almost by chance when the Second Applicant collected his air-ticket. It is to be expected that the threat of such disclosures, which would have had a similar effect of passing on information to the ANC, would specifically and pointedly have been reported to the Second Applicant who was personally dealing with the situation and indeed the future of this group of would-be turn-coats. Such

information would be cardinal to the material considerations at the time.

In the circumstances, the almost casual allusion to the fraud, as referred to by the Second Applicant, is illogical and far fetched. Moreover, the Second Applicant's virtual disinterest in it is similarly unbelievable and indeed improbable.

It is also significant that he did not provide details of the information he obtained through the scheme of intercepting mail allegedly belonging to Warrant Officer Mgoduka.

He alleged that such information gleaned from the intercepted mail played an important role in assessing the situation and in arriving at the conclusion that at least Warrant Officer Mgoduka was in the process or about to cross over to the ANC. Such details would in all probability have been unusual and not experienced on an everyday basis. This operation of eavesdropping on and intercepting mail of colleagues was indeed, by all accounts very unusual in itself. The details of who did the interception, when it was done and why no action was taken to counter the plans contained in the correspondence, cannot be easily forgotten and the failure to testify in regard thereto is significant. Indeed, the alleged information provided sufficient grounds to arrest

Warrant Officer Mgoduka and possibly charge him in terms of the security laws. The failure to do so remains unexplained.

The information the Second Applicant alleges that he had, was markedly different to that which he said pertained to Warrant Officer Mgoduka and that which he stated pertained to the rest. The information that he testified to in relation to the rest was meagre to say the least. This raises the question as to whether he really had any or sufficient information to base a decision on or, more importantly, whether the situation he attributed to them indeed existed at all.

He testified that he thought that one or some if not all of the deceased were leaking information to the ANC. He explained that he discovered that the agent he sent out of the country after being briefed in the presence of all four of the deceased, had been arrested by the ANC. He concluded that it had to be one or more of the deceased who had betrayed the agent to the ANC. At the time he had no other information against any of the deceased. When he went to Gilbert, he intended to obtain formal authority from his superior to kill all the deceased. His intention to kill them was clearly based on suspicion and indeed could not, in the circumstances, have been directed at a specific person or persons. It is difficult to believe that such drastic conduct would be resorted to on such flimsy grounds. This begs the question as to what information, if anything at all, remotely suggested

that any of them had, at the time, links with the ANC, let alone that any of them had intentions to divulge sensitive information and in doing so, cross to the ANC, so as to justify killing them.

As it turns out, probably in an attempt to justify the ultimate decision to murder, he testified that the courier of the letter elicited from an ANC member had been betrayed and as a result, had been killed.

When it was pointed out to him that this could not be so, he stated that the person who had been killed was one Toto Mbali. From the context of his initial evidence, it is clear that the courier was not Toto Mbali. The Second Applicant did not explain this contradiction. It is furthermore noteworthy that the name of Toto Mbali did not feature prior to that, either in his testimony or his written submission. In any event he gave no detail as to the role Toto Mbali or his alleged killing played in the killing of the four deceased germane to this application.

In regard to the evidence of the Second Applicant, the aforementioned are, *inter alia*, material issues which give rise to concern. Each on its own present sufficient disquiet so as to cast doubt on the veracity of his evidence. Most of the issues defy logic, while others are either improbable or are self-contradictory. What is more, their importance is fortified by the fact that each is alleged to have played a significant role in arriving at the conclusion that all the

deceased were in contact with the ANC and consequently, because they were each a risk, had to be murdered.

The globular effect of these criticisms enhance the reservations in respect of his evidence, in particular, those relating to the reasons for these murders. On the conspectus of the relevant evidence, it is still not clear what was taken into consideration in deciding to murder the deceased either as a suggested solution or in terms of granting authority to commit these murders.

In the circumstances it is extremely doubtful as to whether the Second Applicant has fully disclosed all the relevant facts pertaining to why and how the decision to kill all the deceased was arrived at. From the evidence, it cannot be said that the Act has been sufficiently complied with in this regard.

In the circumstances therefore, the Second Applicant has not, even substantially, complied with section 20 (1) (c). We are not satisfied that the Second Applicant has substantially made full disclosure in regard to this application.

Furthermore, even if the version of the Second Applicant were to have been regarded as a full disclosure, which we do not find, there is also another aspect in this application that needs to be dealt with. In

considering section 20 (1) (b), the committee must have regard to section 20 (3) of the Act.

Section 20 (3) reads as follows:-

"Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) the motive of the person who committed the act, omission or offence;

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objectively pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted –

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed."

Section 20 (3) of the Act directs that in establishing whether section 20 (1) (b) has been complied with, reference to the criteria listed therein must be had. While it has been argued that this list of criteria is an exhaustive one, the approach of the amnesty committee in the form of the panels which presided in similar hearings always regarded the list as not exhaustive. There does not seem to be any reason to adopt any other approach in this hearing.

In any event, the facts of this application do not seem to require consideration of criteria which fall outside the list. Indeed none were suggested. Of importance in this list, are *inter alia*, subsections (c) and (f).

The gravity of the acts in question is most important because the deceased were killed. Not much importance can be placed on the manner in which they were killed as this was intended to be made to

look like the work of the ANC. However, in the context of the situation as described by the Second Applicant, the gravity of his actions is not insignificant.

According to the Second Applicant, the political objective sought to be achieved by his actions, was to protect his network of operation within the area of his duties as Head of the Intelligence Section of the Security Police in Port Elizabeth. He suspected all of the deceased of having contact, in varying degrees, with the ANC over the previous approximately five to six months.

At the time, there were various pieces of legislation available to the Security Forces of the country to use in order to curtail or deal with persons considered a threat to the safety of the citizens of the country, the government of the time and the erstwhile ruling party.

Specifically, the Internal Security Act No. 74 of 1982 was in operation at the material time. That Act contained clear provisions for the arrest and/or detention of persons suspected of being a threat to the Internal Security of South Africa.

Indeed, history records that many people were arrested and detained for long periods of time in terms of that Act and without a hearing and/or trial. The provisions also included detention designed to obtain

information to the satisfaction of the interrogator. This was regularly used by the Security Forces of the time.

Then there was also the common law crime of treason available and with which people were charged from time to time.

In applying these criteria to the version of the Second Applicant, the conduct of the applicant must be measured in terms of the directness and proximity of his conduct in relation to what was sought to be achieved thereby and indeed the proportionality of the conduct in relation to what was being sought to be achieved, so as to place his conduct into proper perspective and context in order to determine whether the act, omission or offence in question falls within the provisions of the Act.

Second Applicant stated that in discussing the options with his superior, Gilbert, all the alternatives, including less drastic actions, were considered. These were discussed between them and killing the deceased was regarded as the only option in the circumstances. Save for stating that other lesser options were not appropriate, he did not venture any explanation as to why those options were regarded as inappropriate. The argument that he might have been wrong in making the ultimate choice raises the question of whether, in

considering notions such as proportionality, the conduct in question must be measured objectively or subjectively.

In applying the directives of the Act, it is clear from section 20 (3) that the conduct under scrutiny must have been proportionate to the purpose of the objective of the conduct. This must be measured objectively. In testing the severity and deleterious effects of the conduct, the standards set by society in general in determining the justification must be used as the social barometer to do so. It is this social yardstick that places the exercise within the boundaries of objectivity.

Placed within an objective context, the killing of the deceased must be measured against the interests sought to be protected, which must of necessity fall within the political objective pursued. In examining the proportionality between the consequences of the Second Applicant's conduct and the political objective sought to be achieved, it is clear that the conduct cannot be justified if the purpose it was intended to serve was either non-existent or objectively of insufficient importance or if it would clearly not achieve its intended purpose.

The more severe the deleterious consequences of the conduct, the more important the achievement of the objective must be if the

conduct is to be objectively regarded as reasonable and justified in the circumstances.

See : *R v Oakes* [1986] 1 SLR 103 – CANADA

There must also be proportionality between the conduct and the intended beneficial consequences of that conduct.

The conduct must be proportionate to the ultimate benefit sought.

See : *Dagnenais v Canadian Broadcasting Corporation* [1994] 3 SLR 835 - CANADA

While these decisions serve to assist in gaining insight into the objective approach required to deal with this aspect of proportionality, the enquiry must be put into the South African context.

The benefit sought by the Second Applicant in this case was the protection of the identities and addresses of his colleagues and security police agents and hence the government of the day and its image.

The victim in the Johnson application, Mrs Hanabe, was a school principal and a member of the Klipplaat Municipal Council. During

1991, the local ANC Youth League, of which Johnson, the applicant in that matter, was an executive member, decided to pressurise the councillors to resign from council in order to render that tier of government ineffective. The strategy seemed to be very important to the youth league and its members took it very seriously. Mrs Hanabe refused to do so and after her house was set on fire, she fled to Uitenhage.

In February 1991, the Executive Committee of the local ANC Youth League discussed the matter and decided that Mrs Hanabe should be killed. Later that month, Johnson and some of his fellow members followed Mrs Hanabe to church and waited for her. When she came out, Johnson shot at her in an attempt to kill her in pursuance of the decision. She did not die but sustained serious injuries as a result of which she was rendered disabled. Accepting that the campaign to end the system of apartheid entailed, *inter alia*, strategies such as non-collaboration with such a system, the amnesty committee accepted that the strategy fell within and complied with the provisions of the Act in so far as it was based on political considerations and pursued with a political objective.

However, it reasoned that in considering section 20 (1) it had to refer to section 20 (3) of the Act. It reasoned further that the aim to render to municipality ineffective had in any event been achieved when Mr

Hanabe fled Klipplaat. The political objective had therefore been achieved in that regard. It followed therefore, that the subsequent attempt to kill her was not proportional to achieving what it sought to achieve because despite her not resigning, she had been rendered ineffectual in that regard. The attempt to kill Mrs Hanabe was consequently found not to be proportional *vis-à-vis* the objective so pursued, and as a result the offence for which amnesty was applied for was not an act associated with a political objective. The application was thus refused.

The reasoning in the decision of Ntsikelelo Don Johnson, clearly illustrates the approach adopted in the Second Applicant's present application. Reference to this decision is made for illustrative purposes only, and nothing else.

It has been argued in regard to proportionality, that other policemen were granted amnesty for similar crimes and therefore the Second Applicant should benefit in the same way. Without wanting to embark on a debate on this aspect and bearing in mind that the process is not based on precedent, it is necessary to point out that this application is unique.

The murders of members of liberation movement by members of the State Security Staff was based on the necessity to avoid international

focus and political embarrassment which would arise during such political trials of members of liberation movement. It therefore became a norm for the Security Forces to resort to covert means to deal with certain members of liberation movements in such a manner in order to avoid unwanted focus.

Charging members of the Security Forces would attract far less international (and indeed local sympathy) and attention that would be the case when charging members of liberation movements. Within this context, the murdering of members of the Security Force would therefore be far less objectionable than would be the case in the killing of members of liberation movement. (It must however be emphasised that in neither event are the murders condoned). It would consequently attract far less attention.

Furthermore, in order to be accepted into the ranks of the ANC, it is common knowledge that the deceased would have had to prove their *bona fides* and prove their loyalty to the organisation. It is also improbable that after five months of communication with the ANC, the deceased would not have divulged the key information which the Second Applicant sought to protect. In the circumstances it is probable that the information had already been communicated to the ANC. There was therefore nothing to protect and the deaths of the

deceased would not, in the circumstances, have served any political objective as envisaged by the Act.

The Second Applicant's application must therefore fail on this ground also.

The failure of a family member of any of the deceased to testify and deny that any of the deceased were connected to the ANC, was raised as a matter which should enhance the application of the Second Applicant. It does not follow that the failure of any of the deceased's family members to testify would have assisted the committee any way. None of them were privy to the planning or commission of the murders. Neither does it follow that such failure would attract any inference which dilutes their opposition to the application. The fact of the matter is that this process is conducted under the umbrella of a commission, the decision (of which) must be based on the evidence placed before it. Consequently the absence of evidence on behalf of the families of the deceased does not enhance the application of the Second Applicant.

We have therefore not been satisfied that the Second Applicant has complied with Section 20 (1) of the Act.

In the circumstances, the Second Applicant's application falls to be dismissed.

In the result,

1. Second Applicant's application for amnesty is refused;
2. Third Applicant's application for amnesty is granted;
3. Fourth Applicant's application for amnesty is granted;
4. In the light of the next of kin of the deceased already having been declared victims for the purposes of the Act and were referred to the Committee on Reparation and Rehabilitation for consideration in terms of section 26 of the Act, it is not necessary to deal with their status in this regard again.

Dated at _____ on this _____ day of _____ 2005

_____
R PILLAY
JUDGE OF THE HIGH COURT

_____
N J MOTATA
JUDGE OF THE HIGH COURT

E.

II.

BEFORE THE SPECIAL AMNESTY COMMITTEE OF THE TRUTH

AND RECONCILIATION COMMISSION

(HELD AT PORT ELIZABETH)

In the applications of:

NICOLAAS JACOBUS JANSE VAN RENSBURG	FIRST APPLICANT
GIDEON JOHANNES NIEUWOUDT	SECOND APPLICANT
WYBRAND ANDREAS LODEWICUS DU TOIT	THIRD APPLICANT
MARTHINUS DAVID RAS	FOURTH APPLICANT

In re:

THE MOTHERWELL INCIDENT ON 14 December 1989

MINORITY DECISION

I have read the decision of Pillay and Motata JJ.

I do not agree with the decision in so far as it concerns the refusal of amnesty in the application of the Second Applicant, Gideon Johannes Nieuwoudt. My reasons for disagreeing are set out below.

The Second Applicant's application for amnesty was refused by Pillay and Motata JJ on the grounds: (a) that they "were not satisfied that the Second Applicant has substantially made full disclosure in regard to his application" and (b) that even if the version of the Second Applicant were to be regarded as a full disclosure "the deaths of the deceased would not in the circumstances, have served any political objective as envisaged by the Act."

The facts relating to the incident and the evidence presented at the hearing have been adequately summarised in the majority decision. I shall, however, in dealing with Second Applicant's application highlight some differences in my approach to and my understanding and assessment of his evidence.

Furthermore, I generally agree with the majority's assessment of the evidence tendered by the other applicants and by witnesses who testified at the hearing.

In so far as the Second Applicant's application is concerned, it is common cause that he has complied with all the formal requirements of the Act.

I also agree that the Second Applicant falls within the category of persons referred to in section 22(2)(b) of the Act. He was an employee of the state and a member of the South African Police Services attached to a unit attending to the security of the country. He had express authority to act within the course and scope of his duties as such, against, as he believed, supporters and intended members of a liberation movement engaged in a political struggle against the State and who were about to disclose sensitive information to that organisation. He had the *bona fide* belief that he was acting in the

interest of the state with the objective of countering or resisting the said struggle.

Although the Second Applicant knew all the deceased and most probably their families well, there was no evidence or even a suggestion that he acted out of personal malice, ill-will or spite directed at the deceased. Like the applicants, Du Toit and Ras, he acted upon the orders of a superior, in his case, Brigadier Gilbert, and to some extent Van Rensburg, the latter having given the order in regard to the logistical support to be rendered to Second Applicant to effect the killings.

Admittedly, the Second Applicant's position differs from that of the other two applicants in that he had set in motion a series of discussions and events when he first reported to Gilbert his suspicions in regard to the deceased. He also participated in discussions, even pressing for a decision that the suspects should be eliminated. However, he did not have any independent decision-making authority, nor did he have the authority to order the killing of the deceased. Indeed, he obeyed the instructions of his superior when he was told to first monitor the activities of the deceased and later to kill them. The fact that he was a more than willing participant in the execution of the order that the deceased be killed does not make him the author of the ultimate decision.

The Second Applicant did not deny that other factors, such as the threat of the disclosure of the Goniwe murders, had entered into the picture at the time that Gilbert ordered him to go to Pretoria. At this stage, the names of the perpetrators of the Goniwe incident were not within his knowledge. All he knew was that the threat of prosecution for fraud had caused the deceased or at least two of the deceased to threaten that they would disclose other misdeeds ("wandade") of the

Security Police to the ANC. The issue of the fraud, according to the Second Applicant, was not the reason for the decision to kill because the decision that they should be eliminated had already been taken. It was, as he put it "the catalyst" for the order issued by Gilbert. It is perhaps understandable that the Second Applicant was not particularly perturbed by the threat of disclosure of the Goniwe incident because a decision had already been taken to kill them and he had no personal interest in the Goniwe matter. Van Rensburg and De Kock would have been the persons to feel perturbed since they had participated in the murder of Goniwe and this probably account for their willingness to have readily lent logistical support in the killings.

Admittedly, the Second Applicant's evidence is not without any difficulties and there were certain inconsistencies as well as certain instances where his evidence differed from that of the other applicants. Thus, for example, Du Toit was under the impression that the number of persons to be killed was three while Ras testified that he did not know the exact number. Taking into account the time period that has lapsed between the date of the incident and the hearing, as well as the agitated mental state of the Second Applicant, which in my view was clearly evident during the hearing, it cannot be said that these differences and inconsistencies render the Second Applicant's evidence so flawed that it justifies a finding that he had not made a full disclosure of all relevant facts.

The only real challenge to the Second Applicant's evidence was the evidence of De Kock which was tendered to show that the deceased were killed as a result of their participation in acts of fraud. As stated in the majority decision, De Kock's evidence should be approached with great care and I fully agree "that it is safer to ignore the evidence of De Kock in determining the application of the Second Applicant". I

therefore accept Second Applicant's testimony that the fraud issue arose after the decision to kill had been taken.

There is one common thread that runs through the evidence placed before the Committee and that is that the prime reason for the killing of the deceased was the fact that they were about to defect to the ANC. Especially Ras, the Fourth Applicant, was emphatic in his evidence that he had been told by both De Kock and Second Applicant that the deceased were about to defect to the ANC. He added that Second Applicant, on their way to Port Elizabeth to carry out the order to kill the deceased, had also told him that they had already disclosed some information to the ANC. Having regard to the fact that the Fourth Applicant's application was prepared independently of that of the Second Applicant and that he was presented by a different lawyer, there is little reason to doubt the veracity of his evidence. His evidence in my opinion clearly militates against any conclusion that the Second Applicant's evidence on why the deceased were killed is not true or is a mere fabrication.

In regard to what De Kock told him the Third Applicant testified:

> "Mnr Kock (sic) het my meegedeel dat daar 'n probleem in die Oos Kaap was waar lede van die Mag betrokke was, wat onder andere betrokke was by koverte operasies en dat hulle, hierdie mense, by bedrog betrokke was en het hulle my dit eers later meegedeel Voorsitter die bedrog, maar dit is aan my genoem, maar hierdie mense het op die punt gestaan om oor te loop na die ANC met al die inligting waaroor hulle beskik het in terme van die inligting strukture van die Oos-Kaap."

Although later in cross-examination Du Toit conceded that he was not sure who had said what to him, it is not without significance that he too, believed that the deceased were about to defect to the ANC.

I shall now deal more fully with some of the more detailed reasons for the refusal of amnesty to the Second Applicant on the ground of not having made a full disclosure of relevant facts, dealt with in the decision of Pillay and Motata JJ.

In the majority decision it is stated that: "[as] the evidence proceeded, it became apparent that he [Second Applicant] began to rely more and more on the hierarchy and rank of his superiors in making the decision to kill the deceased."

In my reading and assessment of the Second Applicant's evidence he never tried to steer away from the fact that the decision to kill was taken on the information supplied by him. He never changed his evidence that he regarded the elimination of the deceased as the only solution or that he was more than a willing participant in all the activities that finally led to the killing of the deceased. What he emphasised throughout his evidence was that he operated within a very strict hierarchy of powers and that he did not have any independent decision-making powers in regard to the killing of the deceased, neither was he competent to give an order that they be killed.

The picture that emerged of the Second Applicant, on his own evidence, was that of a ruthless security policeman, but one who would only have acted within the structures, strictures and hierarchy of powers that prevailed at that time. Had he not disclosed the fact that the decision-making powers lay with his superiors and that they had

issued the final order, it could certainly have been construed as him not having made a full disclosure in order to protect his superiors. His uncertainty or even contradiction as to whether Van Rensburg could have reversed Gilbert's order cannot in my view be regarded as material. Only Gilbert and Van Rensburg, both dead now, could have clarified what transpired between them. It is of significance, however, that in his written application Van Rensburg application states that the order was given by Gilbert and approved by a member or members at Head Office.

The fact that the Second Applicant did not follow up on what became of the trained ANC member whose presence he had used to lure the deceased into the vehicle in which they were killed certainly presents a difficulty in regard to credibility and he was extensively questioned on this. His testimony that his instructions to the deceased in regard to the ANC cadre was just a ploy to get them into the vehicle and his explanation that the arrest of the ANC cadre was a matter to be dealt with by the investigation unit who had been fully appraised of his presence do not make his evidence in this regard so improbable as to reject it as false. He testified that the presence of the suspected cadre was generally known amongst the security police and that "die swart lede reeds aan diens geplaas was om patrollies uit te voer." Had his instructions to the four deceased been intended to be carried out by him, the inference sought to be drawn in the majority decision would have been a fair one.

I also find myself in disagreement with the statement in the majority decision that the Second Applicant did not provide details of the information he obtained through the scheme of intercepting mail. There was clear evidence by the Second Applicant of an encoded letter from the deceased Mgoduka addressed to one Mr Isaac

(identified by the Second Applicant as Roje Skenyana, a commanding officer of the ANC in Lesotho) mentioning a forthcoming "wedding". This letter was later decoded by him (Second Applicant). He also testified where letters came from and from whom.

There is no onus on the victims to give evidence at a hearing. However, in a matter such as this, one would have expected the families of the deceased to have assisted the Committee were they able to do so. Surely, if the families truly believed that the deceased had no contact with the ANC, they must have had some factual basis for this belief which could have assisted the Committee. Where the loyalties of the deceased lay, especially in the politically charged atmosphere at the time of the incident, must surely have been within the knowledge of their immediate family members who also had to suffer the consequences in their own communities as a result of their husbands' activities as members of the Security Branch.

The fact that no member/s of the families testified at the hearing, for example, precluded Counsel for the Second Applicant perhaps to have obtained some clarification on the question as to how it came about that it was stated by Counsel for the families at the inquest proceedings regarding their death, that the reason for the killing of the deceased was their contact with the ANC. The argument put forward by Counsel for the Families that it would have been embarrassing for the families to testify at the hearing as a result of the deceased's involvement with the security forces of the time is not convincing

The issue of proportionality was also raised.

In this respect too, I do not agree with my fellow committee members. Even if it were to be accepted that Second Applicant, Nieuwoudt, was

the co-author of the actual decision to kill the deceased, the issue of proportionality should not be allowed to stand in the way of granting him amnesty. I do not agree with the argument that as a result of the five months that had lapsed between the time that the deceased were first suspected of leaking information to the ANC and their killing, "the deceased would not have divulged the key information which the Second Applicant sought to protect". Admittedly some information may have slipped through the net, but, according to the Second Applicant, they were at all times under surveillance, their mail was being monitored and security measures been tightened.

Proportionality was always a difficult issue to deal with in amnesty applications and although the precedent system does not apply in amnesty applications, a committee should at least strive towards some degree of consistency in applying the various provisions of the Act. Amnesty was granted in a number of applications where persons who were only suspected of having been collaborators of the Apartheid Regime were necklaced in a most brutal way. In the case of the murder of Amy Biehl, who was a foreigner and an innocent outsider, and in the case of the St James Massacre, innocent churchgoers were killed. In all these case the issue of proportionality did not prevent amnesty being granted.

It is true that on Second Applicant's own evidence the possibility of transferring the deceased and other steps were mentioned and discussed when he first reported the situation around the deceased to Gilbert. However, the situation had become more problematical as time progressed. It must also be borne in mind that at this time the leaking of information to the liberation movements had become a real threat to the Government of the day as a result of the disclosures made by Dirk Coetzee and other former security policemen. Surely,

proportionality must be judged within the context of prevailing thought and circumstances at the time.

Furthermore, if proportionality were to be an obstacle in the application of Second Applicant it is hard to understand how amnesty could have been granted in any of the applications of security policemen. In all those instances, other options available in terms of the law were also available.

In the result, I am of the opinion that amnesty should also be granted to the Second Applicant, Gideon Johannes Nieuwoudt, for the murder of the deceased in Motherwell on 14 December 1989.

F J Bosman
Member of the Special Amnesty Committee

F.

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 3626/98
3859/98
3729/98

Before the Honourable Mr Justice Conradie
Before the Honourable Mr Justice Foxcroft
CAPE TOWN: Friday 8th May 1998

In the matter between:

THE NATIONAL PARTY OF SOUTH AFRICA	1st APPLICANT
JAMES MARREN SIMPSON	2nd APPLICANT
AND	
THE CHAIRPERSON, COMMITTEE ON AMNESTY OF THE TRUTH AND RECONCILIATION COMMISSION	1st RESPONDENT
THE TRUTH AND RECONCILIATION COMMISSION	2nd RESPONDENT
JANUARY BOY MASILELA	3rd RESPONDENT
DUMISANI HENRY MAKHAYE	4th RESPONDENT
LORD WILFRED HENDRICK MATSANE	5th RESPONDENT
COLIN CECIL COLEMAN	6th RESPONDENT
CHARLES NQAKULA	7th RESPONDENT
BARRY PHILIP GILDER	8th RESPONDENT
ABDULAH MOHAMED OMAR	9th RESPONDENT
BASIL KENYON DUMISANI MAFU	10th RESPONDENT
MONGANE WALLY SEROTE	11th RESPONDENT
BALEKA MMAKOTA MBETE-KGOSITSILE	12th RESPONDENT
PETER RAMOSHOANE MOKABA	13th RESPONDENT
NOSIVIWE NOLUTHANDO MAPISA	14th RESPONDENT
THABO MVUYELWA MBEKI	15th RESPONDENT
SATHY ANDRANATH R. MAHARAJ	16th RESPONDENT
JACOB GEDLEYIHLEKISA ZUMA	17th RESPONDENT
JOHN KGOANA NKADIMENG	18th RESPONDENT
P.R.F. MDLULI-SEDIBE	19th RESPONDENT

/2

LAMBERT LEHLOHONOLO MOLOI	20th RESPONDENT
BILLY LESEDI MASETLHA	21st RESPONDENT
RUTH SEGOMOTSI MOMPATI	22nd RESPONDENT
JACOB SELLO SELEBI	23rd RESPONDENT
ZWELEDINGA PALLO JORDAN	24th RESPONDENT
GARTH RICHARD STRACHAN	25th RESPONDENT
ESSOP GOOLAM PAHAD	26th RESPONDENT
NAKEDI MATHEWS PHOSA	27th RESPONDENT
PRAVIN JAMNADAS GORDHAN	28th RESPONDENT
SIPHO SIDNEY MAKANA	29th RESPONDENT
ALFRED NZO	30th RESPONDENT
JOE JOHANNES MODISE	31st RESPONDENT
ANDREW MANDLA LEKOTO MASONDO	32nd RESPONDENT
LINCOLN VUMILE NGCULU	33rd RESPONDENT
SNUKI JOSEPH ZIKALALA	34th RESPONDENT
KEITH MATILA MOKOAPE	35th RESPONDENT
JOSEPH MBUKU NHLANHLA	36th RESPONDENT
BIKI SAMUEL VICTOR MINYUKU	37th RESPONDENT
MTIKENI PATRICK SIBANDE	38th RESPONDENT
JOHANNES MUDIMU	39th RESPONDENT

Having heard Counsel for the APPLICANTS

and having read the documents filed of record;

IT IS ORDERED THAT:

1. In Case No 3626/98, the decisions made by the Committee on Amnesty (First Respondent) at Cape Town on 28 November 1997, to grant amnesty to the Third to Thirty-Ninth Respondents under the provisions of the Promotion of National Unity and Reconciliation Act, 34 of 1995, are reviewed and set aside.

2. The Committee of Amnesty is to consider afresh the applications for amnesty of the Third to Thirty-Ninth Respondents, including the issue of whether such applications properly comply with the relevant requirements of the Promotion of National Unity and Reconciliation Act. 34 of 1995.

../2

3. In consolidation application, Second Respondent in Case No 3626/98 (The Truth and Reconciliation Commission) is ordered to pay to Applicants in Case No 3626/98 the costs of one counsel taxed at the senior rate.

