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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES ("The Commission").

STATEMENT OF ADVOCATE MOKOTEDI JOSEPH MPSHE IN RESPONSE TO A NOTICE IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES.

INTRODUCTION

1 I am an adult male South African and an advocate of the High Court of South Africa having been admitted on 29 January 1991. I am a member of the Pretoria Society of Advocates ("**PSA**").

2 In 1998, I joined the National Prosecuting Authority ("**NPA**") as a Director of Public Prosecutions in the KwaZulu-Natal ("KZN") Province.

3 At this time, I was attached to the Truth and Reconciliation Commission ("**TRC**") as Chief Evidence Leader, handled TRC amnesty cases, and scheduled all Amnesty Committee hearings.

4 In April 2002, I was transferred to the office of the Director of Public Prosecutions ("**DPP**") in Pretoria where I remained until May 2006.

5 In May 2006, I was appointed to the position of Deputy National Director of Public Prosecutions ("**DNDPP**") and was responsible for the National Prosecution Services ("**NPS"**).

6 While I held the position of DNDPP, I served as the Acting National Director of Public Prosecutions ("**Acting NDPP**") from 23 September 2007 to 30 November 2009, and I took early retirement from the NPA during or about February 2010. My appointment as ANDPP was pursuant to the suspension of Advocate Vusi Pikoli as NDPP on the same date.

7 Unless the context indicates otherwise, the facts deposed to in this statement fall within my personal knowledge and are true and correct.

PURPOSE OF THIS STATEMENT

8 This statement is submitted in response to the Commission's Notice in terms of Rule 3.3 of the Rules of the Judicial Commission of Inquiry into Allegations Regarding Efforts or Attempts Having Been Made to Stop the Investigation or Prosecution of Truth and Reconciliation Commission Cases ("**the Commission**") dated 8 October 2025.

MY ROLE IN THE TRC

9 Before joining the TRC, I practiced as a junior counsel in Pretoria. I was then approached by Mr Dumisa Ntsebeza, who informed me that the late Archbishop Desmond Tutu wished to meet with me. Mr. Ntsebeza was at the time the head of TRC investigations, if my memory serves me well.

10 I duly travelled to Cape Town, where I met with the late Archbishop Desmond Tutu and other TRC Commissioners. I was offered the role of the National Co-ordinator and Chief Evidence Leader in the Amnesty Unit.

11 I commenced serving on the Amnesty Committee on or about October 1997. The Amnesty Unit considered applications for amnesty from all those who participated in human rights violations during apartheid era.

MY APPOINTMENT AS THE DIRECTOR OF PUBLIC PROSECUTIONS (KWAZULU-NATAL)

12 While at the TRC, I was approached by the then Minister of Justice, Dullah Omar, and informed that my services were required as the Director of Public Prosecutions ("**DPP**") for the Province of KwaZulu-Natal ("**KZN**").

13 Thereafter, I was contacted by the office of the NDPP, which office facilitated my appointment to the position of DPP for the Province of KZN. I was stationed in Pietermaritzburg from about 1998 to about 2002.

14 As DPP, I was responsible for prosecutions in the Province. This entailed the appointment of prosecutors and working with deputy directors in the Province, all of whom reported to me.

15 While I was DPP for KZN, I did not come across any matters that related to the TRC.

16 I was then transferred to serve as the DPP in Pretoria from April 2002 until May 2006.

MY ROLE AS THE DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

17 In May 2006, I was appointed to the position of Deputy National Director of Public Prosecutions ("**DNDPP**"). In this position, I was responsible for the National Prosecution Service ("**NPS"**) and was based at the Head Office in Pretoria.

18 My role as Head of the NPS involved taking charge of prosecutions in the country, managing all the DPPs who reported to me in all provinces. I reported to the NDPP about matters pertaining to prosecutions.