4. In the main application under Case No 3626/98, Second Respondent (the 'TRC') is ordered to pay to the applicants in that application their costs on an unopposed footing which are to include the costs of two counsel and the costs of today.

5. In the application for substituted service (Case No 3859/98) the Second Respondent ('TRC') is ordered to pay to Applicants (the National Party and Mr Jmaes Warren Simpson) 50% of their costs which are to include the costs of two counsel.

6. In regard to the intervention application (brought under Case No 3729/98) the Truth and Reconciliation Commission is to pay the wasted costs of the National Party and Mr James Warren Simpson on the footing that the costs of two counsel are allowed.

BY ORDER OF THE COURT

COURT REGISTRAR

Haarhoff Fourie & Butler
per: Willem Lodewikus Fourie
9th Floor Room 926
Groote Kerk Building
23 Parliament Street
CAPE TOWN
8000

/mg

G.

NPA decides not to re-charge Wouter Basson

The National Prosecuting Authority of SA (NPA) has concluded that a fresh prosecution of Dr. Wouter Basson on the charges originally quashed by the Pretoria High Court is in law not permissible.

This follows the NPA's thorough consideration of the judgment by the Constitutional Court passed several weeks ago, and all the relevant principles relating to the doctrine of double jeopardy.

Dr. Basson was originally prosecuted in the Pretoria High Court on charges ranging from conspiracies to assassinate members of the liberation movements, misappropriation of State funds and dealing in drugs.

The trial court quashed charges relating to conspiracies to murder persons outside the borders of the Republic on the basis that the South African courts lacked jurisdiction to try such offences. The trial court later granted the accused discharge on other charges and ultimately acquitted him on the remainder of the charges.

The State sought to appeal to the Supreme Court of Appeal on legal grounds. The trial Court only granted the State leave to appeal on limited and conditional grounds. The State petitioned the Chief Justice in respect of the other grounds where leave to appeal was refused.

The Supreme Court of Appeal found that the State was only entitled to appeal on grounds of law and in that regard, was bound further by its earlier ruling. The Court found that all the grounds relied on by the State were factual and consequently, no appeal could result therefrom, even if such findings were incorrect. The Court also implied that the State had no right to a fair trial and that the Constitution protected only the rights of an accused. Consequently, the State was denied leave to appeal.

The NPA took the decision of the SCA to the Constitutional Court. The appeal was based on three grounds, namely:

* Bias on the part of the Trial Court
* The exclusion of the bail record as evidence in the main trial; and
* The quashing of the conspiracy charges

At a preliminary hearing in November 2003, the Constitutional Court found that the State was entitled to the protection of the Constitution in the prosecution of the criminals and that the above grounds were in fact constitutional matters in respect of which the State could appeal.

The leave to appeal was argued in February 2005 and the judgment was handed down in September 2005. On the issue of bias the Constitutional Court found that although the State was entitled to appeal on this ground, it had failed to establish that the judge was in fact biased, although it accepted that the judge had made a number of incorrect findings in law and on facts and found that the version of the accused on the commercial charges was improbable. On the second issue, the Constitutional Court likewise found that the State was entitled to appeal against the exclusion of the bail record, but it failed to prove that the judge's ruling was incorrect. In respect of both these grounds, the appeal was dismissed.

On the third ground, the Constitutional Court found that both the Trial Court and the SCA had erred in finding that a South African Court could

not try the conspiracy charges. It set aside the order quashing the charges and indicated that the State could now, at its discretion, re-institute these charges, provided that it could overcome the obstacle of double jeopardy. It decided that the issue of double jeopardy had to be adjudicated by the Trial Court if a fresh prosecution was instituted.

It is an intrinsic principle of South African law that an accused cannot be tried twice on the same offence or on substantially the same offence irrespective of whether he was convicted or acquitted in the first trial.

In this matter, the State had originally formulated six individual charges of conspiring to kill persons outside the boarders of the Republic as well as other charges relating to conspiracy to kill persons inside the boarders. The State also added an additional charge, namely count 63, which incorporated all the conspiracies which had been charged as individual counts, in essence therefore, count 63 was an exact duplication of the individuals counts.

The Trial Court quashed the individual counts relating to external conspiracies on the basis that it lacked jurisdiction to try them, but allowed the State to lead evidence on the self same charges for the purposes of count 63. In its final judgment on count 63, the Trial Court analyzed the evidence presented by the State on these charges, found that the evidence failed to established the guilt of the accused and acquitted him.

The NPA's view is that had the trial court been consistent, it would have refused to make a finding on the external conspiracies referred to in count 63 as it had earlier ruled that it lacked jurisdiction on such charges. The upshot of this is that Dr. Basson has in fact already been acquitted on the quashed charges.

Issued by Makhosini Nkosi, NPA Spokesman. Tel: 012 845 6760 or 082 824 2576. E-mail: media@npa.gov.za.

H.

G.P.-S. 12/01

LÊER • FILE No.

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(81/30381)

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ONDERWERP • SUBJECT

APPENDICE "B" HANDED IN BY

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VOL.

TOP SECRET

B

STAFF PAPER PREPARED FOR THE STEYN COMMISSION ON ALLEGED DANGEROUS ACTIVITIES OF SADF COMPONENTS

DECEMBER 1992

18/12/92

A van der Merwe
SANDF

TOP SECRET

General Knobel
Sanjen Genl.

Copy 5 of 5 Copies.

MF KENNEDY 25/2/93
GENERAL MANAGER
COUNTER-ESPIONAGE

STAFF PAPER PREPARED FOR THE STEYN COMMISSION ON ALLEGED DANGEROUS ACTIVITIES OF SADF COMPONENTS

INTRODUCTION

1. **Background.** Annexure A (attached) was compiled from various sources of information, and the document has already been handed to Lt-Gen Steyn. Based on the allegations contained in the document, the following has surfaced:

   a. Some members, contractual workers and co-workers of certain SADF components were involved. In some instances they are still involved in illegal and unauthorised activities that are detrimental to the safety, interests and welfare of the state.

   b. To a great extent some members of the senior command structure are trapped in the momentum of activities of the past, activities which are being subjected to prominent negative publicity at present. However, it cannot be ruled out that other members might be furthering an own agenda.

2. The conclusion reached after an all-inclusive examination of the information picture reflected in Annexure A, is that a revolutionary intervention will be required to eradicate all identified corrupt practices at once.

3. **Instruction.** Chief Director CI has instructed that the above information as well as other relevant information/intelligence be evaluated with a view to submit meaningful recommendations to the Steyn Commission.

4. **Aspects that will affect the execution of the assignment**

   a. **Unverified information.** The greater part of the information available is unverified allegations that need to be substantiated/refuted before proper evaluation is possible. However, indications and weight of allegations were of such a nature that the all-inclusive information picture, as reflected by the allegations, could serve as point of departure in the argument.

b. **Period.** The short period allowed for a very comprehensive assignment might have a negative effect on the quality and evaluation.

c. **Manpower.** The sensitive nature of the matter has required that only one person could handle the matter.

OBJECTIVE

5. The purpose of the document is to make recommendations for action in respect of alleged precarious activities of components/individuals in the SADF on the basis of an evaluation of available information.

AREA

6. The report is structured as follows:

a. Evaluation/summary of/comment on information of precarious activities as contained in Annexure A. Details appear in Annexure B.

b. Evaluation/summary of/comment on information of individuals mentioned in Annexure A and detailed in Annexure C.

c. Summary of other relevant information/intelligence at the disposal of Division Intelligence (SDCI) that has been submitted to the Steyn Commission, and of which particulars are contained in Annexure D, E and F.

d. List of general conclusions.

e. Comment on possible actions.

f. Recommendations.

EVALUATION/SUMMARY OF/COMMENT ON INFORMATION OF PRECARIOUS ACTIVITIES OF SADF COMPONENTS

7. Annexure A is a complete base document containing precarious activities of SADF

components, compiled from source reports. Further details of the events appear in Annexure B.

8. Essential aspects regarding the SADF components can be summarised as follows:

a. **Directorate Reconnaissance (Special Forces)**

i. It would appear that Project Pastoor had served as a peg for nearly all official operations/activities of Directorate Reconnaissance. In terms of the Project's objectives, it would appear that the Project had come into being in view of the conventional threat. However, the Project is still running. At the same time, it would appear that individuals are abusing Project Pastoor for activities not in line with Government policy, e.g. alleged weapons caches in Portugal for utilisation during an internal uprising, weapons caches in the RSA and Southern Africa, and clandestine transport of weapons by means of a modified aeroplane; alleged instruction to murder two Portuguese operators in detention; alleged training provided to resistance movements of other countries; alleged involvement in violence on the East Rand and alleged involvement in train murders in cooperation with Transnet's communications network.

ii. Even if the initial objective of Project Pastoor would have been kosher and would remain needful, it apparently developed and/or had been distorted to such a degree that even unauthorised and self-initiated actions of individuals are regarded as having been authorised by those concerned themselves.

iii. **Conclusion.** Project Pastoor and all other related projects/operations must be investigated in detail in terms of :

(1) Desirability to continue with the project in this point of time.

(2) Possible deviations from the original objective, with special reference to possible self-initiated actions under official pretext.

b. Allegation regarding DCC

i. Allegedly, especially members of the Terrorism Section are involved in destabilisation actions against the ANC on own initiative and in cooperation with Brig Ferdie Van Wyk of GS2, Col Mielie Prinsloo of Directorate Reconnaissance (Special Forces) and Col Eugene De Kock of the SAP. A specific group of persons is said to include individuals whose agenda includes the discrediting of the AN; instigation of violence; facilitation for the failure of negotiations with the Government, etc. Alternatively, previous approved projects/actions are continued in a self-perpetuating manner or extended on own initiative to maintain an official slant.

ii. A proper evaluation of alleged activities on the basis of a "miscalculation table" ("verrekeningblad ???") with a view to come to a meaningful conclusion, is not feasible without further investigations and knowledge of normal duties of those involved. Whether additional alleged activities have been officially sanctioned or not (including instructing PAC members to murder AN members in Transkei; involvement to overthrow Holomisa; the training and arming of IFP members and involvement in SAP Col Eugene De Kock's Askaris), they are not in line with the Government's political objectives. This could create a serious credibility problem for the SADF and the Government.

iii. Allegedly various DCC members are involved in corruption or criminal activities, which likewise might lead to serious embarrassment for the SADF and the Government. It would appear that individuals involved in the above agendas integrate them in such a way with activities of an official nature that not only court-related evidence is being hampered, but those concerned might also implicate the SADF as "partner" (which is not the case).

iv. **Conclusions**

(1) An incisive investigation of the mandate and objectives of Section Terrorism is required. Other official instructions to individuals (such as an alleged assignment to Col At Nel to render intelligence support for discrediting actions), as well as their activities in this regard also require incisive investigation.

(2) All allegations of corruption and criminal activities by members of DCC must be referred to the SAP or Directorate Provoos for investigation.

c. **Army Intelligence (GS2)**

i. Allegations mainly pertains to BEVKOM's involvement in discrediting campaigns against the ANC and a possible misrepresentation by the Bevkom component of the nature and extent of the threat in reports compiled by Brig Van Wyk. Should this be the case (which an evaluation of his reports might prove), it would indicate that Brig Van Wyk has his own agenda and that he uses Bevkom's existing mandate (whatever it is), for that purpose.

ii. Once again it would appear that authorised and official matters have been integrated with self-initiated objectives that high-hierarchy decision-makers had lost track of the initial objectives and real mandate. However, an investigation is required to confirm or refute these conclusions.

iii. Other alleged GS2 activities focuses on the allegation of intelligence support to VR's pseudo-capability in actions against the internal structures of the ANC and the PAC. These operations, whether they have been authorised or not, are also not in line with the Government's current political policy.

iv. It is also being alleged that Lt-Genl Miring gave instruction that Directorate Reconnaissance should not collect information on the right wing or on right-wing organisations, and that he wants to be informed of who stands where in Directorate Reconnaissance. In this regard Lt-Gen Miring's instruction would probably be in line with particular contingency planning. Directorate Reconnaissance plays an important role in this matter, and the conclusion arrived at is that Lt-Gen Miring wanted to make sure what the position was with regard to the authority (mandate) for the utilisation of power. This conclusion also corresponds with other information that Lt-Gen Miring is an avowed realist concerning reform initiatives in the RSA, as well as a supporter of these initiatives. Furthermore, one should guard against the wrong interpretation of his remark concerning the execution of a possible coup, should it be necessary. The remark was probably intended to refer to

official emergency action in case of an attempted coup d'etat from either the left or the right wing.

v. **Conclusion**

(1) All aspects of Bevkom's mandate and instruction must be subjected to incisive investigation, and their desirability or not must be deliberated in view of the Government's political policy.

(2) Monthly reports and motivations for Bevkom's activities must be investigated to determine whether they do not serve as basis to obtain official approval for a self-initiated programme.

d. **7 Med Bn Gp**

i. The core aspects in respect of alleged activities of 7 Med Bn Gp centre on the privatisation of the chemical and biological warfare programme. The fact that the programme is still in the process of privatisation allegedly involves great risks for the SADF and the Government.

ii. Furthermore, information pertaining to activities of Brig (Dr) Wouter Basson in respect of an alleged chemical attack on Frelimo soldiers in Mozambique, an alleged poison disrepute action against the ANC, alleged execution of SADF elimination instructions and that he lives beyond the means linked to his rank.

iii. If these allegations are true, it is unlikely that these actions have been authorised because they are against the spirit of the current political process. Had these allegations been false, they would have the potential to cause unprecedented damage to the SADF and the Government because:

(1) Brig (Dr) Basson is indeed involved in chemical research: (And what is more, he is said to be related to Gen Lothar Neethling).

(2) The public would find it hard to accept the opposite in the light of previous official denials of other events (such as Ferdi Barnard's attachment to the SADF), linked to Brig (Dr) Basson's and the SADF's real involvement in chemical and biological research.

iv. Without considering other facts, on the surface it would appear that Brig (Dr) Basson had adapted and developed an initial Project with pure objectives to a stage that self-initiated actions are the order of the day, which could only lead to embarrassment of a serious nature.

v. **Conclusions**

(1) Although aspects of Brig (Dr) Basson's project is being investigated by the Auditor-General, an incisive investigation regarding the desirability of the Programme in its totality, including cover firms, is required if it had not been done by this time.

(2) Instructions and mandates to Brig (Dr) Basson must be investigated and evaluated against alleged activities as to identify double agendas.

9. **General Conclusion.** The assignments, mandates, objectives, projects and submissions for activities of Directorate DCC (mainly Section Terrorism), Directorate Reconnaissance, Bevkom and 7 Med Bn Gp (which must include Brig (Dr) Basson), must be subjected to incisive investigation.

EVALUATION/SUMMARY/COMMENT OF/ON INFORMATION REGARDING INDIVIDUALS

10. Annexure A, which is a summary of allegations concerning risk activities of SADF components, contains names of various SADF members that require further explanation. Annexure C contains the explanation. Summarised, these individuals can be divided in three categories, i.e.

a. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.

i. Gen Kat Liebenberg

ii. Lt-Gen C.P. Van der Westhuizen

iii. Individuals who can be discredited for activities by subordinates by virtue of their command positions. Individuals in this regard are:

iv. Lt-Gen G. Meiring

v. Gen-Maj H.J. Roux

vi. Brig J.C. Swart
vii. Brig Tolletjie Botha

b. Individuals involved in apparent self-initiated activities against the interests of the state (not necessarily consciously). Individuals in this regard are:

i. Brig Ferdi Van Wyk
ii. Brig (Dr) Wouter Basson
iii. Brig Oos Van der Merwe
iv. Col At Nel
v. Col H.A.P. Potgieter
vi. Col Mielie Prinsloo
vii. Col Bert Sachse
viii. Col Hannes Venter
ix. Comdt Anton Nieuwoudt
x. Comdt Henry Van der Westhuizen

11. If the allegations (mainly unsubstantiated information) of SADF components' activities (Annexure B) are judged in general, the impression (no substance) is gained that:

a. there is a possibility that certain general staff and senior officers had lost sight of the initial mandate and approved objectives of projects, and that they approve/accept/initiate actions that in actual fact involve additional unauthorised objectives and do not necessarily serve the interests of the State;

b. projects afford members the opportunity to follow a self-initiated agenda under an official cover.

12. Significantly, the individuals involved in the alleged activities are the same persons who have been mentioned in most of the alleged risk activities described in Annexure A and B.

13. **General Conclusion**

a. SADF components that must be subjected to incisive investigation (as indicated in the previous conclusion), must be investigated by an independent SADF working group to attain true refinement of mandate, assignments, objectives and to re-establish credibility.

b. It is unlikely that mandate refining itself would bring about credibility in "the SADF and future continuous "clean" SADF actions". A ridding of incumbents from SADF components may also be required. In this regard, those individuals referred to in the three categories mentioned in Par 10, would be affected. The three categories are :

i. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.

ii. Individuals who could be discredited by virtue of their positions of command, for actions by their subordinates.

iii. Individuals involved in apparent self-initiated activities against the interests of the state (not necessarily consciously).

c. In addition to the cleansing of posts, further investigation into the alleged activities/possible double agendas of individuals whose names appear in Annexure B, is required.

INFORMATION/INTELLIGENCE MADE AVAILABLE TO LT-GEN STEYN

14. For the sake of completeness, documents concerning OP CRUSEN and OP WIDOW, which have been made available to Lt-Gen Steyn, are attached as Annexure D and E (Crusen) and F (Widow). The purpose of their inclusion is

a. to have a consolidated document at command;

b. to utilise it as reference when necessary.

15. To sum up, the following information is contained in the documents:

a. **Annexure D** (Op Crusen) : Individuals allegedly employed by or having contact with Division Intelligence and who act suspiciously, whether in connection with violence or criminal actions. (The documents contain recommendations regarding action.)

b. **Annexure E.** Individuals not in direct contact with the SADF with potential concealed agendas and/or possibly involved in activities that can relate to acts of violence. (Recommendations for action have been proposed.)

c. **Annexure F.** Former BSB and SADF members (of whom some serve in the DCC), who might be involved directly or indirectly in activities that could have a bearing on acts of violence. (Recommendations for action have not been made.)

LIST OF CONCLUSIONS

16. Project Pastoor and all other related projects/operations must be investigated in detail in terms of:

    a. Desirability to continue with the project in the present dispensation.

    b. Possible deviations from the initial objective, with specific reference to possible self-initiated actions under official cover.

17. The mandate and objectives of Section Terrorism must be investigated incisively. Other official instructions to individuals (such as an alleged instruction to Col At Nel to render intelligence support for discrediting actions), and their activities in this respect, must also be investigated incisively.

18. All allegations of corruption and criminal activities by DCC members must be referred to the SAP and / or D Provoos for investigation.

19. All aspects of Bevkom's mandate and instruction must be investigated incisively, and its desirability, whether or not, must be deliberated in the light of the Government's political policy.

20. Monthly reports and motivations for Bevkom actions must be investigated to determine whether official approval for a self-initiated programme had not been sought.

21. Although aspects of Brig (Dr) Basson's Project has already been investigated, an incisive investigation is also required if it has not been done as yet, concerning the desirability for the continuation of the Programme in its entirety, including cover firms.

22. Instructions and mandates to Brig (Dr) Basson must be investigated and matched against alleged activities to identify double agendas.

23. **General conclusions**

a. SADF components to be subjected to incisive investigation must be investigated by an independent SADF working group to attain a true refinement of mandate, assignments, objectives and re-establishment of credibility.

b. It is unlikely that mandate refining by itself would bring about credibility "in the SADF and future "clean" SADF actions". A ridding of incumbents form SADF components might also be required. In this regard, those individuals referred to in the three categories mentioned in Par. 10, would be affected. The three categories are:

i. Individuals in positions of command who wear an albatross of the past round the neck as an inescapable burden.

ii. Individuals who could be discredited by virtue of their positions of command, for actions by their subordinates.

iii. Individuals involved in apparent self-initiated activities against the interests of the State (not necessarily consciously).

c. In addition to the cleansing of posts, further investigation into the alleged activities / possible double agendas of individuals whose names appear in Annexure B, is required.

REACTION ON POSSIBLE DRASTIC ACTION

24. It is unlikely that a few adjustments would clean the record, in the light of the current credibility crisis of the Defence Force and the balance of allegations (albeit unconfirmed), regarding SADF components who apparently act outside their mandate, individuals attached to components who apparently exceed their mandate and / or pursue own agendas under official pretext, along with individuals in positions of command who have lost pace with true objectives. The only alternative would be drastic intervention.

25. It is expected that the reaction of various groups with regard to drastic intervention in the SADF, would be experienced differently. Intervention may include refining of mandate, objectives and role; curtailment / cancellation of assignments; rationalisation of functions; large scale post transformations and retrenchments.

26. **General.** The timing for such measures and the manner the issue is to be approached, are regarded as crucial factors in determining the eventual reaction. Factors such as the general security situation, the Government's position with regard to moral high ground, the progress of the process of transition and the economic prospects will have to be considered in the timing. It is anticipated therefore, that the general reaction would coincide with the positive and / or negative general mood in the country.

27. **Anticipated reactions**

a. **Individuals who would be affected as a result of albatrosses of the past or possible discrediting due to activities of subordinates.** The most important factors that would affect their reaction are anticipated to be the manner in which it is to be performed and the acceptability of the motivation for the action. Individuals in these categories are regarded as realists who probably would accept the situation if it is handled correctly.

b. **Individuals involved in double agendas.** Among these individuals are two categories who would react differently:

i. **Those involved in alleged criminal activities.** No matter the circumstances, they would probably find fault with the dispensation, and would probably join particularly opposing right-wing groups.

ii. **Those who pursue self-initiated objectives under official pretext.** They probably believe that they act within their mandate and would feel aggrieved. The majority would probably join opposing right-wing groups.

Remark: Both categories would probably threaten to expose actions of the past, and might even proceed to expose them. However, that would be counterproductive because that would not only incriminate them, but would prompt the need for intervention for that very reason.

c. **SADF components affected (including Division Intelligence).** Members of SADF components who might be affected by intervention, could react according to their political affiliation. The reaction would probably be less intense than that of members whose components might be closed down or drastically scaled down or be accommodated elsewhere in the SADF. Since the majority of SADF members are being regarded as apolitical and are professional soldiers, a realism prevails that the SADF should regain its credibility one way or the other. Should a drastic intervention be motivated as a solution, it would probably be accepted.

d. **The broad population.** The three respective categories that might react differently.

i. **Leftist grouping.** There will definitely be a propagandistic exploitation of the situation. The degree would be determined by the level of the transitional process. It can be expected that the more intense the reaction, the more negative the general reaction would be.

ii. **Right-wing grouping.** Intense reaction is expected, which would increase the right-wing threat potential for future violent actions. This will reinforce their ranks.

iii. **Central grouping.** It is expected that although the reaction would be negative, the intervention may be accepted with the correct motivation and the manner in which it to be executed and the timing.

28. **Procedure.** It is anticipated that :

a. In the light of the current negative mood, a sudden drastic intervention would harm stability.

b. An appropriate peg, such as the results of the Steyn investigation, would be the most acceptable action within a positive climate.

RECOMMENDATIONS

29. In the light of the above, it is recommended that :

a. Para. 16 to 22, which serve as conclusions, be implemented as recommendations.

b. A drastic intervention, as recommended by the Counterintelligence Community and supported in the conclusions contained in the document, be considered. (Vide par. 24).

c. Should the proposed intervention be accepted as desirable, that it be performed in such a manner that it would have the least effect on stability. Individuals who would be affected for the time being are mentioned in Annexure C.

d. Actions as indicated in Annexure B be performed. Included are the allegations that require further internal investigation and / or committal to the Goldstone Commission, the SAP and D Provoos.

ANNEXURE A
STAFF PAPER
DD DECEMBER 1992

RISK ACTIVITIES OF SADF COMPONENTS

This document represents source information and conclusions that have been made available to Lt-Gen Steyn. In addition to other information available, the intelligence picture has been used as basis for the Staff Paper.

1. An analysis of information available indicate that some members, contractual members and co-workers of the SADF were involved, and in some instances are still involved in illegal and unauthorised activities that harm the security, interests and welfare of the State. The spectrum of these activities includes murders, deeds of terrorism, disruption and influencing activities, destabilisation activities abroad, corruption, promotion of factional party political objectives and blatant disregard of Government policy.

2. The motives of individuals involved are diverse and vary from personal gain, reprisal, personal political agendas and pursuit of strategic and tactical objectives in conflict with Government policy. However, some role players are caught up in activities of the past that are unacceptable in this era.

3. Evidence at the disposal of the Counterintelligence Community on which the above statements rest, are based on facts, both confirmed and unconfirmed information from reliable sources, and indications are that these are true. The information is also based on evidence submitted in court and at other investigation forums.

4. A cursory examination of the information indicates that the above activities were mainly centralised at certain Defence components, i.e. the Directorate Covert Collection (DCC) of Division Intelligence, Army Foundation (GS2), and certain components of Special Forces and 7 Medical Battalion.

5. Summarised the intelligence picture pertaining to the above Defence components is as follows:

a. **Directorate Covert Collection (DCC)**

i. Destabilisation of the internal political situation by means of planning and executing coups in self-governing territories and manipulation of important political role players.

ii. The instigation of unrest through murder, providing political factions with arms and executing intimidation activities.

iii. Members' involvement in planning to ruin the Government's reform initiatives through the escalation of violence.

iv. Corruption among members by means of illegal trading in weapons.

v. Involvement in planning and committing murders with major political consequences (e.g. FLORES case).

b. **Army Intelligence (GS2)**

i. Discrediting activities against the ANC and other political opponents.

ii. Influencing activities and perception creation in the mass media as well as in the SADF.

iii. Intelligence support for destabilisation operations.

iv. Members' participation in coup-related planning.

v. The dissemination of disinformation.

c. **Special Forces**

i. Participation in destabilisation operations in black townships.

ii. Creation of arms caches and the development of operational launching positions in neighbouring countries.

iii. Training of military wings of internal political groups (e.g. Inkatha), as well as training to resistance movements in other African countries, including RENAMO.

d. **7 Medical Battalion**

i. Involvement in the SADF's chemical and biological warfare programmes.

ii. Involvemnt in the so-called "Poison murders".

iii. Involvement of some members in corruption vir personal gain.

iv. Involvement in Chemical attack on Frelimo.

v. Handling of drugs for operational utilisation.

6. When analysing the intelligence picture, it would appear that the senior command structure of the above Defence Force components are controlled by Lts-Genl G Meiring and C.P. Van der Westhuizen, who in turn are under the command of the Head of the SADF, Gen Kat Liebenberg. To a high degree, Generals Liebenberg and Van der Westhuizen are caught up in the momentum of activities of the past, which at present, receive prominent negative publicity, whilst Gen Meiring promotes a personal agenda against the interests of the State.

7. At executive level and in varying degrees, the following senior officers are linked to the above activities as a result of their positions of command or their personal involvement in the said activities.

a. Brig Jake Swart
b. Gen H Roux

c. Gen Chris Thirion
d. Brig Ferdi Van Wyk (GS2)
e. Brig Tolletjie Botha (DCC) - Directorate Covert Collection
f. Col At Nel (DCC)
g. Brig Wouter Basson (7 Med) - 7 Medical Batallion
h. Col H.A.P. Potgieter (Special Forces)
i. Brig Oos Van der Merwe
j. Col Mielie Prinsloo (GS2)
k. Col Anton Nieuwoudt (DCC)
l. Col Bert Sachse (5VR) - 5 Reconnaissance Regiment/Commando
m. Col Hannes Venter (4VR) - 4 Reconnaissance Regiment/Commando
n. Comdt Henry Van der Westhuizen (DCC)

8. Strong interaction exist between the above four Defence Force components, which results in the major role players being relatively restricted.

9. The availability of secret funds, virtually unchecked delegated authority and the Total Onslaught Syndrome has led to a situation where these Defence Force components has become self-generating and self-perpetuating. New entry into the ranks of these components have soon declined in the pattern that have been brought about by their predecessors. The leadership and the unique milieu has afforded individuals of one mind the opportunity to move upward in the hierarchy order. This in turn, has resulted in these components having been caught up in particular value systems and ways of thinking.

10. With analysis of the information it has become apparent that an informal structure has been created, of which the major role players pursue the same agenda, which harm the State's interests.

11. It has also become evident that controlling officers of the said SADF components were either involved in malpractices at executive level or were aware of these practices. On the other hand, if they had performed their duty, they had to be aware of these malpractices.

12. It will not be feasible to mould this information into a suitable product that can be utilised in court-related actions, other legal proceedings or disciplinary hearings because

a. Evidence has already been destroyed and is still being destroyed on large-scale.

b. Existing evidence has been acquired in an extremely sensitive manner and would expose agents to retaliation.

c. The powers of the members and groups involved are such that the life of a witness would have no value.

d. The role players protect eac other.

13. The security situation and the delicate stage negotiations for a new constitutional dispensation has reached, compel a revolutionary intervention to eradicate the malpractices that have been identified forthwith. This will not exclude court-directed or other administrative proceedings.

ANNEXURE B
of Staff Paper
dd December 1992

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	a	b	c	d	e	f	g	h	i
1	Special Forces: 1. Establishment of arms caches and development of operational launching positions in neighbouring countries	Serving members: Gen Kat Liebenberg Lt-Gen G Meiring Brig JC Swart Col Mielie Prinsloo Brig (Dr) W Basson Brig Tolletjie Botha *(Documentary)*	DCC maintains close ties with Project Pastoor. There are joint projects, such as arms caching in Portugal that are being linked to arms caches for internal uprisings when required (so-called Palmeira Project). DCC and Pastoor share cover offices in Malawi *(Documentary as well as sources)*	Apparently Brig JC Swart is in command of Operation Pastoor (previously Operation Phantom), under the control of the SADF and Army. The operation is being staffed by members of Special Forces and old BSB members. Objectives are: i. Conducting warfare on an irregular basis ii. Establishing bases in Africa as launching positions for future operations. iii. Establishing arms caches abroad. iv. Development of Malawi as support country into the rest of Africa *(Documentary)*			X		Internal investigation into desirability of Project
			Arms caching is managed from and into the RSA. One of Pastoor's aircraft has been modified to stow weapons *(Reliable sources)*.	It would be a deviation from its imitial objective if arms caching into the RSA takes place under Operation Pastoor			X		Internal investigation

TOP SECRET

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Brig (Dr) W Basson	Two Portuguese operators of Pastoor have recently been exposed and arrested. Brig (Dr) W Basson instructed that the persons detained were to be mrudered if they could not be relieved. *(Reliable source, confirmed by another source.)* Fronts of Operation Pastoor are in Kenia, Zambia and Mauritius, mainly in the nature reservearea. Strong contact with the British SAS exists. *(Documentary)*	Allegedly Brig Basson travelled overseas for this purpose. If this was the case, actions probably were self-initiated beyond Project Pastoor's domain and mandate.			X X		Internal investigation Internal investigation into Pastoor
	ii. Training of military wings of internal political groups (e.g. Inkatha), as well as training to resistance movements in other African countries, inter alia Renamo.	Col Bert Sachse Shaun Gullen Rod Rodrigues Roelie Roelofse Sergeant Americo	Members of 1 Recoon Reg and 5 Reconn Reg (RR) present training to resistance movements in 8 countries. *(Various agents).* Individuals involved in training are Gavin Christie, Col Bert Sachse, Shaun Gullen, Rod Rodrigues, Roelie Roelofse & Serg America of 4RR & 5RR *(Various sources)*	Probably true. The question is whether this was or was not an authorised project. Further investigation is required.			X		Internal investigation
	iii. Participation in destabilisation operations in black townships		Operation Pastoor is involved in violence on the East Rand. *(Technical collection).* Concrete facts not available, but concluded from teleph conversations, evacuations & transfers	If this was the case, actions are beyond Operation Pastoor's domain. Further investigation is required.		X			Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			A discredition action was directed at the ANC to link the ANC to the use of poison. The young interrogators who had questioned the ANC member, were transferred to Pastoor to maintain control over them. This is a clear indication of the mutual relation between GS2, DCC and Pastoor *(Allegations by agent)*	Reporting of this case is obscure. However, if this was the case, actions are beyond Operation Pastoor's domain.		X			Internal investigation
		Serving member: Col Mielie Prinsloo Former members: Brig Archie Moore Col Daan Kershoff Nick Liebenberg Nick Basson Maj Buks Buys	Spoornet's intelligence network comprised former members of special Forces, i.e. Buks Buys, Nick Liebenberg, Nick Basson or Bosman, Archie Moore and Daan Kershoff, with the object to instigste violence by means of train murders. Buys, Liebenberg, Bosman resigned and established their own business. Nick Liebenberg often (the last time in March 1992) reported beforehand to Col Mielie Prinsloo where and when train murders were to take place, and implied that Special Forces are involved. *(Source reports and another Intelligence Service.)*	If the allegation was the truth, it probably was self-initiated. This is definitely not part of the Government's political policy. According to other information, it would appear that the ANC is in possession of similar information, but for one or otehr reason does not utilise it.. However, the allegations have the potential of serious embarrassment for the SADF and the State.			X		Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
2.	DCC i. Destabilisation of the internal political situation through planning and execution of coups in self-governong territories, and manipulation of major political tole players.	Planners are: Brig F van Wyk Col At Nel Col Mielie Prisloo Tinus Hamman Comdt Henry van der Westhuizen *(Reliable source)* Possibly also Capt Pamela du Randt *(Reliable source)* Executive at operational level are: Comdt Anton Nieuwoudt Col Eugene de Kock (SAP) Comdt Henry van der Westhuizen *(Reliable source)* Probable co-workers at operational level: Brian Davis (London) Van Greunen Verne Lange Jimmy Nieuwoudt *(Various sources)*	Individuals involved in suspicious activities are members of Section Terrorism. The agenda of this group of individuals is: i. Discrediting of the ANC. ii. Instigation of public violence. iii. The failure of talks with the Government. iv. Increase in violence. v. De facto coup by the SADF to restore order. vi. Establishment/development and armament of Inkatha , and the creation of alternative right-wing political alliances. *(Allegations and reliable source)* The planning group meet clandestinely at a lodge (West stadium) at Loftus. Pamela du Randt is present often. *(Source reports and technical collection)*	Should this be the case, these allegations would be an indication of an own agenda that may have the potential of serious implications. This matter requires further urgent investigation. Further collection is essential.			X X		Internal investigation thereupon Goldstone Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Col At Nel Comdt Anton Nieuwoudt AO2 Clive Brink	The Ciskei Intelligence Service, controlled by Comdt Anton Nieuwoudt and AO2 Clive Brink. The coup and murder of Sebe was a planned action by Col At Nel and Comdt Anton Nieuwoudt *(Reliable source)*	Although Nieuwoudt controlled the Ciskei Intelligence Service, it has not been confirmed that he had planned Sebe's murder. However, according to a recent report, he is concerned about the fact that a judicial commission in the Ciskei is attmpting to "hang" the murder on Sebe round his neck (implicate him?)			X		Goldstone
			DCC is involved in Mozambique through agents Craig Williamson, Sakkie van Zyl and Celeste who are strongly linked to Renamo armament *(Various sources)*	A number of DCC members maintain contact with Craig Williamson, who, according to some reports, is involved in smuggling activities.			X		Goldstone
			DCC continues with planning to overthrow Holomisa and to substitute him with pawns. (Various agents and technical collection.) Individuals involved allegedly are Col At Nel and Comdt Anton Nieuwoudt.	According to another report, Nieuwoudt handles Col Duli of the TDF, and he along with Eugene De Kock and Chris Nel (alias Derek Louw) had planned to carry out a coup d'etat. Thus, the allegations have been confirmed and clearly point to self-initiated efforts to work against the policy of the Government.				X	Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	ii. Participation of members in planning to ruin the Government's reform initiatives through the escalation of violence.	JC Prinsloo (DCC in Durban)	DCC agents are involved in the training of IFP members, whereupon they are placed at security firms (ubder IFP and SADF control), fully armed. Ex-Rhodesians wit Right-wing radical viewpoints control the security firms COIN, Shield and Hullets. *(Allegations by independent sources.)*	Allegedly, JP Prinsloo of the DCC's Durban office may be responsible for liaison wrt the training. If this proves to be true, it would probably be in pursuance of a self-initiated agenda.		X			Goldstone
			DCC has full control over the Zulu faction's participation in talks with the Government. Allegedly the infrastructure is such that 24 000 Zulus can be armed in the PWV area within 24 hours. *Various independent sources.)*	Further collection is essential for meaningful evaluation.		X			Goldstone
		Col De Kock Leon Flores Steve Bosch Col At Nel	The former 8-member "hit squad" of Vlakplaas was under the command of Col Eugene de Kock, Leon Flores and Steve Bosch, of whom the latter two became DCC members. Col de Kock maintains close ties with Col At Nel. *(Source reports and Technical collection)*	There were various accounts of contact between Col de Kock (SAP) and certain DCC members. From the veiled use of words, it could be concluded that the combination was involved in activities that harmed the interests of the State.				X	Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iii. Instigation of unrest through murder, armament of political factions and execution of intimidation activities. iv. Involvement in planning and committing of murders with serious political consequences (eg the Flores incident)	Col Eugene de Kock Leon Flores Col At Nel Steve Bosch HenryvdWesthuizen Rich Verster	12 former Vlakplaas askaris of Col Eugene de Kock (SAP) are still involved in operations and are handled by De Kock. All of them are fully equipped with weapons and supplied with arms caches, ammunition and supplies. Some of the askaris are hidden on DCC's holding (Olymus 73). *(Confirmed by various agents.)* Until recently Flores assisted the handling of askaris. His own weapons are cached on the holding of Tryon alias Trix alias Leonard. *(Reliable source)*	As mentioned above, the contact between Col De Kock (SAP) and DCC members is disturbing, and it would appear that a combination of individuals are pursuing an own self-initiated agenda.			X		Goldstone
		Brig (Dr) Basson Brig F van Wyk & probably Col At Nel	DCC in conjunction with Brig Ferdi vanWyk turned an ANC member to give evidence that the ANC uses chemical weapons ni Mozambique. (This was just after the chemical attack on the Frelimo group in Mozambique, vide section on 7 Med Bt Gp) *(Allegations by reliable source)*	Although the reporting is not clear, it would appear that an operation involving chemical weapons was launched in Mozambique, and that Col At Nel, Brig F Van Wyk & Brig (Dr) Basson were involved. The British organisation Chemical & Biological Defence Establishments investigated the area, and found that chemical weapons had definitely been used. It would appear that there were attempts to lay the blame on the ANC.		X			Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			The caching of terrorist weapons in Swaziland are being planned by Cols Eugene de Kock and At Nel, and pointed out to the Swazi police, whereupon discredition takes place. *(Technical collection & reliable source)*	Apparently this is being done in pursuance of a self-initiated agenda or an existing assignment is conducted on own initiative but beyond limits.				X	Internal investigation
		Col At Nel & probably also Comdt Anton Nieuwoudt	DCC members handle elements of the PAC leadership in Transkei. Col At Nel instructed that the PAC had to proceed with murders on ANC members in the Transkei. *(Technical collection)*	These allegations, linked to the allegations mentioned elsewhere in this document, which maintain that DCC members continue to plan a coup d'etat in Transkei, once again are indicative of a self-initiated agenda conducted by certain DCC members.			X		Goldstone

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	v. Corruption among DCC members by means of illegal weapons trade.	Col At Nel Comdt Anton Nieuwoudt Comdt Henry wdWesthuizen Rich Verster Jeff Price Col Eugene de Kock (SAP) Piet Botha (SAP) Willie Nortje (SAP) Chappies Klopper (SAP)	The delivery of arms to the SAP located by so-called sources. Funds go to fictitious sources. *(Allegations)* The GS2 remuneration fund of the Army that handles arms located abroad, pays without asking questions, and a great number of fictitious sources are remunerated. *(Allegations.)* Anton Nieuwoudt keeps weapons at Plot 73, Olympus and in a container at a rented farm at Irene.	According to additional reporting, Col At Nel does not register internal sources anymore, and rpesumably they are remunerated from funds obtained form the delivery of weapons. It has also been alleged that munition depots are declared only partially. Allegedly, the remainder is hidden elswhere. Consequently, there is a possibility that other activities too might be funded. This is also an example of how as official responsibility, such as covert collection could be misused for own profit or for pursuance of a self-initiated agenda under official banner.				X	Investigation by D Provoos, whereupon investigation by Goldstone
3	GS2 Discrediting actions against ANC and other political opponents	Brig F Van Wyk Col At Nel	Disclosure concerning Winnie Mandela's disappearance of funds was a Ferdi Van Wyk/Col At Nel project. *(Allegations by source)*	If it was an official project in line with the State's political programme, it would be bona fide different. However, if it was self-initiated, then it would have a high-risk potential for embarrassment.			X		Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		Brig F Van Wyk	The discrediting of the ANC and other political opponents against the Government is managed from the office of the Command. *(Various sources)*	On the basis of various reports, it would appear that official authorisation did exist. However, it would appear that Brig Van Wyk pursues more objectives that are self-initiated or that he attempts to convince his superiors to approve activities that are not always in the interest of the State. This will have to be investigated though.			X		Internal investigation
	ii. Influencing activities and creation of perceptions at the mass media and the SADF	BrigFvWyk	The emphasis on violence in BrigvWyk's report in a certain manner may establish misperceptions. *(Reliable source)*	It would appear that motivations for actions might be intensified to guarantee action. However, this is only a conclusion and needs to be investigated further.			X		Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iii. Intelligence support to destabilisation operations		The pseudo capability of 5Reconnaissance Regiment receives intelligence support from GS2 to be applied to the ANC's and PAC's internal structures. *(Source reports and Technical collection).* According to report received on 14Dec1992, an ANC member was to give evidence at the Goldstone Commission to the effect that members of 5ReconReg 1ReconnReg were to perform operations in KwaZulu. The vehicle registrations to be used for this purpose were checked by OATI. These can be trailed to 5ReconnReg. *(SAP)*	If this was the case, activities would not be in line with Government policy, and this might lead to serious embarrassment. This matter requires urgent investigation.			X		Goldstone ?
		ColHerman van Niekerk (leader) TinusVStaden (OpsOffic) JimLaferty - ex-Rhodesian MikeKennedy - ex-Rhodesian MarkVDMerwe - ex-Rodesian	Rumours are that a pseudo group of 5ReconnReg are involved in train murders along with members of the Rhodesian Selous Scouts under HermanVNiekerk *(Allegations)*	This is probably the same group who were, ito the above allegation, involved in speudo operations in KwaZulu. The allegations require further urgent investigation.					Goldstone

TOP SECRET

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iv. Paticipation of members in coup-related planning	Lt-Gen G Meiring	Gen Meiring instructed SpecialForces to determine which members of the present DefenceForce, the previous DefenceForce and the BSB are on "his" side, to enable him to know whom he could call up when it was necessary. He furthermore instructed that SpecForces was not allowed to collect information on right-wingers and rightwing organisations *(Reliable source)*	Since SpecForces would play an important role in countering a coup d'etat, it seems probable that GenMeiring would have wanted to know who were apolitical for utilisation. His behaviour is therefore evaluated as normal ito contingency planning.					None
		ColMiellePrinsloo	The selective leakage of information from ColMielie Prinsloo's group to Rightwing groups, especially early warnings against possible actions *(Confirmed by various independent sources)*	The evaluation was that Col Prinsloo is sympathetically disposed towards the Right Wing. This fact may endorse the other allegations contained in the document of his possible involvement in an own agenda directed against the ANC. This requires further investigation.				X	Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
4	7MED BN GP i. Involvement in the chemical and biological warfare programme of the SADF	Brig Wouter Basson	There are several chemical firms that operate as private institutions in support of the chemical and biological warfare programme of the SADF. The privatisation of these firms is transparent, which might become serious risks for the SADF and the State in future. The firms are Roodeplaat Research Laboratory, Roodeplaat Tile firm, Delta-G, Protechnics, Ecotex. The activity is headed by Brig(Dr)WouterBasson. *(Documentary)*	The programme is performed under Project Jota. Privatisation does indeed take place. However, the allegation that the privatisation is transparent and might hold serious risks for the SADF and the State requires further investigation.			X		Internal investigation

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	ii. Involvement in chemical attack on Frelimo	Brig W Basson Brig Van Wyk Col At Nel	Allegedly the chemical attack on Frelimo soldiers in Mozambique (vide ser no 3.iv) was a practical training session. An small unmanned reconnaissance bomber was located shortly before the attack on Komatipoort. The toxic substance used in the attack was manufactured and stored by Petrotechnics. (Confirmed, and individuals involved are known)	Allegedly, the aircraft was tested shortly before the attack on Komatipoort. As stated, a British team of scientists established that chemical weapons were used in the attack on the Frelimo soldiers (finding - January 1992). Accor-ding to this and other information in this respect, DCC and GS2 members as well as Brig Basson directed a discrediting campaign against the ANC implicating the ANC as having a chemical warfare capability, is indicative of an attempted cover-up of either an own agenda or an authorised operation which had failed. However, this requires further investigation.				X	Internal investigation
	iii. Involvement in so-called poison murders	Brig W Basson Gen LotharNeethling	Members of Charl Naude's old group (SpesForces/BSB)formed a group under leadership of Brig W Basson responsible for all SADF elimination instruc-tions. Gen Lothar Neethling was intimately involved. (Evidence of members involved can be obtained) Johan Theron (4VR - Reconn. Regim.) And Johan Truter - financial manager (RN Lab), was also involved with the above. At Nel and Johan Theron have close	Vide all the info in the previous column. The allegation prompt-many questions that first need to be answered befor a meaningful evaluation can be made. Conside-ring the weight of allegations, it would appear that some of them might be true. According to reports received in Dec 1992, there was rummaging among certain DCC members at the time of Goldstone's visit to their offices because some beer tins had been "doctored" with poison. This has been confirmed.		X			

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
		GenKatLiebenberg	GenKatLiebenberg has been kept posted during the course of events. Allegedly, until 1989 he himself was also involved in the planning. (Evidence can be obtained from a person who was involved.)	Recently it has also been reported that D Verk/Recoinn??(Spec Forces)had received toxic substances from 7 Med BnGp, which might be utilised for operational purposes, inter alia a poisonous substance which is a "new product" that can be administered in nearly any manner. Allegedly, Brig Basson made it available. However, a meaningful evaluation is not possible before affidavits are obtained and further investigations are completed.		X			
		Name can be obtained	A BSB operator was involved in elimination activities, and disposes of information which directly implicates GenLieben-berg in the murders. (Member has already prepared an affidavit.)			X			
		Allegedly Col AtNel CmdtAntonNieuwou dt CmdtHenryvdWest-huizen are involved	Recently there was an attempt to bring the person under the control of the "generals" by offering a contract to supply poisoned beer to Zulus in Transkei. Wouter Basson furthermore offered him 100 000 tablets per month for one year. (Allegations)				X		

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
			The above person is a key figure and is part of the group BSB members who instituted legal proceedings against the SADF. (Sworn affidavit can be obtained)				X		
			The death of one Holtzhausen who was involved in the SADF's ivory/wood/diamond smuggling trade with Angola might point to this group.(Allegation)				X		
			It is known that Wouter Basson's direct supervisor had no control over him and that he pursued his own agenda. (Technical sources of conversation with subordinates who made arrangements.)				X		

Ser No	Alleged activities	Individuals involved	Information supplied by sources	Evaluation	Nature of Information/Intelligence				Further action
					Vague allegation	Strong allegation	Probably true	Confirmed	
	iv. Some members' involvement in corruption for personal gain		Corruption - Brig Wouter Basson has free access to the Lear Jet of Special Forces for private flights to rugby matches and buying sprees in foreign countries (Allegation - various sources)	Various reports have been received in respect of Brig Basson's misuse of official resources and the fact that that he lives exceptionally extravagant. Aspects are being investigated by the AG (Auditor-General/Attorney-General ??)				X	AG
			- Brig Basson invites others along and makes use of the most expensive accommodation. He has recently bought a house in France as well as corporate membership at a gholf club in France (Allegation by reliable source)					X	AG

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ANNEXURE C OF STAFF REPORT
DD DECEMBER 1992

INDIVIDUALS MENTIONED IN ANNEXURE A

Serial no	Individual	Allegations & circumstances wrt indivuals, supplied by individuals	Remarks	Conclusion
	a	b	c	d
1	Brig Jake Botha	- Supervises Reconn (Special Forces) - Entangled in the past & its momentum - Will not be able to detach himself from the past	It cannot be ruled out that he might be discredited in future due to alleged activities of subordinates	Ought to be included in the intervention
2	Gen-Maj HJ Roux	- Controls Project Pastoor - Supervises Reconnaiss Regiments - Ought to be aware of activities that might lead to embarrassment	Might be caught up in the momentum of activities that were acceptable in the past	Ought to be included in the intervention
3	Gen-Maj Chris Thirion	- In his current post he should be aware of DEC activities that might lead to embarrassment - Should be aware of possible misuse of Operation Pastoor for possible unauthorised activities	After having followed up allegations/ circumstances supplied by sources they were found to be based on wrong conclusions. It was concluded that he (Thirion) had taken over Gen Joubert's association with Project Pastoor when he had succeeded the latter.	NOT affected by possible intervention

4	Brig Ferdi V Wyk	- Commands Bev Com (?) - Was aware of Flores' assignment - Arranged clandestine visit of a foreign journalist via RSA to discredit ANC, but referred him to Gen-Maj Tienie Groenewald - Involved in discrediting activities iro political opponents	May be subjected to serious discrediting actions in future	Ought to be included in intervention
5	Brig Tolletje Botha	- Have direct command over DCC - Was aware of Flores' double agenda	Was discredited	Ought to be included in intervention
6	Col At Nel	- Took initiative in various activities that might have led to embarrassment, such as: i. Discrediting campaigns ii. Attacks by PAC members on ANC members in Transkei	Was discredited and allegedly involved in several other activitiess that may lead to embarrassment	Ought to be included in intervention
7	Brig Wouter Basson	- Involved on poison murders - Involved in chemical attack on Frelimo - A founder of the underground organisation "Binnekring" ("Inner Circle")	His alleged activities are of such a nature that they might lead to serious embarrassment. They also have the potential to seriously harm the State	Ought to be included in intervention
8	Col HAP Potgieter	- Involved in destabilisation activities (probably unauthorised)	May be discredited. Allegedly pursuing own agenda.	Ought to be included in intervention

9	Brig Oos VD Merwe	- Laid down intelligence requirements regarding the guard system at the SP's residence. - Said that he might be prepared to launch a coup to restore order.	May be discredited. Is to retire. Works against Government policy.	Ought to be included in intervention.
10	Col Mielie Prinsloo	- Involved in destabilisation operations on own initiative - Provides intelligence support, of which the official nature is being queried - Involved in coup-related planning/statements	May be seriously discredited. Allegedly pursues personal agenda or twists existing mandate for self-initiated objectives	Ought to be included in intervention
11	Comdt Anton Nieuwoudt	- Was involved in Ciskei coup and Sebe murder - Controls Askaris (probably unauthorised) - Involved in destabilisation activities (probably own initiative) - Involved in coup planning/statements	Was discredited and may still be discredited. May involve the SADF in his own alleged double agenda, which may lead to serious embarrassment (whether true or not)	Ought to be included in intervention
12	Col Bert Sachse	- Involved in training of resistence movements in neighbouring countries - Allegations of smuggling of rhino horns	May be discredited. Probably pursuing a personal agenda	Ought to be included in intervention
13	Col Hannes Venter	- Involved in destabilisation operations (probably own initiative)	May be seriously discredited and may involve the SADF	Ought to be included in intervention

14	Comdt Henry VD Westhuizen	- Involved in destabilisation activities (probably own initiative) - Handles agents with questionable backgrounds	Allegedly pursues a personal agenda and allegedly entwined his official duties with his personal agenda	Ought to be included in intervention
15	Gen Kat Liebenberg	- In full command of SADF - Exposed to blackmail as result of previous involvement in unauthorised BSB activities - Allegedly involved in ivory smuggling (confirmed by independent sources) - Direct superior of Brig Wouter Basson, therefore he ought to know of the latter's probable unauthorised activities (Allegations by independent sources)	Probably caught up in albatrosses of the past that can result in him being discredited	Ought to be included in intervention

16	Lt-Gen G Meiring	- Full command of GS2 and Special Forces - Authorised Flores' visit and itinerary abroad - Gave instruction iro efforts to determine Rightwing support within Special Forces in order ro ensure selective summons when required - Forbade collection by Special Forces on rightwingers or rightwing organisations - Told an inner circle that he was prepared to launch a coup if necessary (Reliable source)	May be discredited due to the Flores case. Wrt the allegation iro Rightwing, his activities are evaluated as part of contingency planning. Since he has full command of the Army, he might not be able to escape the responsibility , should it be found that that the existing mandate/assignments were developed for other objectives	Ought to be included in intervention
17	Lt-Gen CP VD Westhuizen	- In view of his position as commander of the DI and DCC he had to be aware of malpractices at these offices. - He has albatrosses round his neck from which he cannot espcape, e.g. i. Goniwe ii. Hammer Forces iii. Train murders caused by members under his command	Probably caught up in albatrosses of the past that are inescapable	Ought to be included in intervention

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D-1

Annexure D
of Staff report
dd December 1992

INDIVIDUALS ALLEGEDLY ATTACHED TO OR IN CONTACT WITH DIVISION INTELLIGENCE

Serial No	Individual	Affiliation	Activities	Status				Remarks
				Uncertain	Above suspision	Criminal activities	Goldstone Commission	
	a	b	c	d	e	f	g	h
1	JF Verster (Rich) i. ID no [redacted] ii. Alias iii. [redacted]	Member of Company	Allegedly individual is involved in : i. The smuggling of (1) drugs (2) ivory (3) gem stones (4) weapons (5) foreign currency (6) counterfeit money ii. Car and lorry theft			X X		Information regarding the smuggling & vehicle theft has been handed to the SAP (MID) for further investigation
2	JA Nieuwoudt (Comdt) i. J Nel; J Buitendag	SADF ex-Ciskeian Intelligence Service	i. Allegedly the individual is involved in cycad smuggling ii. Allegedly the individual is involved in organising an underground structure to serve as an alternative structure should the negotiation process fail	X X		X		The origin of the information is extremely sensitive and might compromise a total source network. Utilisation of the information must be cleared with the handler

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D-2

3	H VD WESTHUIZEN i. [redacted]	Member of Company ex-SADF (DI)	i. Allegedly the individual is involved in the smuggling of (1) cycads (2) gem-stones (3) counterfeit money ii. Allegedly the individual is involved in activities probably related to violence			X X X	X	information to confirm the allegations could not be obtained. In view of the nature of his position he was concerned with collection on MK
4	G Janse Van Rensburg i. [redacted] ii. Alias: Steven van Lill iii. [redacted] Str	Member of Company ex-NI	Allegedly the person is involved in the smuggling of drugs and Red Mercury	X		X		To date confirmation for allegations could not be obtained

5	Tony Oosthuizen i. *Aliases (1) Tobie Esterhuizen (2) Michael O'Kelly (3) MJ Olivier ii. [redacted]	Member of Company ex-NI	Alleged agent for MI6			X		There were inve...ions in this regard. The allegations could not be confirmed.
6	AM VD Berg (Maj) i. [redacted] ii. [redacted]	SADF	Allegedly the said person misused official contacts for personal gain, and he is involved in an extramarital relationship	X				The allegations regarding the misuse of official contacts are being investigated by an RVO (??). Substantiation could not be obtained.
7	GD Price i. ID No [redacted] ii. Alias: A Wiltshire iii [redacted]	Member of Company ex-Rhodesian	Alleged agent for MI6			X		To date allegations have not been substantiated

8	RI Wishart	Member of Company ex-Rhodesian	Alleged agent for MI6	X		X		Allegation not sub...ntiated
9	HJM Widdowson (Cmdr) i. Force No [redacted] ii. Address [redacted]	SADF	Allegedly involved in theft of an R4 as well as espionage on behalf of a foreign intelligence service	X		X		Allegation not substantiated to date
10	HD Terblanche (Maj) i. Force No [redacted] ii. Address [redacted]	SADF	Allegedly involved in smuggling of gem-stones			X		There are good indications that the individual is indeed involved in smuggling of diamonds
11	Stefan Snyders (Comdt)	SADF	Allegedly involved in smuggling of diamonds and emeralds			X		Snyders maintains very close contact with Henry VD Westhuizen
12	Vernon Lange ii. Alias P Page	Member of Company ex-BSB	Allegedly involved in smuggling activities	X		X		Nature and extent of activities not known

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13	JG Nieuwoudt i. Alias Neuman	ex-BSB Member of Company	Allegedly involved in extramaritsl relationship	X				No further negative information is known
14	JP Du Preez i. Alias J Du Plooy	ex-BSB Member of Company	Allegedly the said person has or had in his possession a number of unlicensed weapons of one Owen, ex-BSB member	X		X		No further negative information is known
15	LA MAREE (Chappies) i. ID No [redacted]	ex-BSB Member of Company	This person still has regular contact with former BSB members. No furhter information is known regarding his activities	X				The only negative information available about this person is speculation regarding the Webster murder
16	FL Smit (Maj)	SADF	Allegedly he is involved in i. the smuggling of weapons; and ii. the smuggling of Red Mercury	X		X	X	Not enough information available to substantiate the allegations. His involvement in arms transactions might be a result of his official duties

17	DH Fourie i. ID No [redacted] ii. Address [redacted]	Company member ex-BSB	Allegations regarding this person are the following: i. He was retrenched by the SADF, and he threatens to go to court. ii. He is involved in the training of people in Ciskei, inter alia in VIP protection. iii. He maintains regular contact with former BSB members. iv. He made contact with one Chris VD Merwe in Windhoek with a view to the possibility to establish a cover firm in Windhoek that can be utilised by Fourie to import arms and ammunition to the RSA.	X			X	Although there are indications, the information is inadequate to substantiate allegations wrt any BSB type of activities. It is possible that the cover firm can be used to evade existing sanctions against the RSA. Allegedly Fourie was the operational manager of the BSB and had to approve all tasks.