19 During my time as the DNDPP, I was not involved in any TRC matters. These were dealt with by Mr Ngcuka, who was the NDPP, and Dr Ramaite, the Special Deputy National Director ("**SNDP**") responsible for the Priority Crimes Litigation Unit ("**PCLU**").

20 I served as the DNDPP until 23 September 2007, when I was appointed as the Acting NDPP. This was upon the suspension of Advocate Vusi Pikoli as NDPP.

MY APPOINTMENT AS THE ACTING NDPP

21 During my tenure as Acting NDPP, I engaged from time to time with the following persons and structures whose relevance appears later in this statement :

21.1 Senior officials within the Justice, Crime Prevention and Security Cabinet coordination structures ("**the JCPS Cluster**"), through which the NPA, SAPS, and the Department of Justice and Constitutional Development ("**the Department of JCD**") ordinarily interfaced on operational matters requiring interdepartmental coordination.

21.2 Mr Simelane, who then served as the Director General of the Department of Justice and Constitutional Development (from around June 2005 to about September 2009).

21.3 The interdepartmental task team ("**the ITT**" or "**the Task Team**") which was established to facilitate coordination between SAPS and the NPA in relation to TRC-related investigations and prosecutions.

21.4 The Minister of Justice and Constitutional Development.

22 When I assumed my role as the Acting NDPP, the PCLU, which handled the TRC matters, reported to Dr. Ramaite, who served as the Special Deputy National Director.

23 Adv. Ackermann, was the head of the PCLU,working with Adv. MacAdam, as the Deputy Head. Dr. Pretorius was the other member and they were later

joined by Mr. Shaun Abrahams. Adv. MacAdam was, however, from time to time, involved in special projects such as prosecuting the nuclear case and representing the NPA in the Financial Action Task Force ("**FATF**"). Advocate MacAdam returned from the FATF in June 2008 to assume the operational management functions and responsibilities of TRC matters within the PCLU. I detail below the management and operationa structure of TRC matters during my tenure.

24 I left the position of Acting Director of National Public Prosecutions ("**ANDPP**") in December 2009, when Mr Menzi Simelane was appointed to the position of NDPP, and reverted to my position as DNPP responsible for the NPS.

RESPONSE TO THE ALLEGATIONS CONCERNING ME

25 I now turn to address the allegations that have been made against me regarding the management of TRC matters by the NPA, during my term as the Acting NDPP.

26 The Rule 3.3 Notice served on me records, inter alia, allegations to the following effect, and to which I respond as follows:

26.1 That soon after Mr. Vusumzi Patrick Pikoli's suspension on 23 September 2007,I relieved Advocate Anton Ackermann of his duties in relation to the TRC cases, and that Advocate Ackermann attributes that to political instruction.

26.2 That there was little or no work on TRC cases during 2008.

26.3 That in early 2009, I summoned Advocate MacAdam to my office, showed him a letter from SAPS indicating that SAPS was withdrawing from the Inter Departmental Task Team, asked him to negotiate with SAPS to investigate TRC cases, and told him to take over the TRC cases.

27 I respond to these allegations below:

AD PARAGRAPHS 271 THE RULE 3.3 NOTICE

The allegation that I relieved Advocate Ackermann of his duties in relation to the TRC.

28 In his affidavit, Adv. Ackermann alleges that shortly after Mr Pikoli's suspension on 23 September 2007, I immediately assumed the position of Acting NDPP, and I summoned him to my office and advised him that he was relieved of his duties in relation to TRC cases with immediate effect. This is incorrect. While I confirm that I relieved Adv. Ackermann of his operational functions and responsibilities in relation to TRC matters, this did not happen immediately after my appointment, and the suspension of Adv. Pikoli. I also explain below the reason and context within which I relieved Mr. Ackermann of his operational functions and responsibilities in relation to TRC matters.