18	DF du T. Burger (Staal)	Member of Company ex-BSB	Allegations regarding Burger are as follows: i. He was dismissed by the DCC but he refuses to accept his dismissal and threatens with a court case. ii. He is involved in an extramarital relationship. iii. Involved in the smuggling of drugs, red Mercury, gold and diamonds. iv. Involved in suspicious special projects. However, the nature and extent are unknown. v. Maintains regular contact with former BSB members.	X		X	X	Existing information is inadequate to substantiate allegations
19	WJ Basson i. ID No [redacted] ii. Aliases (1) WJ Bester (2) M Barnard (3) M Reyneke (4) Christo Brits	Member of Company ex-BSB	No negative information wrt Basson has been obtained through monitoring actions. However, it clearly appears that he maintains contact with former BSB members and that he closely follows the investigations concerning the Webster murder	X				

20	Mrs S De Beer ii. ID No [redacted]	Member of Company ex-BSB		X				No negative information is known regarding the activities of this person
21	Calla Botha	ex-BSB	He had contact with Rich Verster (a DCC member)	X				Nature and extent of activities not known at present
22	Ferdi Barnard i. Alias Lanco Heins	ex-BSB	i. He was utilised as a source by the DCC, but was dismissed in December 1991. However, he still maintains contact with members of the DCC, including Rich Verster, Wally Wilsenach, Frans Smit and Geoff Price ii. Allegedly he is involved in the smuggling of diamonds, Red Mercury and ivory			X		It is not known if the contact is official or not. However, it would appear that the contact might pertain to criminal activities

23	Leon Flores	Former company member	i. Flores has regular contact with BSB members, inter alia with Col Eugene de Kock (Vlakplaas)					As a result of an i...ident in Britain, Flores was dismissed from the SADF. His continued contact with Eugene De Kock is suspicious
			ii Reports indicate that Flores might be involved in smuggling activities, possibly drugs (an amount of R120 000 for 60 gm was mentioned)			X		
			iii. Allegedly he still operates from Vlakplaas offices	X			X	
			iv. Flores maintains good contact with Henry VD Westhuizen					
			v. Flores allegedly made available information to the press			X		

Only Copy
ANNEXURE E
OF STAFF REPORT
DD DECEMBER 1992

Ser No	Individual	Affiliation	Activities	Status				Remarks
				Uncertain	Above suspision	Criminal activities	Goldstone Commission	
	a	b	c	d	e	f	g	h
1	**Anthony James Christopher White (Ant)** **i. ID No** [redacted] **ii. Aliases** (1)Anthony Greenstone (2) Anthony Greenwood (3) Anthony Greenway (4) James White (5) Abe White	Alleged ex-BSB	i. Allegedly, White, in cooperation with Mac Calloway and George Mitchell, smuggled arms (AK47s and AKMs) from Mozambique to Kwazulu where they were sold. Allegedly, SAO members were also involved in the matter ii. White also had contact with Craig Williamson iii. Allegedly White was also involved in ivory and rhenoceris-horn smuggling				X	

2	**Mike Drummond**	Alleged ex-BSB	i. Drummond allegedly assists Ant White and Mac Calloway in the smuggling of weapons. Amongst other things he delivered weapons to Naas Van Zyl (Mossgas) ii. Drummond was also involved in insurance fraud by reporting a vehicle as stolen to have the insurance amount paid out iii. Allegedly Drummond is also involved in the smuggling of gold and shrimps			X X	X	Drummond owns an aircraft that is used for special assignments
3	**Joe Verster** i. **Address** [redacted]	ex-BSB ex-SADF	i. During July 1992, Verster allegedly recruited individuals in the Johannesburg area. *Remark:* It is not known for what purpose recruiting was done ii. Verster maintains contact with Eugene De Kock iii. Verster has access to large sums of money and is orgaanising an unknown action. There is talk of an amount of R100 million iv. Verster allegedly maintains contact with "Terror" Lekota of the ANC v. Verster has established a business which is concerned with a security firm as well as a firm which transports goods to the so-called Frontline States	X			X	Although the information that is available does not point to Verster being involved in incongruities, there are clear indications that he is busy with a type of "BSB" action. He was managing director of the former BSB

4	Glen Gorman	Alleged ex-BSB	Statements by Gorman indicate that he is involved in an organisation that may be involved in violence. Gorman maintains contact with inter alia Pieter Van Zyl, Rocky Van Blerk and Dr Vernon Joynt. The said individuals all have BSB connections				X	Gorman has not been positively identified to date
5	**Eugene De Kock**	SAP	i. Allegedly, De Kock was to leave the SAP at the end of 1992 to join an organisation of Joe Verster. (*Remark:* The nature of the organisation is not known.) Allegedly, various former SAP colleagues of De Kock and Leon Flores were to join the organisation. It was alleged that De Kock would have brought with him to the organisation a large number of weapons cached in and outside the RSA. According to Ferdi Barnard, De Kock did not leave the SAP but was to take over underground structures of the SAP's D Section. ii. Allegedly De Kock is involved in smuggling trade, including Ferdi Barnard's alleged smuggling activities iii. De Kock has close contact with Henry VD Westhuizen, Ferdi Barnard and Leon Flores				X	
6	**Col Jan Breytenbach**	ex-SADF	Allegedly Breytenbach is engaged in recruitment for/creation of a resistence structure. Current as well as former members of the Security Forces allegedly are involved in the organisation	X			X	No further information regarding the resistence structure is available

7	**AB Stander (Riaan)** i. Employed at Intercol Pty Ltd. Directors of this company are Craig Williamson, Stander And Ant White	Alleged ex-BSB	i. Stander maintains contact with Staal Burger. The nature of the contact is unknown. ii. Allegedly, Stander is involved in discrediting activities directed against the RSA Government iii. Allegedly, Stander is involved in currency fraud iv. During a recent search at his house/business concern (Kastech - Eastech ??), a large number of arms and ammunition was found. v. His business concern, Kastech - Eastech??? may have connections with the CIA			X X X		Stander's activities are investigated by the SAP

IN THE COMMISSION OF INQUIRY INTO STOPPED TRC INVESTIGATIONS AND/OR PROSECUTIONS

AFFIDAVIT OF OLE BUBENZER

I, the undersigned

OLE BUBENZER

state under oath as follows:

1. I am an adult male, employed as a Senior Legal Counsel in the European Central Bank, and presently resident in Frankfurt, Germany.

2. I am the author of the book *Post TRC prosecutions in South Africa: Accountability for political crimes after the Truth and Reconciliation Commission's amnesty process* (**the book**) that was published in 2009 by BRILL.

3. The facts stated herein are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.

4. I confirm the contents of the founding affidavit of Lukhanyo Calata dated 17 January 2025 filed in *Calata & Others v Government of South Africa & Others* (Gauteng Division, Case No. 2025-005245), insofar as it pertains to me. A certified copy of this affidavit was supplied by Webber Wentzel attorneys to the Commission on 10 October 2025 in the Calata and Others Volume at bundle 7.

5. The research that I conducted for the book was largely conducted during a four-month trip to South Africa in 2006. I sourced information from court documents, written materials and interviews. I conducted more than 20 interviews with persons who were knowledgeable with the subject of post-TRC prosecutions.

OLE BUBENZER

. The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at _____ on _____ 2025, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

_____

COMMISSIONER OF OATHS

Full names:

Business address:

Designation:

Capacity:

Dr. iur. Ole Bubenzer

Heidestr. 48, 60385 Frankfurt, Germany I M: + 49 (0)179 45 60962 I E: ole.bub@gmx.de

SUMMARY

Lawyer and academic with a focus on public international law, European law and law of international organisations

EXPERIENCE

1/2024 – present **Senior Legal Counsel**
Directorate General Legal Services
European Central Bank – Frankfurt, Germany

- Provision of legal advice as in-house legal counsel on civil service/employment law, contract law and procurement law matters

8/2020 – 12/2023 **Senior Compliance Officer**
Compliance and Governance Office
European Central Bank – Frankfurt, Germany

- Provision of advice on individual compliance and ethics matters and disciplinary follow-up

11/2014 – 7/2020 **Legal Officer**
Directorate General Legal Services
European Central Bank – Frankfurt, Germany

- Provision of legal advice as in-house legal counsel on contract and procurement law matters, privileges and immunities and tax law

2/2014 – 9/2014 **Lawyer**
Federal Office for Nature Conservation – Bonn, Germany

- Legal research and advice on nature conservation law and international nature conservation law and treaties

2/2011 – 2/2014 **Associate Legal Specialist**
United Nations Volunteers/United Nations Development Programme – Bonn, Germany

- Provision of legal advice as in-house legal counsel in UN Volunteer related legal issues and institutional and commercial legal matters

9/2010 – 12/2010 **Attorney**
Orrick – Berlin, Germany

- Attorney in public law/ procurement law, real estate law

5/2008 – 5/2010 **Trainee lawyer**
Supreme Court of Berlin, Germany

- Work as junior lawyer at civil law court, public prosecution office, Ministry of Foreign Affairs, lawfirm, Office of the High Commissioner for Human Rights

EDUCATION

2010 **Second Legal State Exam, Berlin, Germany**
Certification to practice legal professions and be admitted to the bar

2009 **Doctor Iuris/PhD in law**, Humboldt-University Berlin, Germany
Research topic: Prosecution of politically motivated crimes in South Africa after the Truth and Reconciliation Commission's amnesty process

Publication: Post-TRC Prosecutions in South Africa – Accountability for political crimes after the Truth and Reconciliation Commission's amnesty process (Martinus Nijhoff, 2009)

Supervision by Prof. Dr. Gerhard Werle – former Director of the African-German research network and head of a research centre on transitional justice in South Africa, the Truth and Reconciliation Commission and international criminal law (numerous research papers and PhD thesis on the TRC process have been conducted by Prof. Werle or under his supervision such as Justice in Transition – prosecution and amnesty in Germany and South Africa (2006) – Karoline Koppe, Wiedergutmachung für die Opfer von Menschenrechtsverletzungen in Südafrika (2005) - Florian Kutz, Amnestie für politische Straftäter in Südafrika (2001) - Volker Nerlich, Apartheidkriminalität vor Gericht (2002))

2006 **First Legal State Exam**, Hamm, Germany

University studies at Humboldt-University Berlin and Bielefeld University

Social Service

7/1998 – 9/1999 Voluntary work at Camphill Village West Coast, Cape Province, South Africa

NATIONAL PROSECUTING AUTHORITY

REPORT TO PARLIAMENT: 2002 / 2003

INTRODUCTION

On the eve of the 5th anniversary since its establishment in terms of Section 179 of the Constitution and the National Prosecuting Authority Act of 1998, the National Prosecuting Authority ("the NPA"), is once more honoured to have an opportunity to present its report for the year 2002/3 to the Parliament of the Republic of South Africa.

National Director of Public Prosecutions, Bulelani Ngcuka

Consistent with what has now become almost a tradition since its establishment in 1998, the NPA continued in this reporting period, to find innovative ways of contributing to the administration of criminal justice in our country. Its contribution has largely taken place within the 2001 NPA Strategic Framework, which was based on the Balanced Scorecard approach. In this strategic framework we have agreed and defined for ourselves the future direction of the organization. The vision that we have carved out for the NPA, "*Justice in our society so that people can live in free - dom and security*" remains our guiding post to take us into the future. It is this vision that inspires us to continuously reflect on the performance of the organisation.

During 2002, strategic reviews of all the business units within the NPA as well as a review of the NPA's performance at a corporate level were conducted. The purpose of the reviews was twofold. Firstly, to ensure that our strategies remain relevant; and secondly, that we assess our performance and determine those areas which necessitate change.

To reflect on the achievements of the NPA during the reporting period, this report will focus on the following themes:

- Efficient and Effective Court Performance
- Contributing to the Fight Against Crime: Making a Difference

  Taking the Profit out of Crime
  National Priority Crimes
  Impacting on White Collar Crime
  Protecting the Vulnerable in Society
  Specialised Support Service for Vulenarable and Intimidated Witnesses in Judicial Proceedings
  Dealing with the past
  Special Projects

- Enhancing and Improving the Effectiveness and Efficiency of the NPA

EFFICIENT AND EFFECTIVE COURT PERFORMANCE

The NPA has come a long way since its establishment in 1998 when the morale of a substantial number of our prosecutors was at its lowest. The challenges facing the newly established Prosecuting Authority were expressed in what seemed like a list of demands from prosecutors who were protesting almost every day. Some of these challenges were:

- demand for higher salaries;
- high turnover of experienced prosecutors;
- prosecutors not identifying with the new NPA;
- vacant posts not being filled for years;
- lack of basic resources such as fax machines, etc;
- lack of career pathing;
- merit awards not being paid for almost three years; and
- very low productivity levels, e.g. courts set for approximately just over two hours per day.

In responding to these challenges we took some rather ambitious initiatives. This report will demonstrate that we not only successfully addressed all of these issues, but achieved much more than what we set out to achieve.
For example, the vacancies created by the high turnover of staff, which was crippling the proper functioning of offices, and the long and unnecessary delays in filling posts which was threatening the ability of several offices to deliver the most basic services, are now a thing of the past.

Not only did we fill all the vacancies, but we managed to re-employ most of the experienced prosecutors who had left. By re-employing this core of skilled prosecutors we ensured that the quality of prosecutions conducted is of a higher standard. We also ensured that the transfer of skills to our junior prosecutors took place. The filling of vacancies also increased our establishment, so that we now have two prosecutors per court in most Regional Courts.

The recruitment procedure that we have adopted, also ensured that we do not appoint graduates fresh from university and expect them to appear in court and prosecute. A vigorous 6-month training programme under the supervision of tutors has been put in place, specifically to provide "in-court" training to our aspirant prosecutors. This demonstrates our commitment to maintain high quality prosecution standards.

In addition, we have employed 32 Senior Public Prosecutors whose only function is to visit areas where there are problems in order to assist the existing prosecutors in court. By so doing, we also ensured that a process is in place to transfer skills to existing prosecutors. These prosecutors have already visited areas such as the Eastern Cape (the former Ciskei area) and Pinetown in KwaZulu-Natal and would now be dispatched to the Butterworth area.

Further, probably the most critical challenge we faced, one that was very close to prosecutors' hearts and minds, was the issue of salary increases. We seized the opportunity and

turned the issue of salary increases into a platform from which we launched our performance management initiative. We successfully negotiated with government and the unions for a performance-based salary increase for prosecutors. This approach, which was the first of its kind in our sector, formed the basis for the new career path we have now established for prosecutors. Today we can report that relatively few prosecutors leave the service because of poor salary or poor conditions of service. Coupled with bringing the payment of the long outstanding merit awards up to date, the focus of prosecutors is now on performing the core function in contrast to money-related issues.

The totality of the initiatives we embarked on in addressing our initial challenges, resulted in the kind of successes that this report will reflect on.
The NPA measures its performance mainly through the efficiency and effectiveness with which we execute our core function, i.e. prosecutions. Though all the different units within the NPA complement each other in the execution of this mandate, the oversight of our performance in courts is managed by the National Prosecuting Service ("NPS"), a division charged with fulfilling our core business. Through the court management system we can now account for each and every hour that a prosecutor spends in court. The performance of the courts can be illustrated in terms of court hours, backlogs, cases finalized and conviction rates.

National Court Hours
The overall progress made by all the Lower Courts during 2002 is highly commendable.

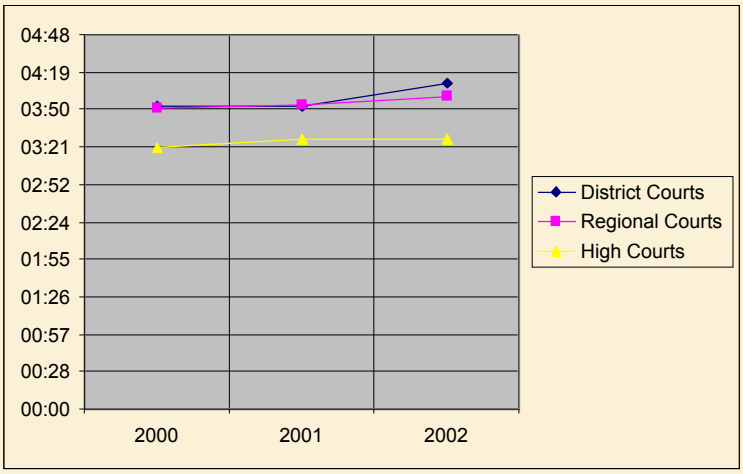
The main **District Courts** have impressed with an improvement in the national court hours from an average of 3h53 in 2001 to an average of 4h11 in 2002. The District Courts still managed to improve their performance by obtaining an average of 4h21 hours during March 2003, the highest national average hours achieved by District Courts since 1999 (which was 3.39).
The progress made by the main **Regional Courts** is equally notable. The average hours of the Regional Courts have improved from an average of 3h55 in 2001 to an average of 4h01 in 2002. They also managed to improve on the latter by obtaining an average of 4h03 during March 2003.

In 2002 the **High Courts** were not able to improve on the average court hours of 3:29 achieved in 2001, maintaining an average of 3:28. This court time represents the actual time spent in court by prosecutors on trial and sentence matters.

The table and graph below depict the increase in courts hours since 2000.

Court Hours			
Courts	2000	2001	2002
District Court	3.53	3.53	4.11
Regional Court	3.52	3.55	4.01
High Court	3.22	3.28	3.28

Court Hours



National Conviction Rates

The District Courts further improved the average conviction rate of 82% obtained in 2001 by maintaining an average conviction rate of 83% in 2002. Further improvement on the conviction rate is already noticeable in 2003, as a conviction rate of 84% has thus far been achieved.

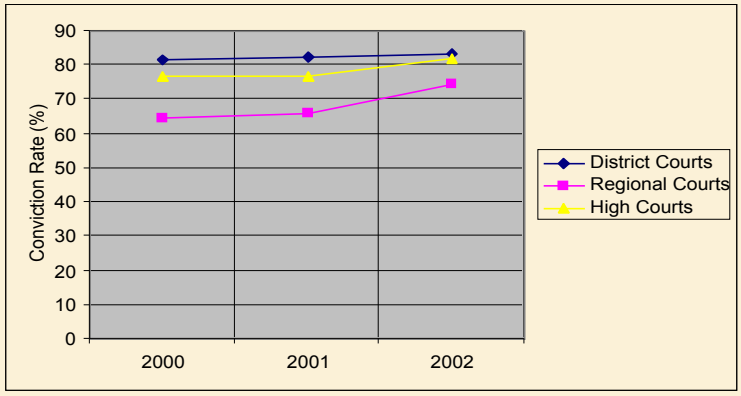
The Regional Courts managed an impressive 74% conviction rate in 2002 as opposed to the 66% conviction rate obtained in 2001. A 4% improvement in the conviction rate is already noticeable during 2003 compared to the same period of the previous year.

The High Courts' average conviction rate for 2002 was 82%, a significant improvement from the 77% in 2001. In the January – March 2003 period an average conviction rate of 87% was achieved. This exceeds the target of 85% set for the High Court.

The increase in the percentage average conviction rates nationally are depicted in the table and graph below.

Conviction Rates (%)		
Courts	2001	2002
District Court	82%	83%
Regional Court	66%	74%
High Court	77%	82%

Conviction Rate (%)



Finalisation of Cases Nationally

The District Courts also managed to improve their finalisation rate by finalising 20% more cases during 2002 than in 2001. They finalised 3% more cases thus far during 2003 compared to the same period in 2002.

Noteworthy is the 48% increase of new cases received by all District Courts during 2002 compared to the new cases received during 2001. Notwithstanding their improved performance, the steady increase in the intake of new cases resulted in a 9.9% increase in the number of outstanding cases on the District Court's roll at the end of 2002. The national outstanding court roll for District Courts has been reduced by 7, 8% thus far in 2003. The total number of outstanding cases at the end of March 2003 was 130 132.

The number of new cases received by the Regional Courts escalated during 2002. 37.4% more cases were received in 2002. The steady increase in new cases resulted in an 11.9% rise in the number of outstanding cases at the end of 2002 compared to 2001. The national outstanding court roll for Regional Courts has thus far been reduced by 0.7% during 2003. The total number of outstanding cases at the end of March 2003 was 35 543.

In respect of the High Courts, in addition to the 1 469 trials that were finalised, 596 minimum sentences were disposed of in 2002. This represents a substantial increase over the 1 178 trials and 448 minimum sentences finalised in 2001. The increase in finalisation was primarily achieved through increasing the number of courts and court days sat. This has further increased in 2003, which has enabled the finalisation of 503 trial matters in the period January - March. Of these matters 184 were minimum sentences.

Cases older than six months

The national target is that 75% of outstanding cases on the roll in each court should not be more than six months old. To monitor these cases, statistics are collected on a six-month basis.

Since the targets were set at the beginning of 2002 the following improvements can be seen:

From June 2002 to December 2002 the Regional Court has improved nationally by 1% and the District Courts have improved nationally by 3%.

Saturday Courts and Additional Cour ts

The Saturday Court Project commenced in February 2001 and the Additional Court Project in March 2002. In 2002 the Saturday and Additional Courts finalised a total of 29 383 cases. The number of cases finalised on the two projects doubled in 2002 compared to 2001. On average there were 75 Additional Courts in session throughout the year 2002 and 82 Saturday Courts. The average court hours maintained by the Saturday Courts in 2002 were an excellent 5h11. Between January and March 2003 a further 7 051 cases were finalised on these projects.

The Additional Court initiative is assisting not only to increase the court hours and number of cases finalized, but also contributes to the transfer of skills from the senior prosecutors who prosecute in these courts to the junior prosecutors who work with them.

The Saturday and Additional Court initiatives therefore continue to yield positive results and are making an immense difference in the effectiveness of our courts' performance.

Number of Withdrawals Nationally

A concern has been raised about the rate of cases withdrawn compared to cases finalized. The total number of cases withdrawn at the Lower Courts for 2002 amounted to 422 404 compared to 397 850 of finalized cases. On the face of it, this may be a cause for concern, as it seems to indicate that a significant number of cases are not finalized with a verdict.

However, our view is that a high rate of withdrawals is not necessarily a reason to panic. It may be indicative of the fact that cases are referred to court, even though the quality of the investigation is not up to standard. It may also be indicative of the success of our efforts to ensure that prosecutors make a proper decision, before placing a matter on roll for trial. In fact we are now arranging consultations with other stakeholders within the criminal justice system in order to ensure that no arrests are effected without a decision by a prosecutor, as far as possible. We hope that through this process we will be able to reduce the number of cases withdrawn at court. Such an approach is already yielding positive results in the Bellville and Wynberg area where prosecutors volunteer, without any form of remuneration, to visit police stations on Saturdays and Sundays, to screen cases and weed out those that should not be on the roll.

Case Flow Management

An audit of the trials and minimum sentences for 2002 in the High Courts, indicated that the period from the commencement of the trial until sentence is unacceptably long. In the case of trials this period averages 667 days, and in the case of minimum sentences it averages 788 days. [The results of the Audit of trials in the High Court is included in Appendix 1]

In order to address this, the Judiciary has been involved in the management of case flow. The Honourable Mr Justice Kriegler has been appointed by the Department of Justice, together with other role players to develop a model for case flow management with the aim to ensure that cases are optimally processed through the judicial system, and that there is greater judicial management of the case flow process.

Fast-tracking of Guilty Pleas

Traditionally an enormous amount of casework is referred to the Director of Public Prosecutions (DPP) for decision-making and oversight. Often this arrangement leads to blockages and delays in the criminal justice system. We have re-engineered the system to provide for greater decentralization of discretion and decision-making to Chief Prosecutors and Senior Public Prosecutors. It allows advocates at the DPP offices to concentrate on matters which would ultimately be heard in the High Courts, and to take responsibility for such cases at an earlier stage. In Kwazulu-Natal cases are being fast-tracked where accused persons have indicated soon after arrest that they wish to plead guilty. Ten such matters were finalised in 2002.

Highlights of Cases

Certain successes also need to be celebrated. These include two serial killer cases finalised in the High Court in Johannesburg. The first being the so-called Bruma Lake Serial Killers where the two accused were convicted on multiple counts of murder and other charges, and received 8 terms of life imprisonment plus an additional 242 years and 5 terms of life imprisonment plus 375 additional years respectively. The Nascrec Serial Killer was convicted on 74 counts, which included 17 counts of murder and 22 counts of rape. He was sentenced to 17 terms of life imprisonment plus 781 years imprisonment. Other high profile cases that have generated a lot of public attention and debate are the Marieke De Klerk murder case in Cape Town and the Boeremag treason case in Pretoria.

CONTRIBUTING TO THE FIGHT AGAINST CRIME: MAKING A DIFFERENCE

As a constitutional institution and an organ of state we are duty-bound to contribute to a society based on democratic values, social justice, fundamental human rights and improving the quality of lives of our people. Crime in general poses a specific threat to these constitutional ideals. It is to this end that we recognize our responsibility in the fight against crime in general and the threat of organized crime in particular. In this regard we are continuing to make significant inroads through our specialized units such as the Directorate of Special Operations (Scorpions), the Asset Forfeiture Unit and the Specialised Commercial Crimes Unit. In addition, we are continuing to make a difference in the lives of the vulnerable in our society through the Sexual Offences and Community Affairs Unit, and the Witness Protection Unit. The NPA is also playing a lead role in targeted task team operations.

TAKING THE PROFIT OUT OF CRIME

Taking the profit out of crime through implementing the asset forfeiture provisions in chapters 5 and 6 of the Prevention of Organised Crime Act, Act 121 of 1998 ("**POCA**"), remains one of the key objectives for the NPA. The use of POCA's forfeiture provisions has, over the past four years, proven to be an effective tool, particularly in the fight against organised crime.

The application of Chapter 5 is dependent on the State securing a conviction in a criminal court. After conviction, the State may apply to have forfeited from the convicted person, an amount equal to the benefit derived as a result of the commission of the proven offence. Chapter 6 permits the State to forfeit the proceeds and instrumentalities of crime in a civil process that is not dependent on or related to any criminal prosecution or conviction.

Since the establishment of the Asset Forfeiture Unit in May 1999 in the Office of the National Director of Public Prosecutions, significant progress has been made in this regard. Thus far the AFU has done roughly 47% of its cases in terms of Chapter 5 and 53% in terms of Chapter 6. The Chapter 5 applications tend to be used in the bigger matters, and about 80% of all assets frozen have been through Chapter 5.

Over the past 4 years we have, through the AFU, frozen assets valued at nearly R500 million in terms of nearly 300 orders that have been sought. We have already proceeded to the second stage where we apply for the forfeiture of the frozen assets in 173 cases involving R155 million.

Thus far 129 forfeiture orders have been granted and applications involving R76 million have been finalised.

The total money deposited in the Criminal Asset Recovery Fund (CARA) stands at R18 million. An important focus of our work has been to ensure that the assets are returned to the victims of the crime. Assets are only forfeited to the State when there is no victim, and it will be seen that the bulk of finalised cases involved victims.

Roughly half the assets we have frozen will eventually be returned to the victims of the crime. In the current year, one very large matter was finalized, which involved the return of more than R85m to a victim of a massive fraud in the **KNA** matter.

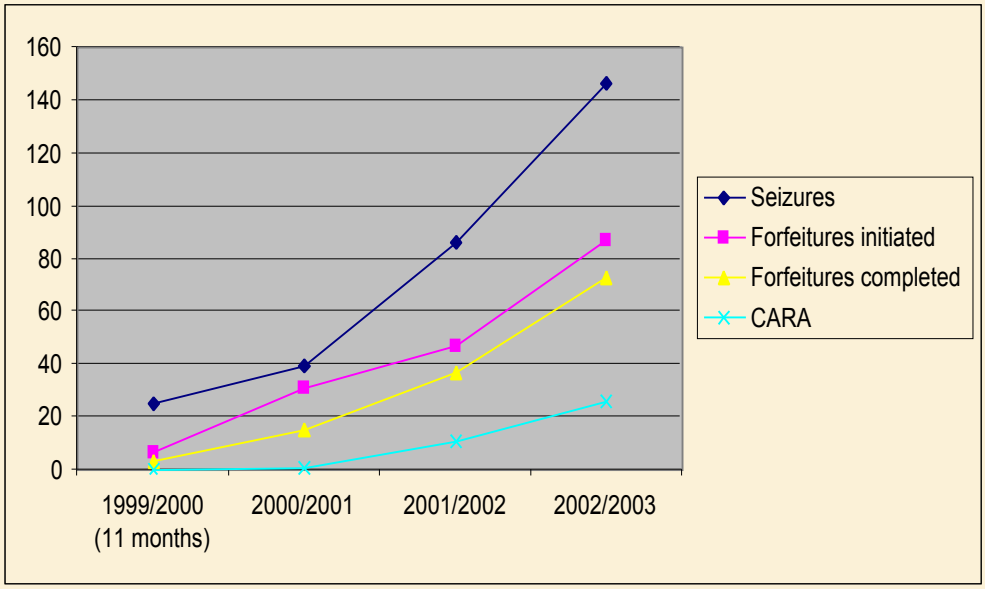
Increased Number of AFU cases

Although our initial emphasis was on doing mainly test cases, a shift has taken place towards increasing the volume of cases.

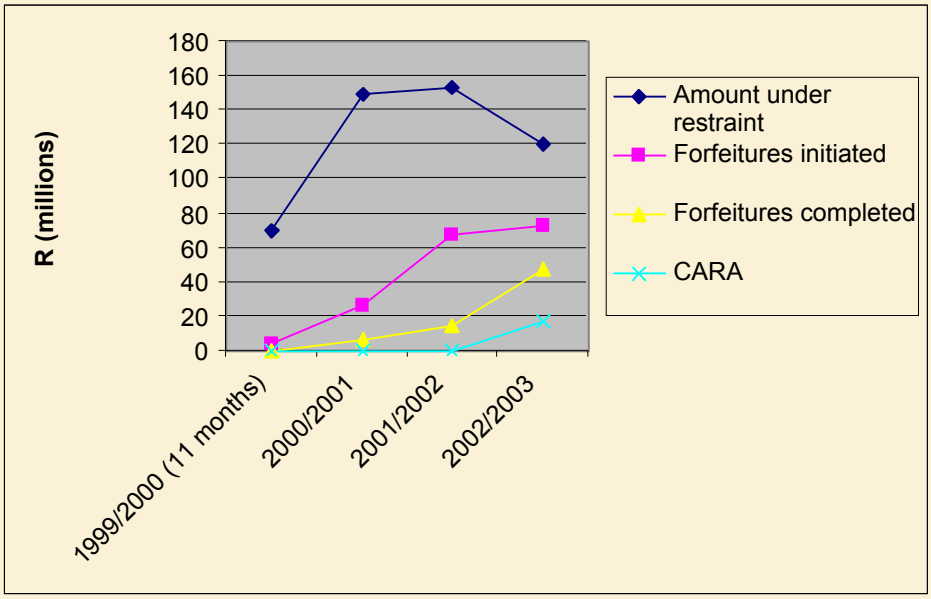
	1999/2000 (11mnths)	2000/01	2001/02	2002/03
Seizures	25	39	86	147
Amount under restraint	R70m	R149m	R154m	R120m
Forfeitures initiated	7	31	47	87
Amount	R3.8m	R26m	R68m	R73m
Forfeitures completed	3	15	37	73
Amount	R0.2m	R7.2m	R15m	R48m
Money deposited CARA	0	1	11	26
Amount	0	R0.14m	R0.58m	R17m

The graph below depicts the increase in the number of asset forfeiture cases since 1999, including the increase of monies in CARA.

Increased Number of Asset Forfeiture Cases



Increased Asset Forfeiture (in R mil)



It is clear that we have achieved exceptional growth in the area of asset forfeiture. The figures show that during the reporting period we have roughly doubled the number of new cases and other applications, as well as the value of assets involved compared to the previous year.

The table and graphs also reflect the special effort we have made to increase the flow of funds into the Criminal Assets Recovery Account. Over the past year, the amount increased spectacularly from R580 000 in the previous year to over R17 million.

Impacting on Selected Priority Crimes

Through the use of asset forfeiture law we are also continuing to impact on selected priority crimes. Although the table below is not comprehensive, it gives an indication of the kind of cases done thus far. It is clear from the table below that a significant impact is being made in the area of economic (white collar crime), corruption, crimes involving natural resources and brothels.

Type	Number	Percentage	Value	Percentage
Economic	102	32.1%	294,079,566	58.7%
Corruption	43	13.5%	38,766,123	7.7%
Drugs	87	27.4%	29. 770. 644	6.0%
Natural Resources	32	10.1%	55,809,740	11.1%
Precious metals	10	3.1%	22,970,600	4.6%
Violent crime	25	7.9%	19,296,747	3.9%
Gambling	4	1.3%	635,000 0	1%
Brothel	2	0.6%	37,500,000	7.5%
Other	11	4.1%	2,322,035	0.5%

Establishing a National Pr esence

To ensure a greater volume of cases, we have started to decentralise the activities of the AFU. We have already established regional offices in Cape Town, Durban, Johannesburg and Port Elizabeth. In addition, we have a small one-person presence in East London and Bloemfontein.

The regional offices will continue to expand in the coming year, and will ensure that asset forfeiture becomes more widely used throughout the country. We are also planning to establish a presence in Kimberley and Mmabatho.

Establishing a Good Jurispr udence: Significant Cases

The complexity of the work of the AFU is illustrated by the fact that we are at present litigating about 30 different legal and procedural issues, apart from a number of constitutional issues. Only two of these issues have been decided and finalised, by either the Supreme Court of Appeal or Constitutional Courts. These litigations have significantly hampered our productivity. The Mohammed case serves as a good example of this.

To date we have obtained 46 judgments on various aspects of the interpretation of POCA (Constitutional Court – 2; Supreme Court of Appeal – 2; High Court – 40; and Magistrate's Court – 2).
Some of the significant cases are highlighted below:

The Mohamed-case
The most significant matter during the year was the four judgments obtained in the matter of Yaseen Mac Mohamed, who owned two properties that were allegedly operated as "chop shops" for stolen or hijacked vehicles.

In March 2002 Judge Cloete in the Witwatersrand Division of the High Court ruled that Chapter 6 of POCA was unconstitutional, because it allowed the State to approach the court *ex parte* and did not allow the court to hear the other party before granting a final seizure order.

The matter was argued before the Constitutional Court as a matter of urgency. It ruled in June 2002 that if the High Court had been correct, it had the power to remedy this unconstitutionality, and that any such remedy would not assist Mohamed, since it would not render the entire chapter unconstitutional.

The Constitutional Court therefore referred the matter back to the High Court to consider the other constitutional challenges raised by Mohamed.
The matter was re-argued in the High Court. In November 2002 the court again ruled that section 38 was unconstitutional. To remedy the unconstitutionality it held that the words "*ex parte*" in the Act should be removed, and that a provision, to allow for a hearing before a seizure order is made final, should be read into the Act. However, the court dismissed a large number of other constitutional challenges.

The matter was therefore referred once again to the Constitutional Court. In April 2003 the court overruled the High Court decision. It held that the correct interpretation of the section is indeed that the court cannot grant a hearing to the other party before granting an order. However, it held that it was not necessary to rule on its constitutionality, as the section did not exclude the court's discretion to grant the order as a provisional order and allow for a speedy hearing of the other party, before making the order final.
The Mohamed case significantly disrupted our work for over a year. In many cases judges simply would not hear applications until the Constitutional Court delivered its final judgment. We also had to spend much time preparing new sets of papers to deal with the arguments in the various Mohamed judgments.

We hope that we will be able to do significantly more cases this year now that these uncertainties have been removed.

Although the Constitutional Court did not make any ruling on the constitutionality of Chapter 6, it stated at paragraph 15 of its first judgment that:

> *"It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to jus tice. The above problems make a severe impact on the young South African democ racy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals*

should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature."

This *dictum* has been very helpful in subsequent constitutional litigation, since it is clear that while some of the detailed constitutional challenges to POCA still need to be decided, the court appears to accept that in principle asset forfeiture is an acceptable weapon to fight crime in a democratic society.

Rautenbach-case

In September 2002, the provisional restraint order against Billy Rautenbach was discharged by a different judge of the same court (the Witwatersrand Local Division of the High Court) which had originally granted the restraint order in September 2000.

Rautenbach had been contesting the granting of this order from Zimbabwe, where he fled to, after initiation of the criminal investigation against him in 1999.

At the time the *curator bonis* appointed in this matter was in possession of a little less than R40 million of Rautenbach's assets, the most valuable of which was a jet aircraft valued at approximately R20 million.

The NPA immediately filed a notice of appeal against the discharge of the provisional order, and it advised the *curator bonis* that the restrained property need not be returned to Rautenbach's control, as the effect of the filing of the notice of appeal was to suspend the operation of the order discharging the provisional restraint.

Rautenbach however, still in Zimbabwe, brought an urgent application, seeking the immediate release of the aircraft, and contesting that the filing of the notice of appeal indeed suspended the operation of the order setting aside the restraint.

Again, the court ruled against the NPA, with the result that the aircraft, and about R10 million in cash had to be released into Rautenbach's control. The aircraft left South African airspace 5 days later.

We are confident that the appeal to the Supreme Court of Appeal will be successful in this matter. The problem, however, is that, if reinstated, the restraint would to a large extent have been denuded of its impact, in that the bulk of the assets have already left the country. This question, as well as the fact that fugitives such as Rautenbach still appear to be able to contest forfeiture proceedings without subjecting themselves to the jurisdiction of our legal system, are some of the issues that the legislature might consider re-examining at some stage.

Mothibe-case

In this matter the AFU was granted a restraint order over the assets of members of a drug syndicate, following the seizure by the SAPS of chemicals and drug manufacturing equipment capable of manufacturing Mandrax with an estimated street value of R2 billion.

Johannesburg International Airport-case

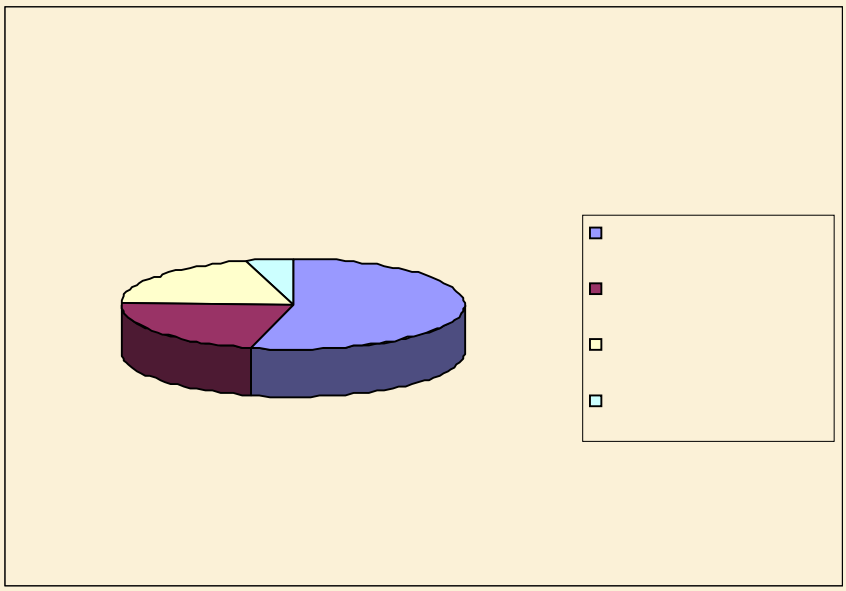
The heist at the Johannesburg International Airport in December 2001 was one of the largest armed robberies in the history of South Africa. We have restrained and forfeited all the properties found in possession of the defendants – both in Zimbabwe and South Africa. Money and goods to the value of some R13, 5 million have been seized.

Viljoen-case

In Cape Town the **Viljoen** matter involving the smuggling of uncut diamonds was finalised with the forfeiture of nearly R2 million to the State.

NATIONAL PRIORITY CRIME

The Directorate of Special Operations (DSO) is specifically mandated to deal with crimes committed in an organized fashion (high-level crimes of national impact). The DSO has differentiated itself from the normal law enforcement approach by adopting a unique, Troika methodology of combining crime analysis, investigation and prosecution in an integrated manner, supported by technology. The focus areas are depicted below.



The DSO has initiated a number of nationally coordinated projects into high-level organised crime in line with our strategic focus areas. These include investigations into:

- Trans-national drug trafficking, by East Asian and West African nationals,
- Human smuggling and trafficking, and
- Cross-departmental corruption in Provincial Governments.

The DSO has created a greater sense of urgency around the application of the Racketeering and Asset Forfeiture provisions of the Prevention of Organised Crime Act (POCA), 121 of 1998. We have already made significant impact in the organized crime cases that are still currently under investigation by using the provisions of the POCA Act. Racketeering prosecutions have been undertaken in six matters, of which four convictions were obtained after the accused persons pleaded guilty. Only one of the matters went on trial where two accused were convicted and sentenced to life imprisonment each **(Green – matter)** .

In one of the major organized crime cases under investigation by the DSO, a total of 66 accused persons have been arrested in four provinces .

This has resulted in the disruption of the activities of the East-Asian criminal groupings operating in South Africa, in collaboration with some South African criminal syndicate groups.

We are also increasing the focus on the criminal conduct and corrupt practices of attorneys and doctors, who abuse the weaknesses in the systems to enrich themselves, more importantly in the Road Accident Fund (RAF) matter. In the same vain the role of auditors in manipulating financial statements and contributing to the demise of major corporations, are under scrutiny. By focusing on major corporate collapses, such as Regal Bank, LeisureNet and Saambou, we are demonstrating our ability to deal with major corporate frauds, which were rarely dealt with in the past, in a way that would instil public confidence in the criminal justice system.

The formation of inter-agency investigative task teams into high profile corporate collapses during 2002, has contributed positively to the way we deal with national priority crimes.

The DSO's contribution to CARA as at the end of March 2003 amounted to approximately R35 million.

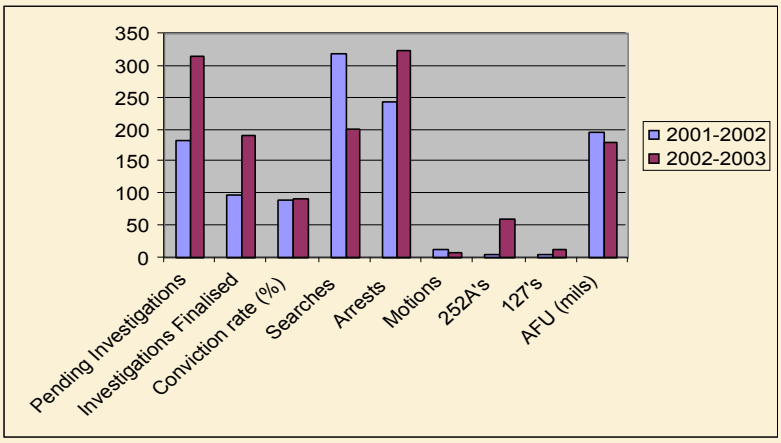
In the face of current technological development, law enforcement is likely to lag behind, unless the DSO has the edge in cyber-forensics, electronic surveillance and financial intelligence. Transnational organised crime syndicates are increasingly exploiting technological developments. Therefore strengthening our capacities herein remains key to our success in 2003 and beyond.

Over the last 12 months alone we have finalised, amongst others, 180 major prosecutions. The investment the government has made in the DSO is bearing fruits.
We have clearly made strides in most of the investigations and prosecutions as opposed to the previous financial year.

The DSO has achieved a positive conviction rate of 86 % (Gauteng 97%; Eastern Cape 98%; Kwazulu Natal 73% and Western Cape 78%), which has contributed to the perception of victory over crime.

A comparative analysis of key activities undertaken during the 2001/2 financial year to those in the reporting period is set out below.

Key Activities: Comparison with previous year



The Directorate is clearly generating more work and has comparatively disposed of more investigations and prosecutions over the past year. The decrease in searches and the increase in arrests, entrapments and monitoring orders demonstrate a positive shift in investigation methodology.

Highlights of cases

Houtbay Fishing

An authorization in terms of section 28(1)(a) of the NPA Act, for investigating offences allegedly committed in respect of the over-harvesting and exporting of South African Lobster, was issued in June 2001. Houtbay Fishing Industries and its affiliated companies as well as officials of the Department of Environmental Affairs, Customs and Excise were the main focus of this investigation. The main accused, representing the company, entered into a plea agreement with the DSO and was convicted of 28 counts of over-harvesting Lobsters and Hake. The accused was eventually penalized by way of a fine and forfeiture to the extent of R20 million, the highest amount in South African asset forfeiture history.

SA Hake (Pty) Ltd was uncovered as having entered into a joint venture with Hout Bay Fishing, overharvesting Hake to the value of R12 million. The Asset Forfeiture Unit finally attached the boat valued at approximately R5,5 million used in this venture, which has now been forfeited to the State.

SA Hake and its director, Manuel Martinez-Martinez, were convicted and fined R150 000-00 and R100 000-00 respectively.

Guanxi:
This is a national project focusing on the activities of East Asian criminal groupings operating in South Africa. A total of 196 suspects and 85 related entities have been identified which are controlled by 14 main targets operating on a national and international level.

The investigations have yielded the following seizures and arrests:

Drugs:

- approximately 2.5 million Mandrax tablets seized at City Deep with a street value of ± R150 million.

Cash:

- approximately R1 million seized in the Peter Xue operation
- R468 000 seized in the Jian Bin Liu operation
- R63 000 seized in the Ka Lun Chan operation
- R129 000 and 1730HK$ seized in the Chi-Chih Hou case;

Abalone:

- 180 boxes of abalone – Chi-Chih Hou case
- 16 856 dried abalone weighing 1030 kg;

Counterfeit cigarettes:

- Over 800 master cases of counterfeit cigarettes with a street value of over R48 million seized to date;

Counterfeit goods:

- One container of branded clothing seized from ethnic Chinese in Durban (value unknown)
- Three warehouses of counterfeit clothing seized in Johannesburg (estimated value ± R12 million);

Seizures, Restraints and For feitures

- R16,5 million Restraint Order granted in the Marx case
- R220 000 Restraint Order granted in the Naidoo case
- Forfeiture application of Plot 154, Bashewa (value R350 000) and Plot 44 Elandsfontein (value R875 300) pending – Peter Shue case
- Forfeiture of No's 45 and 47 Tourmaline drive and Ford LDV (values unknown) KK Day case
- Forfeiture of Plot 144 Petit (value ± R350 000) and Toyota truck (value unknown) Jian Bin Liu case
- Four further vehicles seized by customs in the Ka Lun Chan operation
- Eight other vehicles

Arrests

- 66 (Including one main target Jian Bin Liu)

SAPS executed several other arrests as a direct result of information passed on to them. This forms part of our disruption strategy against abalone poachers, and is aimed at building good relations with SAPS.

Heritage Eyewar e

This case entailed the fraudulent use of the SA government coat of arms in presentations made to overseas companies. These presentations were made by a syndicate operating from Johannesburg in order to fraudulently obtain funds in the form of "419" scams or advance fee frauds. Four accused were arrested, charged and convicted for offences ranging from fraud, corruption and racketeering. They were sentenced to long terms of direct imprisonment, coupled with options of fines in the region of R180 000. Investigations against new identified targets are continuing.

Project Green

The four accused were members of the Green family, who had been charged with drug trafficking and dealing. This was the first racketeering prosecution to be undertaken in the country in accordance with the Prevention of Organized Crime Act (POCA). The court was not convinced that the State had proved the racketeering elements, but convicted three accused on various predicate offences. They were given life sentences as well as some imprisonment terms on other offences. The DSO obtained a restraint order and seized assets to the value of ±R1,5 million; all assets have since been auctioned and the proceeds deposited into the Criminal Asset Recovery Fund.

Indigo

This was a joint investigation conducted by the Police and the DSO in the Utugela area of KwaZulu-Natal. It was a spin-off of the Green matter, which was disposed of during April 2002. Three accused were arrested in a joint sting operation where large amounts of drugs were found. All three accused were convicted of racketeering in the Newcastle Regional Court and were sentenced to 10 years imprisonment each. Assets to the value of R500 000 were also seized and a final forfeiture order made. The significance of this matter is that it was the first racketeering conviction recorded in South African legal history.

Tanstar

This matter involved the investigation of members of the Gayadin-family, who operated illegal casinos. A sting operation was held after which all the illegal casinos in the province, including those run by this family, were closed down. The main accused has been convicted of money laundering, tax evasion and illegal gambling casinos. He was sentenced to two years imprisonment suspended for five years and fined R250 000-00, of which R100 000-00 was suspended. Assets to the value of R17 million were forfeited under the POCA. This matter was tried in the High Court.

Saambou Bank

Three accused were employed by Saambou Bank. One Mr Erasmus, who was a sales manager in the property financing division at the time, manipulated the banking system with the assistance of the other accused, who were his subordinates. The bank and its clients were defrauded of millions of Rands by means of fictitious loan facilities arranged by Erasmus, as well as fraudulent investment transactions.

The main accused was convicted on 35 counts of fraud which involved a total prejudice of R18 million and was sentenced to 15 years imprisonment. The other accused were convicted of corruption and sentenced to five years imprisonment.

West African "419" Scams

This project resulted in three convictions of racketeering in terms of the Prevention of Organised Crime Act. Nigerian nationals were assuming the identity of South African institutions, and particularly the South African Reserve Bank, abroad, with the purpose of perpetrating "Advance Fee Fraud" (popularly known as the "419 scam"). During the course of 2002, eighteen Nigerian nationals were convicted. Three of them paid fines to the amount of R700 000, in addition to the periods of imprisonment imposed. In three cases 50 years of direct imprisonment were imposed. Seventeen illegal immigrants were also deported.

GEMS

This investigation focuses on allegations that SAMWU officials/office bearers received, *inter alia*, substantial financial benefits from one finance company. The investigation team worked closely with the Asset Forfeiture Unit in an attempt to recover millions of Rands lost as a result of the criminal activity. Because of the proactive manner in which the team approached this investigation, the alleged corrupt practices of GEMS were halted by its holding company. This investigation serves as an example of how the DSO conducts proactive investigations.

Leisure Net

An investigation was instituted in December 2001 into what was described by Judge Nel in the liquidation-related High Court litigations, as arguably the largest corporate collapse in South African history, and the former chief executive officers were arrested in March 2002 on fraud charges.

The investigating team has enjoyed a relationship of co-operation with the South African Revenue Service, which has been of substantial benefit to the criminal investigation.

The Reserve Bank's co-operation facilitated a trip to Jersey that resulted in the repatriation of R12 million. It also cemented an ongoing working relationship that reflects an expressed objective of the investigation to use an integrated task team approach of this nature and magnitude.

Project Bur meister

This matter relates to wide scale corruption and fraud committed by employees in the Department of Public Works in Umtata. This matter was brought to the attention of the DSO by the office of the Auditor General. The investigation in this matter was focused on fraudulent acts committed by employees of the Department as well as a private citizen and his family, who paid two consultants of the bribes Department. The private citizen and members of his family also misrepresented that a previously disadvantaged person was the majority shareholder in his company, thereby receiving preference in the awarding of tenders and contracts. The significance of this matter is that it displays the co-operation and confidence other role players like the Auditor General's office in this case, have in the organization. It also shows that the DSO is making its mark in its quest to curb and uproot Government corruption as the case involves government officials.

Project Overhaul

This matter was referred to the office by REPCO Investigation and Tracing of East London after the conduct of an internal investigation in the Ambulance Department of the Amatole District Council. Two members of the ambulance department submitted false requisitions in favour of two companies for repairs or maintenance of ambulance, which services were not required at all. In return, the services providers would submit invoices claiming payment for work purportedly done and which in fact was not done at all. The total loss to the council as a result of these actions was in excess of R2,5 million.

Four accused in this matter were arrested and are currently appearing before court.

Project Eastern Cape Black Empowerment Consortium

Eastern Cape Black Empowerment Consortium (ECBEC) is a Public Company that was formed in order to enable previously disadvantaged people of South Africa to buy shares and invest their money in the joint stock exchange. As a consequence of mismanagement and fraudulent pledges with the invested funds the investors suffered considerable financial loss. It is alleged that the manager of one of ECBEC's subsidiaries misappropriated funds. It is also alleged that a company of which ECBEC was a shareholder, received a tender from the Post Office on the basis of misrepresentations made to the Tender Board.

The significance of the investigation is that it deals with offences that have an impact on the disadvantaged people, who have systematically been robbed of their money by people that they put their trust on. It also gives an opportunity to disclose the high levels of commercial crimes committed under the guise of Black Empowerment in the Eastern Cape Region.

Landbank

This case involves allegations of fraudulent activities carried out against the Landbank of SA by alleged members of syndicates and corrupt officials of the Landbank. These activities include, fraudulent loan applications (for false purposes and fictitious clients), fraudulent supporting documents, false and inflated securities, corrupt payments/bribes etc. The estimated amount of known fraudulent transactions at the beginning of the investigation was R3, 8 million but this figure increased dramatically as the investigation progressed to a figure exceeding R100 million. In 2002, three of the accused were given prison sentences of five years, 12 years and 15 years respectively.

The State versus Lukhayo Nkonqo and 17(Seventeen) Others

This case marked an important achievement because it is the first case involving a racketeering charge in the Eastern Cape. The matter was part-heard in the East London, High

Court. The accused are charged with the following offences, racketeering, murder, attempted murder, unlawful possession of firearms, and other minor offences.

This matter involves a conflict between members of MELTA Taxi Association and MELTA Non Racial Taxi Association, which resulted in MELTA Taxi Association members embarking on illegal activities resulting in the commission of the above mentioned offences.

The significance of this matter is that it involves the Executive member of MELTA Non Racial Taxi Association and since his arrest there has been a significant reduction in taxi related violence.

Gauteng Corporate Investments

Gauteng Corporate Investments lured investors into believing that the company had yielded immense profits through a share portfolio that was secure against inflation and devaluation of the Rand. All income generated by the company was in fact derived from the investment capital of new investors. Members of the public invested approximately R9 million in the company. Nine directors of the company have been arrested on charges of fraud and theft between December 2001 and September 2002.

Sun Multiser ve

Sun Multiserve was a pyramid scheme that defrauded investors with promises of very high returns in a very short space of time. Five suspects were arrested on 16 August 2002 on charges of fraud and contravention of the Banks Act.

IMPACT ON WHITE-CALLAR CRIME

Whilst serious and complex financial crime is regarded as a national priority crime, at a lower level the NPA continued to focus on white-collar crime (or commercial crime). In this regard the Specialised Commercial Crimes Unit (SCCU) is playing a key role in ensuring that we make a difference in this area. The increase in the conviction rate for this reporting period and productivity figures are indicative of the impact that we are making in this area. Due to the effectiveness of this unit, a second unit was established in Johannesburg during September 2002, which was officially opened by the Minister of Justice and Constitutional Development on 24 January 2003.