29 Soon after my appointment as NDPP, I held briefings with various stakeholders, including those that were responsible for TRC matters as mentioned in paragraph 21 above. During these engagements, it had become

apparent to me that there was much acrimony directed towards Adv. Ackermann and his management of TRC matters. In my opinion, these were personality issues. Further, during or about November 2007, I received information concerning a complaint lodged by Reverend Frank Chikane, who was the Director General of the Presidency. Reverend Chikane had been a complainant in the matter of State v Van der Merwe and Others. This matter concerned the poisoning and attempted murder by security police of Reverend Chikane by the accused. Mr Ackermann was the prosecutor in the matter. I attach hereto, marked annexure **"MJM1**", a copy of Reverend Chikane's complaint to the Minister of Justice and Constitutional Development, Ms Bridget Mabandla,MP. After reading the complaint and considering relevant material including the plea agreement and the press statement issued by the accused after the conclusion of their case, I became concerned that the operational management of the functions and responsibilities of TRC matters by Mr. Ackermann had become untenable because of tensions between him and the stakeholders mentioned in paragraph 21 above. I attach hereto marked "**MJM1A**".

30 I fully supported Mr. Ackermann in his response to the complaint, as is fully set out in my letter to Minister Mabandla; but the perception of him by stakeholders and the acrimony directed against him remained; and this would in my considered view compromise the necessary cooperation between the PCLU and the stakeholders with whom he was required to interphase in his work relating to TRC matters. Accordingly, and with effect from November 2007, I deemed it prudent to relieve Mr. Ackermann from TRC-related duties

and responsibilities. I was however confident that this could be done without compromising the work on TRC matters as Advocate Chris MacAdam would take over the TRC operational management and responsibilities as soon as he finished his FATF project. I attach hereto my letter dated 24 January 2008 marked as annexure "**MJM2**" addressed to Minister Mabandla, wherein I confirmed Mr Ackermann's removal and addressed the complaint against Mr. Ackermann by Reverend Frank Chikane.

31 I refer to an internal memorandum dated 05 June 2008 addressed by Adv. Ackermann to Dr. Ramaite, then Deputy National Director of Public Prosecutions, the subject matter of which is the TRC Task Team. In that memorandum, Adv. Ackermann refers to a meeting between him, Adv. MacAdam and Dr. Ramaite, which concerned new internal arrangements and allocation of functions and responsibilities for TRC matters; and confirms the following:

- That Adv. MacAdam, who had now returned from the FATF, will supervise and manage Adv. Mhaga

- That Adv. MacAdam will attend all meetings of the Task Team, and attention will be paid to all investigations registered to date, and in that regard, Dr. Bukau will also be co-opted to deal with certain matters

- That prosecutors will not perform functions that will usurp the duties of the SAPS and NIA

- That the PCLU, as contemplated by the guidelines, will be responsible for operational management of TRC matters under the supervision of Dr. Ramaite and that of the NDPP.

- The memorandum deals with TRC matters, such as the Pebco Three case. I attach a copy of the internal memorandum marked "**MJM3A, MJM3B, MJM3C, MJM3D**". It is noted that these internal arrangements concerning TRC matters were being implemented under the overall supervision of Mr. Ackermann.

32 I refer to an internal memorandum dated 9 June 2008 addressed to me by Adv. MacAdam, relating to TRC cases wherein he discusses the NPA annual plan that required the PCLU to formulate an action plan for the prompt and effective disposal of TRC cases, Adv. MacAdam in the internal memorandum that as a consequence of the action plan decision, Adv. Ackermann and him had meetings with Adv. Mzinyathi and Dr. Ramaite, pursuant to which an agreement was reached that Adv. MacAdam should attend the Task Team meetings as well as any strategic discussions involving Dr. Ramaite and I. I attach a copy of the memo marked annexure "**MJM3E**"

33 The next email is dated 09 July 2008, it is from Ms Helena Zwart, who was an assistant in the office of Adv Ackermann and Adv. MacAdam. Its subject matter is also TRC matters and is addressed to Adv. Ackermann. The email lists several TRC matters which Adv. MacAdam requests Adv. Ackermann to address during his absence the following week. I attach the email marked as annexure **"MJM4"**.