Productivity Figures and Conviction Rates

Notwithstanding the extremely difficult task of managing the court rolls of the Specialised Commercial Crime Courts effectively, the productivity of these was still encouraging.

Court Hours

		Pretoria	Johannesbur g
	2001	**2002/3**	**2002/3**
Total court days	301,5	375	94
Total court hours	1410,58	1751,68	409 hours 5 minutes (for 7months only)
Average daily hours	4,68 (4 hours 41 minutes)	4,67 (4 hours 40 minutes)	4,35 (4 hours 21 minutes)

Workflow

Period	Pretoria		Johannesburg
	2001	2002/3	2002/3
New case dockets registered	1292	1454	2308
Cases enrolled for trial	253	389	135
Acquittals	22	10	2
Convictions	173	254	29
Conviction Rate	**88.6**	**96.2%**	**93.54%**

It is evident from the workflow that since the establishment of the SCCU in Pretoria, there has been an increase in the conviction rate from 86,6% to 96.2%. The SCCU in Johannesburg has only been operational for 7 months during the reporting period and already, it has a conviction rate of 93.54%. This clearly demonstrates the success of these units in the fight against white-collar crime. The following highlights serve as examples.

Highlights of Cases

The sentences in the cases below illustrate the seriousness with which the Commercial Crimes Court views white-collar crime. It is also significant to note that our focus is broadening to deal with any person, including lawyers, police officials, public office bearers or other government officials.

S v Sithole and Others

This matter involved an investigation into an international fraud syndicate that defrauded a bank. One of the accused was convicted and sentenced to 15 years imprisonment.

S v Kankindi and Another

This matter related to fraud and theft of Department of Justice Warrant Vouchers valued at R3.5 million. The accused was convicted and sentenced to 7 years imprisonment.

S v Kruger

The accused was convicted and sentenced to 17 years imprisonment for running an investment scheme involving R27 million.

S v Fazli and Others

Several attorneys have been investigated and prosecuted for fraudulent claims against the Legal Aid Board. One of the attorneys Fazli was convicted and sentenced to 3 years correctional imprisonment in terms of section 276 (1) (h) of Act 51 of 1977.

Coronet Equities Case

The three accused in this matter were convicted for fraud pertaining to the Johannesburg Stock Exchange. Accused One was sentenced to 15 years imprisonment of which Five was suspended. Accused Two was sentenced to 12 years imprisonment of which four was suspended. Accused Three was sentenced to two terms of five years wholly suspended.

S v Berg

The accused, a former advocate of the Bar, was convicted in the High Court on several charges of fraud, theft and statutory offences. He was sentenced to 12 years imprisonment of which effectively five must be served.

S v Eksteen

In this matter a Deputy Commissioner in the South African Police Service was convicted of

fraud and corruption. The accused was sentenced to three years correctional supervision in terms of section 276 (1) (h) of Act 51 of 1977.

Establishing a National Pr esence

The SCCU will be rolled out in Cape Town, Durban and Port Elizabeth. Good progress has already been made in this regard, especially in getting the other role players such as SAPS (Commercial Branch Unit), Directors of Public Prosecutions, Department of Justice and the relevant Regional Court Presidents on board. All the offices in the different centres (including Pretoria) will ultimately form part of one business unit that is to be coordinated from the NPA's national office.

PROTECTING THE VULNERABLE IN SOCIETY

The endless cycle of domestic violence and sexual abuse against women and children remain a key priority area for the NPA, as these offences directly erode the fundamental right to dignity.

We are on a drive to promoting the prosecutor as a lawyer of the victim - the people's lawyer. We want to engender attitudes of care, support and empathy in our prosecutors. Our mission is to make justice more accessible to women and children, and above all, to all victims of crime.

It is against this background that the Sexual Offences and Community Affairs Unit (SOCA) continues to design effective mechanisms that contribute towards robust prosecution of offenders and effective protection of the vulnerable. _

Increasing the number of Sexual Of fences Cour ts

The establishment of a number of sexual offences courts has in the past year bolstered the fight against the pervasive culture of sexual abuse.

In practice a "normal" court is converted into a favourable environment for the hearing of these matters. Victims of abuse become more comfortable in these courts, which have separate waiting rooms for children and women, equipped with couches and television sets.

In the past year we have spearheaded the creation of eleven such courts in, Vosloorus, George, Umtata, Thohoyandou, Nelspruit, Evander, Parow (2 courts), Atlantis, Vredendal and Thabamoopo, Polokwane. This has boosted the number of such courts to 39 countrywide.

A Victim-Centred Approach: Thuthuzela Car e Centres (TCC)

The NPA has adopted a victim-centered approach that is aimed at reversing the secondary victimization of women. It is this approach that informed the creation of the Thuthuzela multidisciplinary centres in Cape Town, Manenberg, Mdantsane (East London) and Ntlaza near Umtata in the Eastern Cape.

In consultation with the Department of Health, we are converting two centres that currently focus on various issues, Nthabiseng Centre in Chris Hani–Baragwanath and Prince Mshiyeni Victim Support Centre in Umlazi into TCCs.

This 24hr facility provides the professional support required by all rape survivors and ensures that there is easy access to justice. Such facilities are well underway in other areas and it is hoped that women who have survived sexual violence will be treated with the greatest of

respect, sensitivity and empathy.

As a result, this initiative has increased community participation and the role of NGOs in the process. This approach has strengthened our ties with NGOs and other government departments, which were at a certain stage operating in isolation.

The centre is located inside the hospital, thus ensuring access to assistance from medical staff, investigating officers, counselors and emergency support service on a 24hour basis.

Furthermore, special facilities are available for rape survivors e.g. consultation rooms, bathrooms, new clothing, rest rooms and kitchens. Each centre is managed by a site coordinator who has access to dockets and regularly informs complainants about the progress of their cases.

Standardised crime kits, proper guidelines and rapid HIV testing are utilised to assist rape survivors.

Notably, we have registered remarkable successes:

- The average conviction rate of sexual offences in these courts is between 70% and 75%;
- In some instances, turnaround time has improved significantly, particularly in those courts which draw cases from the TCC. In some of these courts, we have been able to reduce turnaround time to under six months from date of report to finalisation.
- There is a proper management of case files and an accessible record of both arrest and non-arrest dockets;
- Continuous communication between TCC and victims provides feedback regarding status of cases;
- There are professionally trained personnel employed at the centres and courts to deal with cases.
- Survivors are treated in a comforting and caring way.

We also appointed four victim assistance officers to assist in reducing and eliminating victimization of victims of sexual domestic abuse in the courts. They provide short-term counseling and keep victims informed of development and outcomes in their cases

Enforcing Child Support

Section 4 of the Maintenance Act places a responsibility on the NPA to develop a core of trained and dedicated maintenance prosecutors. Over the past year we have created 80 maintenance prosecutor positions, 10 seniors and 70 junior prosecutors.

We have filled 69 of the vacancies and hope to appoint the rest in the next two months. This process aims to ensure that maintenance complainants receive professional assistance and quality service.

- A training manual focusing on the civil and criminal aspects of maintenance was developed to assist prosecutors to effectively deal with all maintenance matters. The

manual was also introduced at a two-week training seminar arranged for the newly appointed maintenance prosecutors.

- A committee has been constituted to do a policy and legislative review of the current maintenance system, for example, the execution of orders in terms of the maintenance Act.

- For monitoring and evaluation purpose, a format for the collation of statistics has been developed and submitted to prosecutors. This tool will enable us to have reliable data available regarding the current stance of maintenance, nationally and provincially.

- The NPA identified the need for a national integrated strategy on the management of maintenance matters. We are interacting with all relevant role players in this regard.

- The Unit together with the Department of Justice and Constitutional Development (DOJCD) facilitated the appointment of 55 contract maintenance assistants to assist maintenance prosecutors. They will assist the prosecutors to effectively deal with maintenance matters. These positions are on contract for 6 months and the appointments have been effective as of April 2003.

Justice for Childr en

We also wish to lend a hand in the protection of child offenders by being part of a process that would consolidate and manage the diversion of young offenders. In order to review policy and current guidelines on diversion of young offenders a national audit was conducted in October 2002 for the period covering July 2000 – June 2002. During this time prosecutors have diverted 30 994 young offenders.

The NPA is currently facilitating, with relevant role players, the introduction and standardization of diversion programmes for young offenders, ensuring replication across both the urban and rural divide.

Training

In addition, the SOCA Unit is embarking on a continuous training process that should enhance our capacity to humanely handle and vigorously prosecute cases of sexual violence against women and children.

- A Multi disciplinary training manual on domestic violence has been compiled, formatted and is in the process of completion. The package consists of participant's manual and resource reference, trainers' manual, visual aids and training and evaluation questionnaires.

- The Unit developed and published a bulletin on sexual offences to empower prosecutors in their pursuit of successful prosecutions. It contains valuable and practical information, including the latest legal developments applicable to sexual offences.

Joint Initiatives with other Stakeholders

As part of a collaborative effort in this field we have reached out to other stakeholders, as cooperation is a foundation for success:

- We participated in the initiative to develop a National Interdepartmental Anti-Rape

Strategy Framework that was adopted by Cabinet last year. This exercise included the Departments of Safety and Security, Social Development, Treasury, Health, Correctional Services, Education and GCIS.

- The SOCA Unit was part of the review and developmental process of legislation pertaining to sexual offences. Comprehensive recommendations were submitted to the South African Law Commission regarding the proposed Sexual Offences Bill.

- The Unit also initiated negotiations with several Law Schools with the aim of introducing focused and practical sexual offences law courses into the LLB and LLM curricula, thereby ensuring the continuous development of expertise in this field for future prosecutors and presiding officers.

Public Education Awareness

- During the 16 Days of Activism campaign, SOCA officials with other role players designed a programme and spearheaded public information activities, which included a public information session in Diepsloot attended by approximately 900 people.

- To encourage increased reporting in sexual offences and domestic violence, Public Awareness Workshops were held at 10 different formerly disadvantaged communities, reaching about 2000 people.

- We also facilitated and arranged multi-disciplinary training seminars attended by more than 500 delegates to build capacity and develop skills. The training covered related topics on sexual offences, domestic violence, child support and child justice.

Specialised Support Services for Vulnerable and Intimidated Witnesses

Essential to the functioning of the criminal justice system is the confidence by witnesses that they can provide evidence without fear of intimidation or danger to themselves or their families. Witness Protection is a tool by which the NPA achieves its objective of securing the evidence of vulnerable and intimidated witnesses.

Since the NPA took over the function of the protection of witnesses in 2001, we have sought innovative ways of protecting and managing witnesses.

We have thus redesigned the Witness Protection Unit (WPU) in order to meet the demands of the 21st Century law enforcement. This is to ensure that we create an environment where witnesses under threat are treated with humanity, fairness, dignity, sensitivity and respect.

The Unit therefore provides a specialized support service for vulnerable and intimidated witnesses in judicial proceedings in terms of the Witness Protection Act 112 of 1998.

The WPU adopted a new operating model, which includes the following critical elements:

- Pro-active risk identification
- Speedy turnaround time for removal of witness from danger areas

- 24-hour accessibility
- Simple witness grievance procedure
- Humane discharge and "after-care" for witnesses

Persons under the WPU

- 375 Witnesses;
- 360 Extended family members;
- 105 Children of witnesses;
- 5 Attending crèche;
- 30 Attending school

✶ **70% are Section 204 Witnesses**

Risk classification of witnesses

- 90 % High Risk
- 10% Medium Risk

Referring agencies

• SAPS	302 Witnesses
• DSO	65 Witnesses
• SOCA	1 Witness
• Other	5 Witnesses
• Military Police	2 Witnesses
TOTAL	**375 Witnesses**

Successes for period 1 Jan 2002 to 31 Mar ch 2003

The single most important measure of success in witness protection is ensuring that no witness is killed or harmed whilst under the care of the WPU. Indeed for this reporting period not a single witness has been killed, whilst part of the witness protection programme. In fact, most of the witnesses testified satisfactorily in court, and through their participation the prosecution secured the following results:

No.of witnesses testified	No. of cases	No. of Accused	No. of Convictions	No. of acquittals	Jail term sentences	Life ter m sentences
114	87	183	141	42	2 626	72

DEALING WITH THE PAST

As part of healing the wounds of our recent past and fulfilling the Constitutional mandate of national reconciliation, the NPA is charged with the investigation and prosecution of all cases emanating from the TRC process. A unit that has this responsibility within the NPA is the Priority Crimes Litigation Unit. A lot of work has already been done in terms of the investigation and preparation of cases for prosecution.

About 7 cases are being prepared for prosecution, while 459 cases are being evaluated for prosecution purposes.

SPECIAL PROJECTS

The Eastern Cape Intervention

The Joint Anti-Corruption Task Team ("JACTT")
(An NPA/SAPS-Led Law Enforcement Task Team in the Eastern Cape)

Background
During November/December 2002 National Government set up an inter-departmental committee to assist the Eastern Cape Provincial Government with the running of the administration in a wide range of areas. One of the issues that are of major concern to Government in relation to the Eastern Cape administration was the backlog in the finalisation of disciplinary proceedings of those civil servants that have been charged of misconduct. Part of the brief of this inter-departmental committee is also to deal with issues of public service corruption in the Province. Accordingly, the law enforcement agencies have been asked to develop quick responses to deal with corruption.

The following approach has been adopted:

Disciplinary matters
The NPA responded by constituting a team of experienced personnel to assist the Interim Management Team (IMT) in dealing with disciplinary matters fairly quickly. Significant progress in this regard has already been made.

Corruption cases and the establishment of JACTT

In response to its brief the law enforcement agencies established JACTT to the deal with challenges posed by corruption in the Province. JACTT is led jointly by the NPA and the South African Police Service, and is constituted as follows:

- National Prosecuting Authority – including the following specialized units: DSO (Scorpions), Asset Forfeiture Unit and Special Commercial Crimes Unit;
- South African Police Service – mainly detectives from the Commercial Branch and SAPS intelligence;
- Forensic Division of the Auditor General's Office (Eastern Cape);
- Special Investigations Unit; and
- National Intelligence Agency

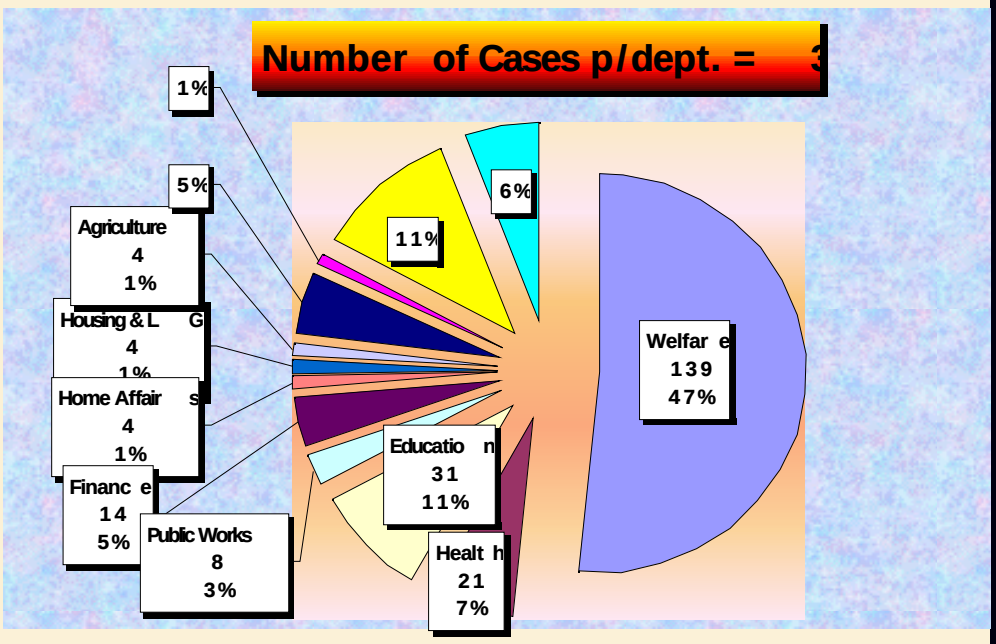
The total number of investigators, analysts, forensic investigators and prosecutors forming part of JACTT amount to approximately 85, and a great majority of them have been drawn from other parts of the country.

JACTT Operations

JACTT operations can be divided into two phases. The **first phase** relates to the eradication of existing backlog of corruption related cases in the Province. The **second phase** relates to investigation and prosecution of high profile and complex cases of corruption in the Province. To some extent, the investigation of cases relating to both phases is being done simultaneously.

First Phase (eradication of existing backlog)

The existing backlog consists of **340 cases**. Even though these cases emanate from almost all the Provincial Departments, a large number of them relate to fraud and corruption perpetuated against the Provincial Department of Social Development. *(See chart on Cases Per Dept.)*



Since the commencement of the project the following has been achieved:

- To date approximately **104** accused persons have been brought before court. A few of them, especially employees of the Department of Social Development, are involved in more than one case.
- **Eighteen accused** have already been **convicted**, and 10 have been sentenced, with effective prison term sentences ranging from six months to 15 years imprisonment.
- The **Asset Forfeiture Unit** has already **seized assets worth** about **R 4,2 million** in relation to some of these cases (more are in the pipeline).

Second Phase (high pr ofile and complex cases)

A number of high profile and complex cases are being assessed and will be reported on in due course.

However, one case that falls under this category, and in which action has already been taken, relates to investigations into payments made on a fraudulent or erroneous basis by the Eastern Cape Provincial Government.

These investigations follow from previous investigations undertaken by the Auditor General's office, into payments made by the Department of Health. Sixteen million Rand (R16m) worth of possible duplicate or fraudulent payments were uncovered for the period 1998 to 2000.

JACTT has already executed search warrants against one of the identified companies alleged to have been fraudulently paid at least six million Rand (R6 000 000.00).

A further R 3 326 400.00 was uncovered as an erroneous payment to a supplier of the Department of Health: Eastern Cape. These funds were recovered from 3M South Africa (Pty) Ltd by JACTT and returned to the Eastern Cape Provincial Government.

Road Accident Fund

Over the 18 months, the DSO has arrested a number of professionals and individuals who have been cashing-in on the Road Accident Fund (RAF). A number of attorneys, doctors, RAF officials and touts have been investigated, charged, arrested and convicted in Gauteng, KZN and the Western Cape.

As a result of the success we have had in those investigations, we are currently establishing an ad hoc specialist prosecution capacity within the NPA that is dedicated to combating serious and organized crime affecting the RAF.

The extent and seriousness of fraud and corruption aimed at the RAF is of grave concern to the NPA.

Together with the RAF we want to:

- Boost law enforcement efforts aimed at individuals and syndicates;
- Develop an integrated investigation and prosecution strategy;
- Significantly increase convictions;
- Widely employ asset forfeiture as a mechanism to retrieve the proceeds of crime;
- Reduce the existing levels of crime against the RAF to manageable levels.

Specialist Tax Capacity

Given the low levels of tax compliance, the strong link between organised crime and tax evasion, the increase in organised revenue-related crimes as well as the States' limited capacity to investigate and prosecute tax related offences within the country, we entered into an agreement with the South African Revenue Service (**SARS**) for the NPA to set up a dedicated tax litigation capacity. It is expected that the dedicated prosecutorial tax capacity will be responsible for the prosecution of serious tax crime, and act generally as a reference point in the prosecuting authority

The objectives for the establishment of a dedicated prosecutorial tax capacity within the NPA are:

- The enhancement of the NPA's ability to prosecute tax offences;
- The enhancement of SARS's overall ability to collect revenue by creating an environment of voluntary compliance backed by efficient prosecution;
- Effective skills transfer between the SARS and the NPA; and
- To increase the conviction rate in tax prosecutions.

ENHANCING AND IMPROVING THE EFFECTIVENESS OF THE NPA

The NPA has embarked on a range of initiatives to enhance the effectiveness and efficiency within the organization, based on a foundation of sound financial management. Integrally related to this, is our commitment to rolling out a performance budgeting system.
A key priority area identified to enable the NPA to enhance its effectiveness and efficiency is based on the building of strategic management skills. In addition to extending the skills base within our organisation, specifically those relating to compliance with the Public Finance Management Act, we have also embarked on a pilot programme to provide students and unemployed people with practical experience of working in the organisation.

This section of the report will accordingly deal with the following components:

- An assessment of the financial statements for the year 2001/2002
- The introduction of a Performance Budgeting System
- The Executive Development Programme
- Training in PFMA and Batho Pele
- The internship pilot programme.

An assessment of the financial statements for the year 2001/2002
The NPA achieved an unqualified report from the Office of the Auditor General (AG) for the financial statements produced for its first year of partial independence from the DOJCD, 2001/2 (See Appendix 5).

For fiscal budgetary purposes the NPA is included as a programme in the DOJCD annual budget. However, with approval, the NPA established separate accountability and produced its own set of financial statements, audited by the AG. The DOJCD also prepared a consolidated set of financial statements to combine its results with that of the NPA. These consolidated statements were not subjected to a separate audit.

The NPA is proceeding on the same basis for the 2002/3 financial year, with the approval of the DOJCD, Accountant General and Office of the Auditor General.

Three areas of concern were raised in the AG's report with respect to the 2001/2 financial year:

- Lack of Tender Committee Approvals: To address this issue the NPA has established a special committee on all irregular, unauthorized expenditure headed by a DDPP from the SCCU. A draft report was received in May 2003 and recommendations for action are being finalized. The committee is also responsible for monitoring implementation of its recommendations. The NPA also obtained a higher delegation from the State Tender Board (STB) and can now finalise tenders up to the value of R5m.
- Debt Management: The NPA has reduced its debt during 2002/3 by 73% from R11,6m to about R3m and also appointed dedicated staff for the collection and maintenance of debts. Interest is being charged at the approved rate as gazetted.
- Separate Accountability for the NPA: A submission, which has the support of both Accounting Officers in the NPA i.e. the CEO of the NPA and DSO and the Director General of DOJCD, has been submitted to the Minister of Justice and Constitutional Development, for an amendment to the PFMA listing the NPA as a constitutional institution. This was based on legal advice received.

The Performance Budgeting System (PBS)

Performance budgeting is a management tool to budget and manage finance and resources cost-effectively and according to Departmental objectives.

PBS is designed to devolve management and financial responsibility and accountability to the lowest appropriate level. Budgeting, financial planning and monitoring performance becomes an issue for all managers with a defined responsibility - the programme manager, the financial manager, the activity manager.

The PBS project has achieved the following

- A new and consolidated budget structure detailing programmes, subprogrammes, sub-subprogrammes, activities and outputs has been developed. This includes the costing of the outputs and activities as determined by Business Units informed by the NPA strategy
- A framework governing the interface of PBS and transversal systems has been established.
- A testing protocol and time-frames have been agreed-upon with the BAS (test directories, data integrity etc).

Executive Development Programme

The Presidential Strategic Leadership and Development Programme (PSLDP) has been designed specifically to meet management and leadership challenges in the public sector, by equipping managers and in some cases, advancing their management skills in the context of the public sector.

57 delegates comprising of DDPPs, DPPs, Corporate Services (CS) senior managers and office managers from all the offices are registered on this programme. The programme has 8 modules 5 of which have been presented already. These modules are:

- Strategy into Action
- Leadership and Management
- Human Resources Management
- Financial Management for non finance managers
- Project management

PFMA/Batho Pele Training

About 250 NPA: Corporate Services staff members were trained in the Public Finance and Management Act (PFMA) and the government's customer intimacy policy document (Batho Pele). The chief aim of this training intervention was to expose staff to the framework and content of both the PFMA and Batho Pele.

The Batho Pele/PFMA training project was aimed at improving service delivery in the NPA, and to assist CS managers develop an NPA customer services strategy.
The training was segmented into two programmes, one for managers and the other for general staff within Corporate Services. The former was specifically focused on the broader strategic issues relating to PFMA and Batho Pele, whilst the latter was focused more on the practical applications of the two instruments. In brief, the objectives were the following:-

- to conscientise staff about the importance of the principles of Batho Pele in service delivery; and
- to develop an understanding of the PFMA and how it affects service delivery within the public sector.

Internship Pilot Programme

The internship programme is a structured training and development initiative by the NPA that seeks to promote a learning environment, by offering opportunities to current students and unemployed graduates to gain practical workplace skills and knowledge. Through this supportive targeted work experience, young people are assisted by an experienced mentor to design their development plans with the aim of enhancing their chances of gainful employment and for them to make informed career choices. As an organisation, we hope to gain from the exchange of ideas and knowledge as well as creating a resource pool for recruitment purposes.

The NPA has set the following short and long-term objectives for the programme:

- To promote the development of knowledgeable and skilled candidates that will contribute positively within the NPA and in the Public Service.
- To facilitate the exchange of new knowledge and skills to inform current work processes.
- To ensure a better understanding of government policies and programmes.
- To promote a better understanding and insight into how the NPA attempts to find solutions to its challenges.
- To ensure effective management and implementation of an internship programme within all business units, that will ultimately improve the quality of services offered by the NPA.
- To facilitate the development of unit standards and ensure accreditation of the Internship Programme by the POSLEC SETA.

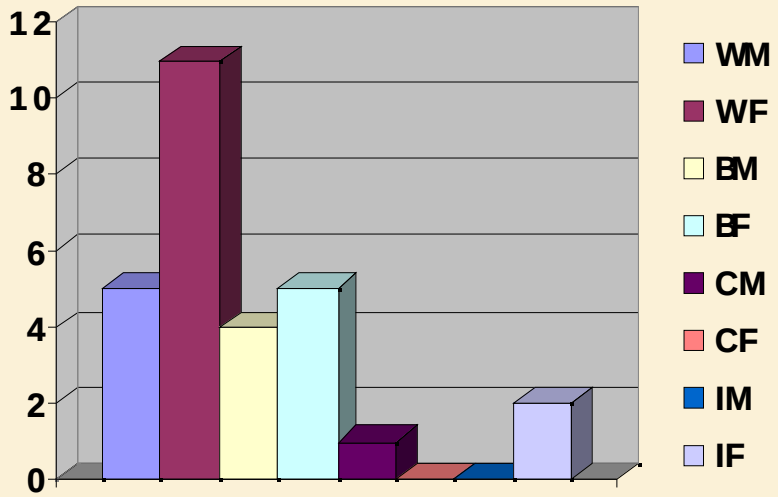
The Internship program is currently being piloted in the National Prosecution Service and Corporate Services. The overall target is 100 for 2003, with the intention of evaluating trends to improve the roll out phase in 2004. Regardless of job description, individuals are paid a stipend of a R1000 per month.

Employment Equity

Changing the demographics of the NPA has been one of our priorities since 1998. Today we can say with confidence that our organization is well on its way to being a truly representative State institution. The implementation of our Employment Equity Policy is showing results.