34 The next memorandum is dated 01 October 2008 from Adv. MacAdam addressed to Dr. Ramaite and copied to Adv. Ackermann, and deals with the TRC case of Dr. Anton Lubowski. I attach the email as annexure "**MJM5**".

35 On 10 December 2008, Adv. MacAdam addressed an email to Dr. Ramaite, in which Adv. Ackermann is copied, and the email reports on TRC issues of the year 2008, and notes that the majority of matters referred to therein can only be taken forward with the assistance of SAPS and NIA. It further recommends that, as a matter of urgency in 2009, a meeting should be set up with the acting NDPP Adv. Ackermann and Adv MacAdam to obtain the NDPP's approval on the way forward. I attach a copy of the email marked "**MJM6**".

36 The memoranda referred to above are a contemporaneous record and reflect that Adv. Ackermann was months after my appointment as ANDPP, allocating operational management functions and responsibilities relating to TRC matters: This after consultation with Dr. Ramaite, who was the DNPP responsible for the PCLU and TRC matters. Mr Ackermann therefore retained his supervisory role over the staff dealing with TRC matters within the PCLU. I had no objections to this arrangement.

THE TRC PORTFOLIO AND ROLE ALLOCATION (AD PARAGRAPH 302 OF RULE 3.3 NOTICE)

37 I deny that I stopped or intended to stop the investigation or prosecution of TRC matters, whether by instructions, policy formulation, or any stratagem; or

that I acted on any improper political instruction, or that I participated in any collusion to suppress the investigation and prosecution of TRC matters.

38 I have already explained that I did not engage in any matters relating to the TRC which were being considered by the PCLU.

39 While I was Acting NDPP, I had no reason to believe that there was any interference with prosecutorial discretion. This is supported by reports that were tabled at meetings I attended with the leaders of various units, including the PCLU. To the extent that there were delays, inactivity, or limited progress in any matter during my tenure as the Acting NDPP, those circumstances must be understood against the practical constraints that existed at the time. The prosecution of complex historical matters is ordinarily dependent on complete investigation dockets, the identification and location of witnesses, sufficient admissible evidence, and the ability of the investigative authorities to prioritise and execute the required investigative steps. Challenges in interdepartmental cooperation and coordination may therefore have affected capacity and timing. Those constraints do not, without more, amount to interference with prosecutorial discretion. There were however constraints regarding the availability of investigators because the SAPS management and the NPA differed in the interpretation of each other's roles in the implementation of the NPA Policy and Guidelines.

TRC CASES DURING 2008 (AD PARAGRAPH 305)

40 The rule 3.3 notice records an allegation that little or no work was done on TRC cases during 2008.

41 I do not accept that the position can properly be reduced to a simple assertion that “no work” was done or that matters were “left unattended.” The available contemporaneous documentary record reflects internal management and supervision arrangements concerning TRC matters within the PCLU during 2008, including the arrangements recorded in MJM3 annexed above.

42 I further record that any material progress in TRC prosecutions depended on investigative cooperation, docket readiness, and resourcing, all of which were not within the unilateral control of the NPA.

43 To the extent that it is contended that any alleged inactivity in 2008 is itself proof of intentional suppression or collusion, I deny that inference.

44 I dispute that it is factually correct or that it can be assumed that little or no work was carried out by the NPA, SAPS, or DSO on the TRC cases during 2008. I have referred above to internal memoranda from “MJM3 to MJM7” as examples showing that work was being done during 2008 regarding TRC matters. These are merely examples and are not exhaustive. In addition to that, I attach my report to then Minister of Justice and Constitutional Development of the TRC work that was done during the relevant period, marked as Annexure “**MJM7**”. I also attach hereto a memorandum marked

"**MJM8**" dated 28 May 2009 addressed to Minister Jeff Radebe in which I report on the Pebco three matter. The last page of the memorandum is however missing and will be furnished as soon as I find it.

CONCLUSION

45 For the reasons set out above, I deny that I did anything to stop, suppress, or improperly interfere with TRC-related investigations or prosecutions.

46 I have responded to the allegations in the rule 3.3 notice as fully as I am presently able to do so on my personal knowledge and on the documents presently available to me.

47 From my knowledge and involvement in TRC matters, I deny that there was any political suppression or interference with prosecuting any TRC related matters.

MOKOTEDI JOSEPH MPSHE

18 March 2026

THE PRESIDENCY
REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

22 October 2007

Ms Brigitte Mabandla, MP
Minister of Justice and Constitutional Affairs
Private Bag X276
PRETORIA
0001

Dear Minister:

STATE V VAN DER MERWE AND OTHERS

As you would know, the case of those who were involved in my poisoning, namely, Johannes Velde VAN DER MERWE, Adriaan Johannes VLOK, Christoffel Lodewikus SMITH, Gert Jacobus Louis Hosea OTTO and Hermanus Johannes VAN STADEN was disposed of at the Pretoria High Court on the 17th August 2007 through a Plea Bargaining arrangement between the accused and the State.

Although I am pleased that we have concluded this matter, I am concerned about a number of issues, which I would like to raise with you and, hereby, the Government of the Republic of South Africa. I hope that you will find it necessary to share my concerns with Cabinet as I believe that this will be helpful in handling other matters of a similar nature.

The first point I would like to raise is the handling of this matter by the National Prosecuting Authority (NPA). From my interaction with the relevant officials within the NPA, it is clear to me that the said officials are simply the wrong people to deal with the 'post-TRC' matters. My experience with them is that they will not be able to relate to victims of gross violation of human rights or their next of kin with the sensitivity that is required. In fact, they did not seem to understand the nature of the challenge we were facing. Firstly, my court case was used to fight battles between the NPA and the Government about the "Guidelines" for dealing with post-TRC cases. Throughout this process I was left with a feeling that no one in fact cared about me – as a 'victim'. What mattered were the politics around the handling of the post-TRC cases and how people would win their battles.

As part of the consultative processes relating to the case of the *State v Van der Merwe and Others*, Adv. Ackerman, the Special Director in the Priority Crimes Litigation Unit, and his assistant visited me (as the 'victim'). Instead of just consulting me as 'the victim', he entered into an acrimonious argument with me about the approach of the

dw Mhaga
Assistant

Government on 'post-TRC' matters and the Guidelines. From this interaction, it was clear that he was radically opposed to the Guidelines as agreed upon by Cabinet and the Parliament of the Republic of South Africa. In fact, he seemed to be more interested in prosecution for the sake of it rather than the management of this difficult 'post-TRC' process.

What I detested most was that my case was being used to fight their battles with the Government. In pursuit of this objective, a draft letter which was constructed in a manner that would enhance their position in the prescribed forum with other departments was presented to me for my signature. What was more disgusting for me was that when I refused to sign the draft letter, Adv. Ackerman then threatened to use Section 204 of the Criminal Procedures Act against me to force me to surrender all the information he claimed I had received from Mr. Vlok on my poisoning. I dared him to do so, and reminded him that this was tried against me during the apartheid days and it did not work and that there is no reason why it would work now. He backed off and left. His colleague who was with him is my witness in this regard.

Not true I was present No threats Made in my presence

V. Mkaga Heard not present at meeting

Secondly, I was not consulted about the details of the Plea Bargaining Agreement. The NDPP informed me in writing about the arrangements for suspended sentences for the accused. My views were not solicited in this regard. In fact, I was not informed about the basis for the Plea Bargaining Arrangements. I only saw the Plea Bargaining Agreement during the proceedings in Court. I was particularly distressed by the submission in Section E, paragraph 6.3 of the 'plea agreement' which claims that I was consulted about it and that I was "satisfied with the plea agreement" and that I did "not wish to make any further representation in connection with the matter". The reality is that I could not be satisfied with something I had not seen. Having now considered it, there are naturally a number of issues I have concerns about which I had no opportunity to deal with. This leads me to the second matter I would like to raise.