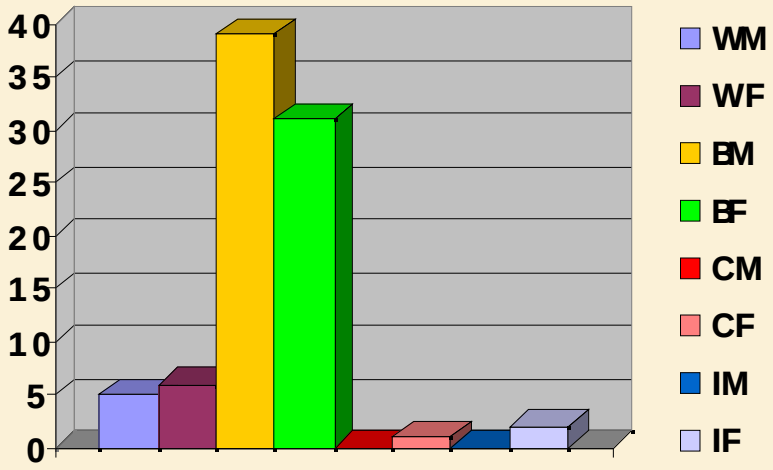
The race/gender profile of the NPA, on 18 March 2003, is as follows:

SCCU



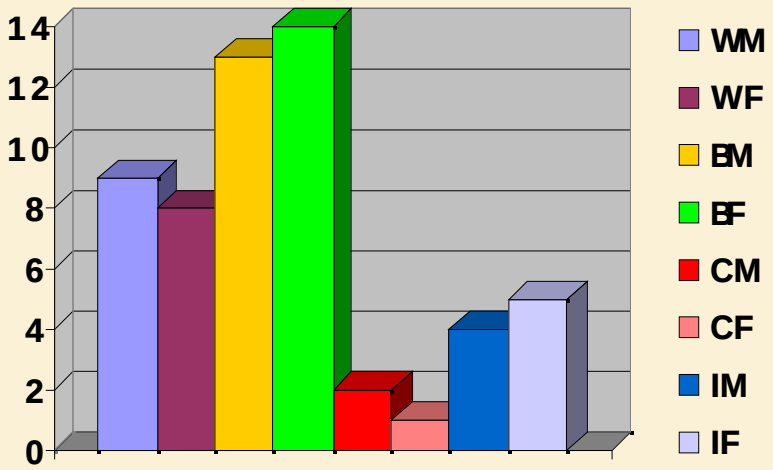
5	11	4	5	1	0	0	2	**28**
18%	39%	14%	18%	4%	0%	0%	7%	**100%**

SOCA



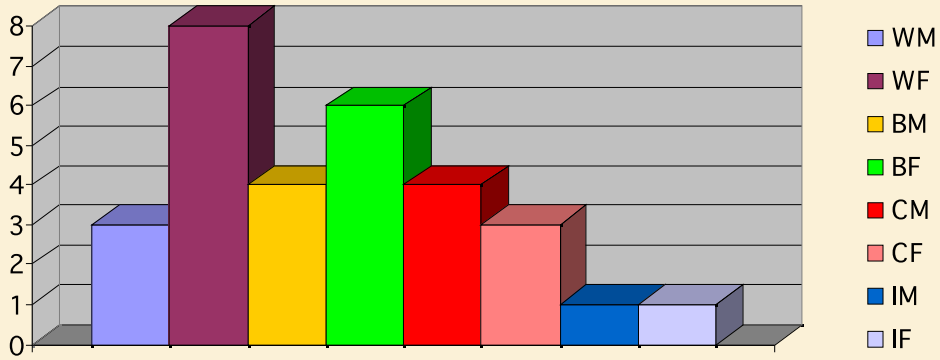
5	6	39	31	0	1	0	2	**84**
6%	7%	46%	37%	0%	1%	0%	2%	**100%**

AFU



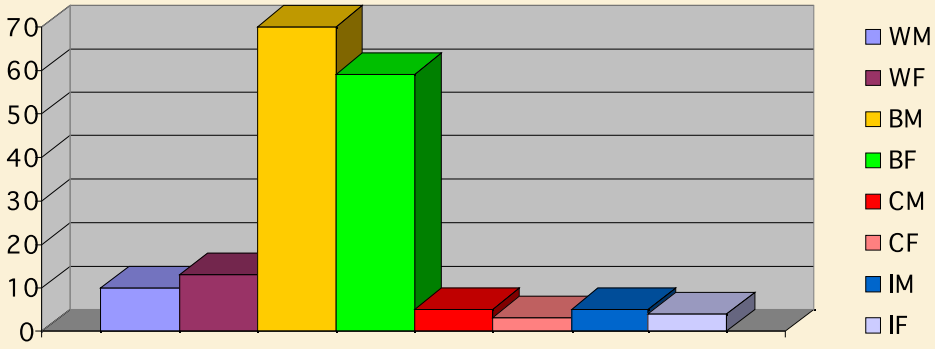
9	8	13	14	2	1	4	5	**56**
16%	14%	23%	25%	4%	2%	7%	9%	**100%**

WPU



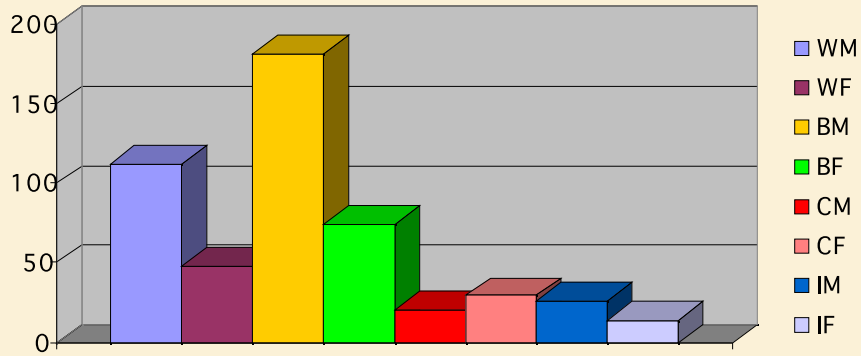
3	8	4	6	4	3	1	1	**30**
10%	27%	13%	20%	13%	10%	3%	3%	100%

Corporate Services



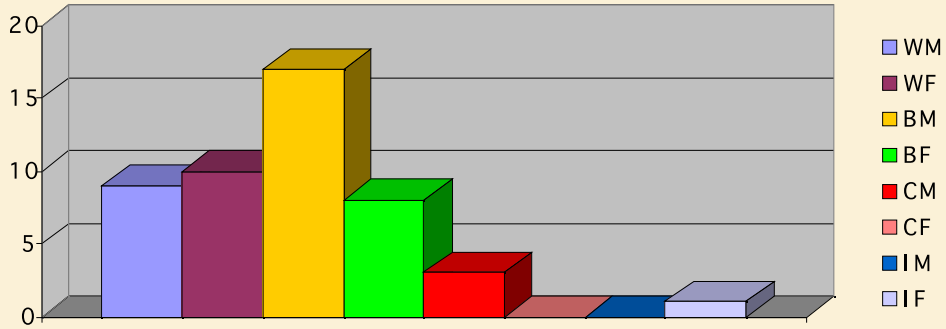
10	13	70	59	5	3	5	4	**169**
6%	8%	41%	35%	3%	2%	3%	2%	100%

DSO



113	48	182	74	20	29	26	14	506
22%	9%	36%	15%	4%	6%	5%	3%	100%

NPS - Senior Managers and Professional Staf f



9	10	17	8	3	0	0	1	48
19%	21%	35%	17%	6%	0%	0%		100%

WAY FORWARD

In the 1999-2000 Annual Report to Parliament, the first Report after the establishment of the NPA, we highlighted the enormity of the tasks which faced the organization. New structures and systems had to be developed – it was a start of a process to build a new dispensation for the prosecution service in the country. Today, the NPA has grown phenominally and has become a star performer among the centres of excellence in the country.

Today our team is among the most motivated and vibrant in the public service, as we have not only successfully dealt with the issues that plagued the organization in the beginning, but

also shaped it into a performance-driven organization. We have enhanced our efficiency and effectiveness, and increased our outputs. We have therefore demonstrated that we can deliver tangible improvements in the administration of criminal justice and implement practical change. We *are* becoming the lead agency in shaping criminal justice in this country.

However, we recognize that at this critical juncture in the history of the NPA we are faced with an equally massive task of consolidating the victories that we have recorded in the past five years and map out a strategic direction that will sustain our successes. But we *can* say that the tide has turned in our favour.

We are still confronted with a number of major challenges of:

- building a dynamic leadership corps;
- building a culture of acting in the defence of the Constitution, promoting and protecting human rights, the rule of law and good governance in criminal justice proceedings;
- building a prosecution service based on a victim-centred approach;
- successfully implementing performance management linked to our strategic objectives, people management and improving productivity;
- building a modern and dynamic national management culture.

As a dynamic organization we are also faced with the growing demands of the changing environment within which it operates. The NPA therefore continuously strives to adapt and innovate to meet the challenges of a 21st century organisation. The results of all the Reviews that were conducted during 2002 have indicated the need for the NPA to develop a long-term plan (2004-2006) to change the way we do our business and to become more strategy-focused. In this regard we decided to embark on a long-term planning process based on the principles of a strategy-focused organization, namely:

- translating our strategy into operational terms;
- aligning the organization to the strategy;
- making strategy everyone's everyday job;
- making strategy a continual process; and
- mobilizing our change efforts through executive leadership.

This process commenced after the completion of the Reviews, which ended in March 2003. The NPA Senior Management convened to carve out a long-term corporate strategy for the NPA. A Core Team of senior managers has been appointed to design the new NPA Corporate Balanced Scorecard based on the long-term strategy. The team, which was assisted by two consultants at various stages of the design, produced the new NPA strategy map. This strategy formulation and designing process is continuing and will be finalized later in the year with the cascading of the Balanced Scorecard to all Business Units.

In recognizing the need for fundamental change we have placed the transformation of the NPA at the centre of our strategy to achieve the newly developed strategic objectives which are designed to address:

- the fear of crime by the public;
- enhance public confidence in the Criminal Justice System;
- the reduction in the crime rate; and
- the culture of civic responsibility

The Core Team will for the coming year focus their attention on developing the Transformation Programme and assist with the change process. Once developed, the Transformation Programme will ultimately determine how the NPA should position itself in a new legal order (characterized by a transformed judiciary, legal and criminal justice system) and changing future to bring justice, freedom and security closer to the people.

Management Report

– for the year ended 31 March 2002

Report by the Accounting Officer to the Executive Authority and Parliament of the Republic of South Africa.

1. General review of the state of financial affairs

On 5 February 2001, the Board of the Department of Justice and Constitutional Development, chaired by the Minister, accepted the new strategy and structure of the NPA. In terms of this structure, the NPA consisted of seven business units:

- National Prosecuting Service (NPS)
- Directorate of Special Operations (DSO) or Scorpions
- Asset Forfeiture Unit (AFU)
- Sexual Offences and Community Affairs Unit (SOCA)
- Specialised Commercial Crimes Unit (SCCU)
- Witness Protection Program (WPP)
- Corporate Services (CS)

The Board also took the important decision that from 1 April 2001, the NPA should assume direct responsibility for all support services previously rendered by the Department of Justice and Constitutional Development (DOJCD) and that the budget of the lower courts should be split, with the NPA taking over the proportion of this budget allocated to prosecutors. Previously, the budget for prosecutors in the lower courts was part of the DOJCD Court Services Business Unit.

The NPA successfully took over most of the support functions from the DOJCD, with the exception of the prosecutors in the lower courts. While the personnel budget for prosecutors in the lower courts was transferred to the NPA, the remainder of the budget remained with the department.

From 1 April 2001, the NPA opened its own bank account, with Treasury approval, and has run its own financial systems (Basic Accounting System or BAS) and its own payroll on Persal. It was necessary to produce financial statements for the DSO for the period December to March 2001 because of the promulgation of the NPA amendment Act December 2001, in terms of which the DSO had its own Accounting Officer. This Accounting Officer was however only appointed at the end of March 2001. The DOJCD therefore assisted and prepared the financial statements for the DSO for the three-month period referred to above.

CEO of the NPA, who had assumed office in April 2000, was appointed simultaneously to the position of CEO of DSO at the end of March 2001. As already stated, since the NPA ran its own account and systems from April 2001, financial statements are therefore the first separate financial statements produced for the NPA as a whole. These ments are to be incorporated into the department's statements, by agreement with the DOJCD, National Treasury Office of the Auditor-General.

	2001/02 R '000
The following is a breakdown of the current financial year's budget reconciliation:	
Appropriated Amount	822 241
Virement	(96 764)
Total amount appropriated	**725 477**
Less total expenditure	724 809
	668
Analysis of the amount of R668:	
1. Fruitless and wasteful expenditure	88
2. Under expenditure of personnel costs	580
	668

2. Services rendered by the NPA

The National Prosecuting Programme aims to provide a prosecution service that is prompt, vigorous and fearless, promoting the public interest and ensuring that all people are treated with dignity.

- Public Prosecutions coordinates and assists prosecuting structures in the Office of the Director of Public Prosecutions and Lower Court Prosecutors.
- Witness Protection Programme coordinates the safekeeping and protection of witnesses in certain serious criminal cases.
- Special Operations funds the Directorate of Special Operations, also known as the Scorpions, which came into operation in January 2001. The Directorate of Special Operations investigates serious organized crime, aiming to prosecute these offences effectively.

3. Under spending

NPA under spent on their programs. Refer to notes to the Appropriation Statement.

4. Capacity constraints

The following are the most common capacity constraints facing the NPA:

4.1 Training and skills development

- The Troika methodology used by the DSO, involving a combination of investigative, prosecutorial and analytical approaches, is an entirely new concept in the South African law enforcement environment and requires a new set of skills. The DSO has had the benefit of obtaining extensive support from other jurisdictions, notably the United States of America and United Kingdom, in equipping new DSO recruits with these skills and has also drawn extensively on former SAPS personnel. However, the challenge remains for the DSO to develop a new set of skills suited to the DSO methodology and mandate.

- This challenge to source scarce skills had to be managed with the joint imperative to ensure employment equity in the organisation. While equity has been achieved to a large degree at junior investigator levels, the major challenge remains at the level of senior investigators and senior management in the DSO.

- A further capacity constraint faced by the DSO was the fact that the personnel of the DSO were recruited from a variety of organisational and cultural backgrounds. This posed a serious challenge of integrating personnel from widely differing backgrounds into a new and developing organisation.

- Current core skills development in the DSO professional corps is focused on five areas: financial investigator training, conventional investigator training, prosecutor and prosecutor-directed training, DNA management and other forensic training and analyst and operational support training.

- While it is understandable that much of the DSO attention during its first few years has necessarily focused on the operational or professional corps, it has also become increasingly evident that administrative and support personnel also urgently require training and development.

- The NPS has an extensive training program for prosecutors focused largely on aspirant and entry-level prosecutors. Existing prosecutors who lack core skills and were recruited before the commencement of the new policy have been identified and a tutor program is running with donor funding.

- The major training challenge facing the NPS is the development of expert prosecutors who wish to remain in court and do not opt for managerial duties.

- Within CS, the major training challenge is to instill in staff a customer-focused approach as opposed to a bureaucratic "civil servant" mentality. The training focusing on the "customer is king" approach has been piloted successfully in the Human Resources and Management Development Service Centre and will be rolled out to all CS staff before the end of the year.

- The WPP's major capacity challenge is to manage effectively and/or replace existing SAPS personnel providing protection services for witnesses. This unit has a proposal to replace all SAPS personnel with its own specialised protectors. The existing SAPS personnel are not fully accountable to the WPP, and are largely demotivated since their stint in the WPP takes them out of the offing for benefits such as promotion etc in SAPS.

- The NPA as a whole is challenged with capacity constraints at senior management level. This relates to the entire spectrum of management including such matters as PFMA compliance, compliance with the Labour Relations Act and the broader ability to effectively lead and manage their components. In order to address this problem, tenders for a Management Development Program are currently being evaluated for senior management in the NPA. The program will be a mandatory requirement for all senior management, commencing with the heads of business units and cascading down to the next 2 or 3 layers.

4.2 Resources (funding, staffing and systems)

- While the DSO was initially faced with budgetary difficulties, government has in the last two years provided some funding for growth of the organisation. While this funding has not been sufficient to allow the DSO to recruit the personnel complement of 2000 that was originally planned for at the inception of the organisation, it has provided for a steady intake of new recruits.

- Further funding is however urgently required for the DSO to build its own in-house training capacity or facility, to reduce dependence on outside agencies and foreign jurisdictions.

- Within the NPS, funding is urgently required to provide adequate support services to prosecutors in the lower courts. While the Director-General has issued an instruction for the lower courts budget to be split between the NPA and the department, it is clear because of the level of under-funding in the department, that the funds to be eventually transferred to the NPA will be insufficient. To illustrate the problem, the current personnel budget of prosecutors in the lower courts is in the region of R330m it is expected that at the best, the department will only be able to make R15m available for non-personnel budget

- The NPS also urgently requires funding to provide administrative support staff to prosecutors. Funding has been identified for the appointment of additional prosecutors and some of this funding has been used for the appointment of administrative staff, for example, to Chief Prosecutors, who have operated without administrative staff since their appointment a few years ago. Funds are required to provide administrative support staff to prosecutors at all levels in the courts.

- Urgent intervention is required throughout the NPA to ensure a proper ratio of support staff to professional staff. The ratio has improved over the last year, with the recruitment of additional staff in CS and additional administrative staff in regions. An Organisational Development and Review Study (ORDS) Phase 2 is currently to assess administrative structures and systems in all business units and by the end of the year, a clearer picture of needs in this area will emerge.

- The WPP program urgently requires funding if it is to recruit and train its own specialised protectors.

- At a systems level, and as an innovation in the law enforcement environment in South Africa, DSO was further confronted with the challenge of developing its own operational procedures and protocols. This challenge has occupied much of the time of senior management but should be finalised in the current financial year.

- CS, as indicated earlier has developed its own procedural manual. This will need to be refined on an ongoing basis. One of the major challenges currently is the customisation of these procedures to the needs of various business units but also to manage this against the need for some level of uniformity.

- Other important areas requiring funding are IT infrastructure, Fleet Services and security equipment.

4.3 Managing expectations and the imperative of service delivery

- The broad challenge facing the NPA is best illustrated by this excerpt from the Final Narrative Report of the Organisational and Review Design Study conducted for CS in September 2001:

  "Overall, the history of the National Prosecuting Authority (NPA) is typical of a new entity where the pressure to create a structure that can deliver services often outweighs the requirement for engaging in systematic organisational strategy development and design. This was equally true of the CS structure.

  "The organisation (CS) and management provision thereof naturally suffers from defects that are common to all organisations whose form develops ahead of a full appreciation of their function' (NDPP Organisational Development Study – Terms of Reference, p2). "

- This challenge, which the Director-General of the Department of Public Service and Administration has likened to "trying to change a wheel on a moving car" has been particularly acute in newer units in the NPA such as the DSO and CS.

4.4 Legislative and Operational constraints

- The broader NPA is faced with enormous legislative constraints relating to corporate governance and the existence of two Accounting Officers in this organisation, This point is expanded upon in the section dealing with corporate governance.

- The DSO also faces a number of legislative constraints on its operations. It is foreseen that some legislative amendments will have to be considered in an attempt to negate certain hampering effects on the functional activities of the DSO. This would include, inter alia, the attributing of more operational powers (such as the powers to subpoena witnesses to criminal trials, the taking down of confessions, the authorisation of sting operations) to members of the DSO. Furthermore, the dictates of the DSO's operational realities necessitates more flexibility in the authority to delegate powers within the DSO.

- Within AFU, major legislative constraints exist in terms of Chapter 6 of the Organised Crime Act and a court ruling by the Transvaal Division. The unit is currently awaiting the outcome of an appeal to the Constitutional Court. Proposals have been forwarded to Parliament for the necessary amendments to this legislation to ensure the effective functioning of AFU.

4.5 Remuneration Systems

The legislative inadequacies referred to above, also present the NPA with a situation in which it has at least three different salary scales and sets of conditions of service. A remuneration study was conducted and proposals are currently before the Department of Finance for the approval of a new remuneration system to ensure equity for prosecutors and investigators. The proposed model introduces a performance based and more flexible system along the same lines as the new SMS dispensation in the public service.

5. Utilisation of Donor Funds

Below is an exposition of projects funded through donations during the financial year under review:

Donor	Project	Short Description
USAID	Sexual Offences and Community Affairs	To empower prosecutors and other role players with specialised knowledge and skills to better handle cases of sexual and domestic violence through multidisciplinary training, community outreach and research programs.
WK Kellogg Foundation	Sexual Offences and Community Affairs	To manage care centres for victims of child abuse and rape/training and development/including public education
Finland Government	Sexual Offences and Community Affairs	Training on implementation of Lower Court Management Systems

6. Public Private Partnerships (PPP)

While the current project to obtain a new headquarters building for the NPA, is not strictly speaking a public private partnership, the procurement process has followed - on the advice of National Treasury - the same principles of a PPP. The procurement process has been split into two broad fields:

- The hard services, or rental of the building, has followed a State Tender Board process, while
- The soft services required at the new HQ are currently being negotiated with the owner of the new premises along the lines of a PPP. The final SLA's will be presented to Treasury's PPP Unit before finalisation.

The entire process has been approved by National Treasury and the State Tender Board. The Department of Public Works has also been part of the process. The expected date of occupation at the new premises is 1 October 2002.

The NPA is currently investigating similar procurement processes for the DSO Regional Offices in Cape Town and Durban. Specifications are also being drafted for a PPP for the provision, implementation and post implementation support of an information and communication technology infrastructure.

Proposals have also been forwarded to the STB for the WP to be exempted from STB Delegations ST36 and ST37 to obtain a sole supplier for the full range of support services required by witnesses. The plan is to obtain these services by means of a PPP.

7. Corporate governance arrangements

7.1 Risk Management and Risk Assessment

A risk assessment exercise was conducted towards the end of 2001, in preparation for the first internal audit of the NPA.

The NPA is now considering appointing an Executive Manager: Risk Assessment in the CEO's Office to set up an ongoing program of risk assessment in the organisation. It had originally been envisaged that the Executive Manager: Internal Audit, who is currently being recruited and should be in place by September 2002, would assume responsibility for both functions. However, the CEO has since been advised that it is better to separate the two functions to ensure that risk assessment is not subsumed into the internal audit process. Risk assessment will however be managed as a line function. The role of the central office on risk assessment will be to ensure that the system takes root and to ensure overall co-ordination and quality assessment.

7.2 Anti-Fraud and Corruption Strategy of the NPA

The NPA is currently reviewing and customising the anti-fraud and corruption strategy of the Department of Justice and Constitutional Development. This process is not expected to involve a radical departure from the department's existing strategy, but is intended to ensure it is customised to suit the specific requirements of the NPA. This process is expected to be finalised by June 2002 when the NPA will present the strategy to the Minister for approval.

7.3 DSO Code of Conduct and Code of Conduct for Prosecutors

Because of the particular nature of the Scorpions, a separate code of conduct has been developed. The NPA has also developed a Code of Conduct for prosecutors. CS is currently developing a specialised code of conduct for procurement staff in the Finance and Procurement Service Centre.

7.4 Integrity Management Unit

In order to ensure the overall integrity of the NPA, an Integrity Management Unit has been set up in the Office of the National Director. While this unit was originally envisaged as a DSO unit, it has since been agreed that it should service the entire NPA.

7.5 Internal Audit/ Audit Committee

The NPA is in the process of establishing its own Internal Audit Unit in the Office of the CEO. The post of Executive Manager: Internal Audit was recently created and advertised and applications are currently being processed. It is planned that interviews will be conducted before the end of June 2002 with the successful applicant commencing duties in August/ September 2002.

For the past financial year, the NPA has co-sourced the internal audit function, under the management of the Executive Manager: Finance and Procurement. The internal audit program has been run with the assistance and full co-operation of the DOJCD's Internal Audit Unit. It was also further agreed with the Director–General of the department and the chair of the department's Audit Committee, that the NPA should make use of the department's Audit Committee until such time as it had set up its own. This arrangement was however also important from an accountability point of view, to ensure proper co-ordination because of the existence of two Accounting Officers in the NPA. This point will be expanded upon later in this report.

7.6 Accounting Officer Status of the NPA and DSO

The legal status of the NPA continues to present problems with regard to accountability and corporate governance. In terms of the NPA Act, there are currently two accounting officers for the NPA. The DSO has its own accounting officer while the Director-General of the department is the accounting officer for the remainder of the NPA. In order to ensure some coherence and clarity of reporting lines, the CEO of the NPA has simultaneously been appointed CEO and accounting officer of the DSO. The CEO has also received a delegation from the Director-General, delegating his responsibilities as accounting officer for that portion of the NPA for which he remains accountable. This has assisted in running a coherent organisation but still presents difficulties. The uncertainty has also made it difficult to finalise a comprehensive set of delegations for the NPA. A basic set of delegations is in place and a draft of a more comprehensive delegations manual has been completed but is difficult to finalise in the current environment of legal uncertainty. When the CEO was required to sign a performance agreement, this could theoretically have been signed with the Director-General, National Director of Public Prosecutions or the Minister – or all three. However, the Minister directed the CEO to sign her performance agreement with the National Director of Public Prosecutions.

It is essential for good corporate governance and to ensure that the NPA functions as a coherent whole, that there is a single accounting officer for the organisation. Various options were presented to Treasury in April 2001. The option the NPA has operated with for the past financial year has been for the Director-General of the department to delegate what he can in terms of the PFMA. A further option now being explored is for the NPA to be declared a public entity. The PFMA provides a number of options but the matter requires an urgent political decision to rectify the situation.

8. Progress with financial management

- The NPA has made significant progress on improving its financial management and operations. As indicated earlier, this has been the NPA's first year of semi-independence from the department and has been regarded as an important test of the organisation's ability to sustain good corporate governance. The NPA had a very short period of time within which to set up systems and take over support services previously rendered by the department – less than three months. In spite of this tight time frame and very limited capacity, a project called Project Harayeng, succeeded in mobilising staff and management and the NPA did take over these functions on 1 April 2001. The decision that this should happen was only taken on 5 February 2001. Financial managers were only recruited in January 2001. However, while the task appeared herculean at the time, the NPA overcame many obstacles and had its own systems running on 1 April 2001.

- The NPA has recruited many more financial managers and staff since April, and is currently recruiting a few more. The internal audit report pointed out important loopholes that required to be filled by recruiting more staff but the NPA was already planning a further recruitment drive from the start of the new financial year.

- The internal audit report has shown up the need to tighten up some of the internal controls, but has not indicated any major problems. From 1 April 2001, the NPA has had its own procedural manuals and policies for most major financial (and non- financial) processes. These have largely proved effective. These manuals were developed with staff and management and a training program is currently running to ensure that all administrative staff is trained in the manual.

- However, the major challenge facing the NPA in the coming financial year is to ensure that the PFMA takes root in all the business units and regional offices of the NPA. A project is already underway to implement an output based budgeting system in the NPA. This system will provide line managers with the ability to budget effectively and to manage their budgets. The system will also provide line managers with access to BAS and LOGIS. Separate access will be provided to Persal. This project includes a significant amount of training, not only in terms of how to operate the software, but the more important process of budgeting and financial management.

- For the senior management layer, this training will be supplemented by more advanced training in financial management to be provided by means of a compulsory Management Development Program. Tenders for this program are currently being evaluated and the first training should commence by September 2002. The training is a long-term program over a 1 – 2 year period.

- Specifications are also currently being drafted to provide compulsory PFMA training for all staff in the NPA.

- A special committee has been sef up to manage all reported cases of irregular, unauthorised and fruitless expenditure. No cases of unauthorised expenditure have been reported since 1 April 2001. Much of the expenditure being investigated by this committee is irregular expenditure as opposed to unauthorised or fruitless or wasteful expenditure. A final report will be tabled to the CEO with recommendations for action by the end of June 2002.

- In order to deal with this problem, the CEO has issued warning letters to the heads of all business units, pointing out that clear guidelines for procurement do exist and must be followed. This same communiqué has indicated that all reported cases of irregular expenditure will, in future, be investigated directly by the CEO's Office and that any irregular expenditure will in future be regarded as a dismissable, and possibly a criminal offence, even if the expenditure incurred makes sense in terms of the requirements of service delivery.

- Difficulties have also been experienced, particularly in the NPS, with the appointment of temporary staff without the necessary authorisation. Despite many warnings by the CEO that no ex post facto appointments will be authorised, the problem persists and a final communiqué has now been issued to the effect that anyone authorising the appointment of temporary staff without the necessary approval will be investigated by the CEO's Office and that this too, will be regarded as a dismissable offence, even if the appointments make sense to ensure continued service delivery.

9. Progress with prior year unresolved matters.

9.1 Possible unauthorised expenditure – R5,9 million

- Transactions amounting to R 4 million were resolved, supporting documentation was submitted to the auditors for audit purposes.
- Transactions amounting to R 1,9 million have been referred to the State Tender Board for condonation. This has been included in note 10.4 to the financial statements.

9.2 Unauthorised expenditure – R523 000

- This expenditure has been disallowed in the financial statements and reflected as unauthorised expenditure, as disclosed in note 10 to the financial statements.

9.3 Lack of supporting documentation for R117 000

- Transactions amounting to R 48 000 were submitted to the auditors for audit purposes and batches amounting to R69 000 will be furnished to the auditors in due course.

The annual financial statements set out on pages 92 to 113 have been approved by the Accounting Officer.