Failure to consult me before the Plea Bargaining Arrangements were made resulted in the presentation of documents in Court which did not only have factual errors, but were politically and philosophically problematic to me as a 'victim'. Firstly, my background is presented as if I was both General-Secretary of the SACC and Vice President of the UDF when, in fact, I held these positions at different times (see paragraph 28). Secondly, the Plea Agreement document falsely argues that it was the stated policy of the UDF "to propagate and support ... *violence* for the ... purpose of rendering the country ungovernable" (own emphasis).

There are three issues I would like to raise on matters of substance. Firstly, Count 2 was withdrawn as part of the plea arrangements, and by so doing, the collaboration between the Security Police Special Unit and Wouter Basson and his team in producing and or procuring the lethal chemicals used was not probed further when it is clear from the plea bargain arrangement document that more information could have been extracted. Secondly, there is a reference in the plea arrangement document to a 'list' containing the names of 'high profile' members of the anti-apartheid liberation struggle who were to be acted against, and in 'extreme cases' be killed (paragraph 37). There is no indication that this matter was probed further. The State should be interested, for instance, in a copy of such a list to determine as to who else was on the list and what happened to them. Thirdly, there is no indication as to what discussions the NPA had with General Basie Smit and Dr. Basson to source more information about their operations and what the NPA is planning to do about them. Fourthly, there is no indication that there has

been a process to probe the involvement of the SADF on these matters and what happened to their list of external targets.

The Guidelines for the 'post TRC' cases make it clear that our objective is not just prosecution but the need to solicit more information about what happened to victims of gross violation of human rights, especially those who died or disappeared. Moreover, it is to get a better understanding of how the old national security management system functioned to make sure it does not happen again. Although the Van der Merwe and Others case assisted me to know more about what happened to me, failure to follow the Guidelines (and thereby collaborate with other entities of the State, like intelligence services, the Police and the Defence Force) made us miss opportunities to learn more about what befell other people who might have been affected in the same way.

Lastly, I found the Court itself completely 'foreign' and insensitive to me as a 'victim'. Firstly, the Court was completely white, from the Judge to the Prosecutors, defence lawyers and the accused. But worse, the proceedings were conducted in Afrikaans without due regard to the 'victim', especially where technical, legal and court processes are involved. As a result, I missed the greater part of the proceedings in the court. I am sure that we can make the court friendlier to victims than what I experienced that day.

On the side of Government, I felt that the handling of the *State v Van der Merwe and Others* case was left to me, as a 'victim', to explain to the public instead of the State or the Government. No effort was made by Government to manage this process or deal with public perceptions about it. No one got involved to make sure that the process achieved the objectives Government had agreed upon. Clearly, once the NPA acted unilaterally the Government apparently walked away from the matter. I do not think that this hands-off approach assisted us in any way to achieve the objectives set out in the Guidelines.

I shall be pleased, Minister, if the Government could deal with all the matters I have raised as well as remedy the situation before another case is dealt with.

Sincerely Yours,

FRANK CHIKANE
DIRECTOR-GENERAL

COPY

MJM2

Office of the National Director of Public Prosecutions

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24 January 2008

Ms B Mabandla, MP
Minister of Justice & Constitutional Development
Private Bag X276
PRETORIA
0001

Dear Minister

REPRESENTATIONS: REV FRANK CHIKANE

As requested, find herewith my response to the complaints raised by Rev Chikane in his letter, dated 22 October 2007, addressed to you. I intend dealing with these matters *seriatim* as I have numbered the paragraphs 1 to 12 (a numbered copy of Rev Chikane's letter is attached hereto for ease of reference as **Annexure "A"**).

Ad par 1

I have no comments.

Ad par 2

I have no comments.

Ad par 3

1. The officials who dealt with post-TRC matters during the relevant period were:

   (i) Adv Vusi Pikoli;
   (ii) Dr MS Ramaite;
   (iii) Adv AR Ackermann; and
   (iv) Adv MC Mhaga.

2. As a result of this letter and the prominent role played by Adv Ackermann, I have deemed it prudent to relieve him from all TRC-related duties since November 2007.

3. As you are aware, Adv Pikoli has been suspended and his future role is presently the subject of the Ghinwala Inquiry.

4. I have decided that all future post-TRC investigations and prosecutions be managed by Dr Ramaite, Adv Mhaga and the TRC Task Team.

Ad par 4

Both Advocates Ackermann and Mhaga deny that there was an acrimonious argument. See also par 5 *infra*.

Adv Ackermann admits that he had some concerns about the Guidelines and in a number of official memoranda, raised his concerns on the constitutionality thereof. Despite reservations, he diligently applied the criteria as stipulated in the Guidelines. With the wisdom of hindsight, it appears that there was some merit in Adv Ackermann's reservations. Indicative thereof is the institution of a civil action in the High Court, challenging the validity of the TRC Guidelines. (See ***Nkadimeng & Others v the NDPP and the Minister of Justice & Constitutional Development*** (Case No 32079/07).

Ad par 5

1. The gravamen of Rev Chikane's complaint is his perception of being used as a pawn in a battle between Government and the NPA. No mention is made of any specific Government department.

2. Rev Chikane further states that he was presented with a pre-drafted letter, which in his view was compiled in such a manner as to enhance the NPA's position in this so-called battle.

3. Adv Ackermann confirms that a pre-drafted letter was indeed presented to Rev Chikane after the former had explained the letter's *rationale* to Rev Chikane.

4. It is deemed necessary to briefly explain the background which led to the presentation thereof to Rev Chikane:

   (i) In December 2004, prior to the drafting of the TRC Guidelines, Adv Ackermann had a consultation with Rev Chikane where *inter alia* the intended prosecution was

discussed. During this consultation, Rev Chikane fully agreed to the said prosecution.

(ii) During December 2005, the TRC Guidelines came into operation. In terms of par A.4 thereof, the views of a victim are one of the factors to be taken into consideration prior to the institution of a prosecution.

(iii) The TRC Guidelines provide for perpetrators to make representations to the NDPP. The perpetrators in *S v Van der Merwe & Others* submitted representations through their legal representative, which were dealt with by the NDPP and Dr Pretorius. Adv Ackermann was not involved in this process at all.

(iv) After the conclusion of the process, Adv Pikoli instructed Adv Ackermann to proceed with the prosecution in terms of the Guidelines. Adv Pikoli also informed Adv Ackermann that Rev Chikane had been consulted and had intimated that the legal process should take its course.

(v) During a TRC Task Team meeting thereafter, the representative of the SAPS informed the meeting that according to National Commissioner Selebi, Rev Chikane was against the intended prosecution.

(vi) After Adv Ackermann had once again enquired from Adv Pikoli as to Rev Chikane's attitude to the intended prosecution, Adv Pikoli then once more contacted Rev Chikane, who apparently confirmed his previous views on the matter. Adv Pikoli thereafter instructed Adv Ackermann to immediately schedule a consultation with Rev Chikane and to arrange for Adv Mhaga to accompany him to this consultation.

(vii) In order to prevent any further confusion regarding Rev Chikane's attitude as far as the intended prosecution was concerned, Adv Ackermann deemed it imperative to obtain his written views.

(viii) Since Rev Chikane had conveyed his attitude to Advocates Pikoli and Ackermann on numerous occasions, the latter took the liberty of drafting a letter in Rev Chikane's name (a copy of which is attached hereto as **Annexure "B"**.)

(ix) Upon presentation of the letter, Rev Chikane refused to append his signature thereto and declined the suggestion to formulate his views in writing.