.....
Adv. V. Pikoli
Director-General: Justice and Constitution Development
Date: 31 May, 2002

.....
Ms Marion Sparg
Chief Executive Officer: NPA
Date: 31 May, 2002

Report of the Auditor-General
– to Parliament on the financial statements of the National Procecuting Authority for the year ended 31 March 2002

1. Audit Assignment

The financial statements as set out on pages 96 to 113, for the year ended 31 March 2002, have been audited in terms of section 188 of the Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996), read with sections 3 and 5 of the Auditor-General Act, 1995 (Act No. 12 of 1995). These financial statements, the maintenance of effective control measures and compliance with relevant laws and regulations are the responsibility of the accounting officer. My responsibility is to express an opinion on these financial statements, based on the audit.

2. Nature and scope

The audit was conducted in accordance with Statements of South African Auditing Standards. Those standards require that I plan and perform the audit to obtain reasonable assurance that the financial statements are free of material misstatement.

An audit includes:

- examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements,
- assessing the accounting principles used and significant estimates made by management, and
- evaluating the overall financial statement presentation.

Furthermore, an audit includes an examination, on a test basis, of evidence supporting compliance in all material respects with the relevant laws and regulations which came to my attention and are applicable to financial matters.

I believe that the audit provides a reasonable basis for my opinion.

3. Unqualified Audit opinion

In my opinion, the financial statements fairly present, in all material respects, the financial position of the National Prosecuting Authority at 31 March 2002 and the results of its operations and cash flows for the year then ended in accordance with prescribed accounting practice.

4. Emphasis of matter

Without qualifying the audit opinion expressed above, attention is drawn to the following matters:

4.1 Lack of tender committee approvals

Expenditure amounting to R4million was not approved by the National Prosecuting Authority (NPA) Tender Committee as required by the delegations of the State Tender Board. Subsequent to year-end, management requested that ex post facto approval be given by the NPA Tender Committee. At the date of finalising this report, this matter remained unresolved.

4.2 Debt management

The following shortcomings were identified in debt management:

- Inadequate follow-up of debtors.
- Debtor reconciliations had not been performed since September 2001.
- Interest is not being charged on debts as prescribed in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

4.4 Separate accountability for the NPA

For fiscal budgetary purposes, the NPA is included as a programme in the Department of Justice and Constitutional Development's (department) annual budget. With approval the NPA established separate accountability.

The department will also prepare consolidated financial statements to combine its results with that of the NPA. However, these consolidated financial statements will not be subject to a separate audit.

4.5 Computer audit of the logical access controls

A computer audit of the logical access controls and security parameter settings within the information technology environment was completed in May 2002 and the findings were brought to the attention of the accounting officer in a separate report.

5. Appreciation

The assistance rendered by the staff of the National Prosecuting Authority during the audit is sincerely appreciated.

S A Fakie
Auditor-General

Pretoria
30/07/02

Statements of Accounting Policies and related matters
– for the year ended 31 March 2002

The financial statements have been, unless otherwise indicated, prepared in accordance with the following policies, which have been applied consistently in all material respects. However, where appropriate and meaningful, additional information has been disclosed to enhance the usefulness of the financial statements and to comply with the statutory requirements of the Public Finance Management Act, Act 1 of 1999 (as amended by Act 29 of 1999) and the Treasury Regulations for Departments and Constitutional Institutions issued in terms of the Act, as well as the Division of Revenue Act, Act 1 of 2001.

1. Basis of preparation

The financial statements have been prepared on the cash basis of accounting according to Generally Recognised Accounting Practice (GRAP), except where stated otherwise. Under the cash basis of accounting transactions and other events are recognised when cash is received or paid. This basis of accounting measures financial results for a period as the difference between cash receipts and cash payments.

2. Revenue

Voted funds are the amounts appropriated to a entity in accordance with the final budget known as the adjustment estimate. Interest received is recognised upon receipt of the funds, and no accrual is made for interest receivable from the last receipt date to the end of the reporting period. Unexpended voted funds are surrendered to the National/Provincial Revenue Fund.

Dividends received are recognised as revenue in the financial statements of the entity, however, it is also recognised as an expense in the same year, as the dividends are paid over to the Revenue Fund.

3. Expenditure

Capital and current expenditure is recognised in the income statement when the payment is made. Interest paid is also recognised when paid and no accrual for interest is made between the payment date and the reporting date.

4. Unauthorised, irregular, and fruitless and wasteful expenditure

Unauthorised expenditure means:

- the overspending of a vote or a main division within a vote, or
- expenditure that was not made in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division.

Unauthorised expenditure is treated as a current asset in the balance sheet until such expenditure is recovered from a third party, authorised by Parliament, or funded from future voted funds.

Irregular expenditure means expenditure, other than unauthorised expenditure, incurred in contravention of or not in accordance with a requirement of any applicable legislation, including:

- the Public Finance Management Act ,
- the State Tender Board Act, or any regulations made in terms of this act, or

Irregular expenditure is treated as expenditure in the income statement until such expenditure is either not condoned by National Treasury or the Tender Board, at which point it is treated as a current asset until it is recovered from a third party.

Fruitless and wasteful expenditure means expenditure that was made in vain and would have been avoided had reasonable care been exercised. Fruitless and wasteful expenditure is treated as a current asset in the balance sheet until such expenditure is recovered from a third party.

5. Debt written off

The Departmental debt write-off policy as detailed in the Departmental Financial Instructions entails the following:

Any debt to be written off by the Accounting Officer, was only considered provided that:

- All reasonable efforts to trace the debtor has failed (in effort to trace the debtor, the debtor's address may possibly be obtained inter alia through the South African Police Services, Department of Home Affairs (population register), The Department of Finance: Pensions Admini-stration, Governing body of a recognised profession, of which the debtor is a member);
- The debt is not owing by employees of the State;
- The debt did not originate or become irrecoverable owing to fraud, theft, wilful damage or delay on the part of any employee of the State;
- Recovery of the debt would be uneconomical;
- Recovery of the debt would cause undue hardship to the debtor or his/her dependants;
- It would be to the advantage of the State to effect a settlement of its claim or to waive the claim; and
- Any debt written-off must be disclosed in the Annual Financial Statements, indicating the policy in terms of which the debt was written off.

Interest payable on debts to the state:

- Interest must be charged on all debts to the State at the interest rate provided for in terms of Section 80 of the Public Finance Management Act.
- Interest is to be calculated on the decreasing balance of the debt and is not to be capitalised. This implies that the simple interest method is to be used. Interest stops accruing as soon as the interest equals the amount of the capital debt. Once a portion of the interest is paid, the interest again accrues until it equals the amount of the capital debt. If the full amount of the interest, plus a portion of the capital debt is paid, the interest will only accrue until it equals the amount of the then outstanding capital debt.
- Before interest may start to accrue, the debtor must be placed in mora, i.e. he/she must have been informed about the debt and given an opportunity to settle the debt. This mora period lasts for 30 days. After 30 days, during which the debt is not extinguished, interest starts accruing.
- If interest has been arranged for by means of an agreement, such as study con-tracts, housing guarantees, etc. interest starts accruing on the day that the pay-ment is due. No mora period is applicable as the debtor is aware of the debt in terms of the conditions of the agreement.

6. Assets

Physical assets (fixed assets, moveable assets and inventories) are written off in full when they are paid for and are accounted for as expenditure in the income statement.

7. Receivables
Receivables are not normally recognised under the cash basis of accounting. However, receivables included in the balance sheet arise from cash payments that are recoverable from another party.

8. Payables
Payables are not normally recognised under the cash basis of accounting. However, payables included in the balance sheet arise from cash receipts that are due to either the National Revenue Fund or another party.

9. Provisions
Provisions are not normally recognised under the cash basis of accounting.

10. Lease commitments
Lease commitments for the period remaining from the accounting date until the end of the lease contract are disclosed as a note to the financial statements. These commitments are not recognised in the balance sheet as a liability or as expenditure in the income statement as the financial statements are prepared on the cash basis of accounting.

11. Subsequent payments
Payments made after the accounting date that relates to goods and services received before or on the accounting date are disclosed as a note to the financial statements. These payments are not recognised in the balance sheet as a liability or as expenditure in the income statement as the financial statements are prepared on the cash basis of accounting.

12. Employee Benefits
Short-term employee benefits
The cost of short-term employee benefits is expensed in the income statement in the reporting period that the payment is made. Short-term employee benefits, that give rise to a present legal or constructive obligation, are deferred until they can be reliably measured and then expensed. Details of these benefits and the potential liabilities are disclosed as a note to the financial statements and are not recognised in the income statement.

Termination benefits
Termination benefits are recognised and expensed only when the payment is made.

Retirement benefits
The entity provides retirement benefits for its employees through a defined benefit plan for government employees. These benefits are funded by both employer and employee contributions. Employer contributions to the fund are expensed when money is paid to the fund. No provision is made for retirement benefits in the financial statements of the entity. Any potential liabilities are disclosed in the financial statements of the National Revenue Fund and not in the financial statements of the employer entity.

Medical benefits
The entity provides medical benefits for its employees through defined benefit plans. These benefits are funded by employer and/or employee contributions. Employer contributions to the fund are expensed when money is paid to the fund. No provision is made for medical benefits in the financial statements of the entity.

Retirement medical benefits for retired members are expensed when the payment is made to the fund.

13. Capitalisation reserve
The capitalisation reserve represents an amount equal to the value of the investments and/or loans capitalised, or deposits paid on behalf of employees of a foreign mission, for the first time in the previous financial year. On disposal, repayment or recovery, such amounts are transferable to the Revenue Fund.

14. Recoverable revenue

Recoverable revenue represents payments made and recognised in the income statement as an expense in previous years, which have now become recoverable from a debtor due to non-performance in accordance with an agreement. Repayments are transferred to the Revenue Fund as and when the repayment is received.

15. Comparative figures

As this is the first year that the National Prosecuting Authority has reported as a separate entity, no comparative figures have been provided. The prior year results of the National Prosecuting Authority have been included in the comparative figures of the Department of Justice and Constitutional Development which are not restated for disclosure purposes.

Income Statement (Statement of Financial Performance)

– for the year ended 31 March 2002

	Note	2001/02 (R'000)
Revenue		
Voted funds		725 477
Non voted funds (Other Receipts)	1	1 030
Foreign aid assistance (including RDP funds)	2.1	498
Total revenue		**727 005**
Expenditure		
Personnel	3	519 203
Administrative		53 009
Inventories		8 301
Equipment	4	11 951
Land and buildings	5	8 985
Professional and special services	6	102 994
Miscellaneous	7	19 668
Special functions: Authorised Losses	8	698
Foreign aid assistance (including RDP funds)	9	585
Total expenditure		**725 394**
Net surplus		**1 611**
Add back unauthorised, irregular, and fruitless and wasteful expenditure disallowed	10.2	523
Net surplus for the year		**2 134**
Analysis of net surplus for the year		
Unauthorised expenditure - To be surrendered	10.2	523
Funds to be surrendered to Revenue Fund via Department of Justice and Constitutional Development	15	668
Revenue surrendered or to be surrendered to Revenue Fund	14	1 030
Local and foreign aid assistance (including RDP funds)		(87)
Rolled over to the following year	17.1	381
Recoverable from donors	16.1	(468)
		2 134

Balance Sheet
(Statement of Financial Position)
– at 31 March 2002

	Note	2001/02 R'000
Assets		
Current assets		
Unauthorised, irregular and fruitless and wasteful expenditure	10	611
Cash and cash equivalents	11	83 104
Receivables	12	11 558
Prepayments and advances	13	315
Foreign aid assistance (including RDP funds) recoverable from donors	16.1	468
Total assets		**96 056**
Liabilities		
Current liabilities		
Revenue funds to be surrendered	14	1 030
Payables	15	94 645
Total liabilities		**95 675**
Net assets/Equity		
Local and foreign aid assistance (including RDP funds) rolled over	17.1	381
Total net assets/equity		**381**
Total liabilities/Equity		**96 056**

Statement of changes in net assets/equity
– for the year ended 31 March 2002

	Note	2001/02 R'000
Local and Foreign aid assistance (including RDP funds) rolled over		
Opening Balance		0
Transfer from income statement		381
Closing Balance		**381**

Cash flow statement
– for the year ended 31 March 2002

Cash flows from operating activities		
Net cash flow generated by operating activities		2 134
Add: Capital expenditure disclosed separately		17 096
	19	**19 230**
Cash generated/ Utilised to increase working capital	20	80 970
Net cash flow available from operating activities		**80 970**
Cash flows from investing activities		**(17 096)**
Purchase of equipment	4.1	(8 296)
Purchase of land and buildings	5.1	(8 800)
Net cash flows from operating and investing activities		**83 104**
Net increase in cash and cash equivalents		**83 104**
Cash and cash equivalents at beginning of period		0
Cash and cash equivalents at end of period	11.1	**83 104**

Notes to the Annual Financial Statements
– for the year ended 31 March 2002

	2001/02 R'000
1. Other receipts	
Description	
Recoveries of previous years expenditure incurred by the Department of Justice and Constitutional Development	263
Miscellaneous Revenue	148
Rent – Property	189
Parking – Official	75
Commission	213
Stale Cheques	142
	1 030
1.1 Gifts, donations and sponsorships received in kind excluding RDP funds by the department (Total not included above)	
Nature of gift, donation and sponsorship	
Furniture, Computer equipment – South African Breweries	100
Two vehicles – Delta Motor Corporation	176
	276
2. Foreign aid assistance (including RDP)	
2.1 Received in cash	
WK Kellogg Foundation (Statement B)	498
Total foreign aid assistance received in cash	**498**
2.2 Received in kind (value not included in income statement)	
Description	
Air Fares to visit the USA for attending seminar by Asset Forfeiture Unit Officials – US Embassy	34
	34
3. Personnel	
Basic salary costs	367 660
Pension contributions	54 382
Medical aid contributions	19 731
Other salary related costs	77 430
	519 203
Average number of employees	3 072

	Note	2001/02 R'000
4. Equipment		
Current (Rentals, maintenance and sundry)		3 655
Capital	4.1	8 296
		11 951
4.1 Capital equipment analysed as follows:		
Cellular Telephone equipment		91
Furniture and office equipment		1 405
Surveillance Equipment		6 800
		8 296
5. Land and Building		
Current Expenditure		185
Capital Expenditure	5.1	8 800
		8 985
5.1 Capital property expenditure analysed as follows:		
Properties (Promat Building – Silverton)		8 800
		8 800
6. Professional and special services (Current expenditure)		
Auditors remuneration		679
Legal services		24 090
Professional services: other		22 669
Computer services		50 141
Other		5 415
		102 994
7. Miscellaneous		
Remissions, refunds and payments made as an act of grace	7.1	111
Gifts, donations and sponsorship made	7.2	21
Witness Fees		151
Protected custody of witnesses		19 267
Psychiatric		79
Other		39
		19 668
7.1 Remissions, refunds and payments made as an act of grace		
Nature of remissions, refunds and payments		
Payment of Arbitration		69
Civil Action / Court order		30
Labour Court case/CCMA		12
		111

	Note R'000	2001/02
7.2 Gifts, donations and sponsorships paid in cash by the department (items expensed during the current year)		
Nature of gifts, donations and sponsorships		
Purchase of Corporate gifts and Promotional items for use by NPA for National and international guests.		21
		21
8. Special functions: Authorised losses		
Material losses written off	8.1	698
		698

8.1 Material losses written off in income statement in current period

Nature of losses	Current Exp.	Capital Exp.	2001/02 R'000
Civil Action	3	0	3
Damage to Government vehicle	4	0	4
Damages against Witness Protection	691	0	691
	698	**0**	**698**

9. Foreign aid assistance (including RDP)		
9.1 Expenditure per organisation		
USAID (Statement A)		376
WK Kellogg Foundation (Statement B)		117
Finland Government (Statement C)		92
		585
9.2 Expenditure by standard item		
Administrative		256
Inventories		258
Equipment		71
		585
10. Unauthorised, irregular and fruitless and wasteful expenditure		
Unauthorised expenditure in respect of previous years not yet approved (Balance taken over from the Department of Justice and Constitutional Development)	10.1	523
Fruitless and Wasteful – Cell phones subscription fees paid for phones not in use	10.1	88
		611

	Note R'000	2001/02
10.1 Reconciliation of movement in account balance		
Opening balance		0
Transfer from Income statement	10.3	88
Prior year expenditure disallowed during current year	10.2	523
Closing Balance		**611**

10.2 Unauthorised expenditure in respect of previous years not yet approved

Year Disallowed	Incident	2001/02 R'000
2000/01	Non-compliance with State Tender Board Directives	523
		523

10.3 Fruitless and Wasteful expenditure

Year Disallowed	Incident	2001/02 R'000
2001/02	Fruitless and Wasteful – Cell phones subscription fees paid for phones not in use	88
		88

10.4 Reported Irregular and Fruitless and Wasteful expenditure still under investigation

Incident	Disciplinary steps taken/ criminal proceedings	2001/02 R'000
Procedures not followed	Still under investigation – Follow-ups are currently being made on reported Irregular Expenditure	4 853
Interest paid (Imperial Fleet Services)	Still under investigation – Follow-ups are currently being made on reported Fruitless and Wasteful Expenditure	46
		***4 899**

* *Not included in the amount above, is an amount of R4 million where the NPA Tender Committee did not approve the expenditure incurred. Subsequent to year-end, ex-post facto approval was requested. At the date of finalising this report, this matter was still unresolved.*

In addition to the above, and due to the inherent nature of the Witness Protection Programme, expenditure in excess of R30 000 did not adhere to delegations of the State Tender Board (STB). The STB has been approached to obtain ex post facto approval for non-compliance and a special standing delegation to negotiate directly with suppliers on the activities of the directorate.

If condonation is not received, the financial statements will have to be adjusted with an unknown amount which is yet to be quantified to reflect the irregular expenditure for amounts relating to years subsequent to 1999 and as unauthorised expenditure for amounts relating to years prior to 1999.

	Note	2001/02 R'000
11. Cash and cash equivalents		
Paymaster General Account	11.1	83 104
		83 104
11.1 Paymaster General Account / Exchequer Account		
Balance as per National Accounting Office		102 236
Add: Outstanding deposits		34
Sub total		102 270
Deduct:		19 166
Orders payable		370
PMG adjustment account		318
Electronic funds payable		7 582
Persal Credit Transfers		5 069
ACB control account		5 827
Balance above		**83 104**
12. Receivables - current		
Amounts owing by other departments	18	157
Staff debtors	12.2	976
Other debtors	12.3	10 425
		11 558
12.1 Age analysis – receivables		
Less than one year		11 558
		11 558
12.2 Staff debtors		
Debt Account (Salary overpayments)		976
		976
12.3 Other debtors		
Disallowance Miscellaneous		8
Supplier Disallowance		74
Salary Control Accounts		619
PAYE Adjustments		9 724
		10 425
13. Prepayments and advances		
Nature of prepayments/advances		
Subsistence and Transport Advances		308
Advances Petty Cash		7
		315

	Note	2001/02 R'000
Revenue funds to be surrendered		
Funds to be surrendered		
Opening balance		0
Revenue generated during the year		1 030
Transfer from income statement for revenue to be surrendered		1 030
Paid during the year		0
Closing balance		**1 030**

15. Payables - current

Description		
Advance to be repaid to Department of Justice and Constitutional Development		*94 342
Other payables	15.1	303
		94 645

* *Included above is voted funds amounting to R668 000 to be surrendered to the Revenue Fund.*

15.1 Other payables

Description	
Warrant voucher Re-issued	45
Claims Payable	63
Salary Control Accounts	149
Suspense Account: Imperial Fleet Services	46
	303

16. Foreign aid assistance (including RDP funds) repayable to donors/ recoverable from donors

Recoverable from donors	
USAID (Statement A)	376
Finland (Statement C)	92
	468

Reconciliation of accounts

16.1 Recoverable from donors

USAID (Statement A)	
Opening Balance	0
Transferred from income statement	376
Repaid to donors during the year	0
Closing Balance	**376**

	Note	2001/02 R'000
Finland (Statement C)		
Opening Balance		0
Transferred from income statement		92
Repaid to donors during the year		0
Closing Balance		**92**
Grand total		**468**

17. Foreign aid assistance (including RDP funds) rolled over

WK Kellogg Foundations (Statement B)		381
		381

17.1 Reconciliation of account

Rolled over		
WK Kellogg Foundation (Statement B)		
Opening Balance		0
Transferred from income statement		381
Repaid to donors during the year		0
Closing Balance		**381**

18. Transactions with other departments

Name of Department	**Owing by other departments**
South African Police Services	70
Department of Justice and Constitutional Development	43
South African National Defence Force	26
Department of Transport	18
	157

19. Net cash flow generated by operating activities

Net surplus as per Income Statement		2 134
Adjusted for items separately disclosed		17 096
Purchase of equipment	4.1	8 296
Purchase of land and buildings	5.1	8 800
Net cash flow generated by operating activities		**19 230**

	Note	2001/02 R'000
20. Cash generated (utilised) to (increase)/decrease working capital		
Increase in receivables – current		(11 646)
Increase in prepayments and advances		(315)
Increase in payables		92 931
		80 970

21. Contingent liabilities

Liable to	Nature of contingent liability	Note	As at 31 March 2002 R'000
Stannic	Motor vehicle guarantees		1 297
Various Banks	Housing loan guarantees	21.1	376
			1 673

The outcome.on civil actions pending against the entity is unknown, as these matters have not been finalised.

21.1 Housing loan guarantees

Name of financial institution	Balance of outstanding guarantees
ABSA	119
BOE Bank	66
First Rand Bank: FNB	73
Permanent Bank	17
Saambou Bank	59
Standard Bank	25
Nedbank limited	17
	376

22. Subsequent payments not recognised in income statement

22.1 Listed by standard item	
Administrative expenditure	3 709
Professional and special services	3 906
	7 615

23. Short term employee benefits

Major classes	
Leave entitlement	1 382
Thirteenth cheque	28 339
Performance bonus	6 840
	36 561

24. Commitments (Only Current Expenditure)

Liable to	Current expenditure	2001/02 R'000
Approved and contracted		
Manto Management / Training	398	398
PWC / Organisational development	1 836	1 836
Deloitte and Touche` / PPP Project	1 294	1 294
PWC / Public Entity registration	548	548
AFREC / PBS	2 450	2 450
KPMG / Golden Arrows	138	138
	6 664	**6 664**

25. Key management personnel

25.1 Remuneration

National Director, Deputy National Directors, CEO	**3 015**

Appropriation Statement

Sub-Programme	Adjustment Estimate 2001/02	Virement 2001/02	Amount Voted 2001/02	Expenditure 2001/02	Savings (Excess) 2001/02	%
Public Prosecutions	587 241	(84 472)	502 769	502 189	580	0.12%
Witness Protection Programme	25 000	(106)	24 894	24 806	88	0.35%
Special Operations	210 000	(12 884)	197 116	197 116	0	0
Special Function	0	698	698	698	0	0
Total	**822 241**	**(96 764)**	**725 477**	**724 809**	**668**	
Current						
Personnel	612 634	(92 851)	519 783	519 203	580	0.11%
Other	189 178	(3 547)	185 631	188 510	(2879)	(1.55%)
Capital						
Acquisition of Capital Asset	20 429	(366)	20 063	17 096	2 967	14.80%
Total	**822 241**	**(96 764)**	**725 477**	**724 809**	**668**	

Standard Item	Adjustment Estimate 2001/02	Virement 2001/02	Amount Voted 2001/02	Expenditure 2001/02	Savings (Excess) 2001/02	%
Personnel	612 634	(92 851)	519 783	519 203	580	0.11%
Administrative	69 717	(16 620)	53 097	53 009	88	0.17%
Inventories	9 691	(1 390)	8 301	8 301	0	0
Equipment	20 552	199	20 751	11 951	8 800	0
Land and Buildings	0	185	185	8 985	(8 800)	0
Professional and Special Service	79 647	23 347	102 994	102 994	0	0
Transfer Payments	0	0	0	0	0	0
Miscellaneous	30 000	(10 332)	19 668	19 668	0	0
Special Function	0	698	698	698	0	0
Total	**822 241**	**(96 764)**	**725 477**	**724 809**	**668**	

Notes to the Appropriation Statement
– for the year ended 31 March 2002

	2001/02 R'000
1. Explanations of material variances from amount voted (After virement):	
The amount of R 88 000 relates to irregular expenditure in respect of cell phones purchased but not used.	
The amount of R 580 000 relates to salary overpayments (Judge White Commission) which were disallowed.	
2. Reconciliation of appropriation statement to income statement	
Total revenue per income statement	727 005
Less: Non voted funds	1 030
Less: Local and foreign aid assistance (including RDP)	498
Amount voted per appropriation statement	**725 477**
Total expenditure per income statement	725 394
Less: Local and foreign aid assistance (including RDP)	585
Actual expenditure per appropriation statement	**724 809**
Gross Funds to be surrendered	**668**

Summary Income Statement of Aid Assistance received
– for the year ended 31 March 2002

	Note	2001/02 R'000
Received in kind		
Foreign aid assistance (USAID – Statement A)	2.2	34
Total aid assistance received in kind		**34**
Received in cash	2.1	
WK Kellogg (Statement B)		498
Total foreign aid assistance received in cash		**498**
Less: Donor funded expenditure	9	
USAID (Statement A)		376
WK Kellogg (Statement B)		117
Finland (Statement C)		92
Total foreign aid assistance expenditure		**585**
Deficit		**(87)**
Analysis of deficit		
Rolled forward	17	381
Recoverable from Donor	16	(468)
		(87)

Analysis of donor funded expenditure
– financial year ended 31 March 2002

Total Foreign Aid Assistance

2001/2002	USAID Statement A	WK Kellogg Statement B	Finland Statement C	Total Donor Funded Exp
Expenditure per Standard item				
Administrative	148	16	92	256
Inventories	228	30	0	258
Equipment	0	71	0	71
Total	**376**	**117**	**92**	**585**
Expenditure per Sub-programme				
Public Prosecution	376	117	92	585
Total	**376**	**117**	**92**	**585**

Statement of Foreign Aid Assistance received
– for the year ended 31 March 2002

Statement A

Source of funds Actual 2002	Extended use	Amount rolled over 1 April 2001	Amount received for the year ended 31 March 2002	Amount spent for the year ended 31 March 2002	Balance unspent/ (over-spent) as at 31 March 2002
United States Agency for International – USAID	Sexual Offences Court	0	0	376	(376)
		0	**0**	**376**	**(376)**

Value received in kind

Source of aid	Intended use	2002 R'000
US Embassy	Air fares for visit to USA by Asset Forfeiture Unit	34
		34

Performance information on use of assistance:

Sexual Offences Court (NPA)
NPA Project

Minimag Publication. Articles were printed including rights of children and are distributed to schools and sold at bookshop outlets.

Eleven (11) Public awareness campaigns (workshops) were held in the nine Provinces relating to Sexual Offences and Violence against women.

Statement of Foreign Aid Assistance received
– for the year ended 31 March 2002

Statement B

Source of funds Actual 2002	Extended use	Amount rolled over 1 April 2001	Amount received for the year ended 31 March 2002	Amount spent for the year ended 31 March 2002	Balance unspent/ (over-spent) as at 31 March 2002
WK Kellogg Foundation	Opening of Multidisciplinary Care Centres	0	498	117	381
		0	**498**	**117**	**381**

Performance information on use of assistance:
NPA – Project

Opening of the Thuthuzela rape care centre in Libode, Umtata. The centre opened in July 2001 and became operational in October 2001 with social workers and medical doctors on call. An implementation committee is operational to deal with challenges faced by the centre. Volunteer site coordinators are also in place. Sixty (60) rape cases have been reported and three convictions obtained.

Statement of Foreign Aid Assistance received
– for the year ended 31 March 2002

Statement C

Source of funds Actual 2002	Intended use	Amount rolled over 1 April 2001	Amount received for the year ended 31 March 2002	Amount spent for the year ended 31 March 2002	Balance unspent/ (over-spent) as at 31 March 2002
Finland	Training on Implementation of Lower Court management system	0	0	92	(92)
		0	**0**	**92**	**(92)**

Performance information on use of assistance:
NPA – Project

Workshops were held where training was given to prosecutors and state advocates on the policy on the implementation of the Lower Court Management System. Every Director of Public Prosecutions could hold a training session and these were held in the following provinces:

- Limpopo (previously Northern Province)
- Western Cape
- Free State
- Mpumalanga
- North West Province
- Eastern Cape
- Northern Cape

NOTES