5. With regard to Rev Chikane's alleged claims of threats by Adv Ackermann during this meeting, the latter vehemently denies having threatened Rev Chikane in any manner. On the contrary, Adv Ackermann is of the view that he had a very pleasant meeting with Rev Chikane. Adv Mhaga, who was at all times present, also denies having witnessed any threats during the meeting. Adv Mhaga is further of the view that the interaction between the parties was conducted in a very amicable manner. Both Advocates Ackermann and Mhaga are of the view that no animosity was revealed by either of the parties during the meeting.

Ad par 6

Adv Ackermann admits not having consulted with Rev Chikane on the details of the Plea & Sentence Agreement. Adv Chikane was however informed of the proposed suspended sentences.

However, in various newspaper articles, after the conclusion of the trial, Rev Chikane publicly expressed his satisfaction with the proceedings (**Annexure "C"**).

With regard to the concerns raised by Rev Chikane relating to the stated policy of the UDF, it is important to note that in Plea & Sentence Agreements, the version of an accused person also has to be incorporated.

The following *dicta* in ***S v Esterhuizen* 2005 (1) SACR 490 at 494 e – h** is apt in explaining plea bargaining in terms of Section 105A of Act 51 of 1977:

> *"e* ....
> *Indeed it will often be so, once plea negotiations are entered into, that the accused's defence will also be known to the State. The contents of the State's dockets and the strength of the State's case will be known to the accused.*
>
> *f* *It must be so that substantial room for an adjustment of the charges (including the withdrawal of certain charges and the possible acceptance of competent verdicts on other charges) is open to the State. It must also be clear that in the give and take of negotiations, an accused person may tender in the negotiation to plead guilty to a charge of which that accused*
> *g* *person is guilty, but in respect of which the State may have had considerable difficulty in achieving a conviction.*

h *In return for the concession of a plea of guilty to a charge difficult to prove, it must be so that the Legislature has envisaged that the bargaining mechanism would bring home a result which satisfies the interests of justice. These would be that where a crime has been committed a conviction has been achieved. The price may be that the sentence which would normally flow from the commission of such a crime is lower than might otherwise have been imposed. This does not mean that justice has not been achieved."*

Ad par 7

It is incorrectly stated by Rev Chikane that his background had been presented as though he held the position of General-Secretary of the SACC and Vice President of the UDF simultaneously.

Par 28 of the English version of the Plea & Sentence Agreement states:

> *"... he was, inter alia the Secretary General of the South African Council of Churches and the Vice President of the United Democratic Front".*

The use of the term "*inter alia*" clearly denotes that Rev Chikane held these two positions at a particular point in time in his life and not simultaneously.

Ad par 8

Withdrawal of Count 2

Count 2 was included as a legal tactical strategy to *inter alia* have key evidence admitted should the accused have pleaded not guilty. In any event, the available evidence which the prosecution relied on is in the public domain (See ***S v Wouter Basson***).

The list

I am informed by Adv Ackermann that extensive attempts have been made to obtain knowledge of the contents of the list. He even went as far to use it as a bargaining tool not to accept any plea agreement. All avenues to obtain the list have been explored. Matters of this nature would not form part of a plea agreement.

The legal representative of the accused in the plea agreement categorically stated that none of the accused recalled the listed names.

Discussions with Smit and Basson

Basson has on numerous occasions publicly declared his innocence, most recently, during his hearing at the Medical Council.

Discussions were held between Smit's legal representative and Adv Ackermann. Smit denied any knowledge or involvement in these crimes.

One of the conditions negotiated by Adv Ackermann and which forms part of the Plea Agreement in *S v Van der Merwe & Others* is that the accused had undertaken to testify against Smit.

In August 2007, Adv Ackermann requested the NDPP's authorisation to proceed with an investigation against Basie Smit (See **Annexure "D"**).

SADF Involvement

Dr Pretorius had extensive consultations with members of the SADF in this regard.

Ad par 9

The NPA is in full agreement with the sentiments expressed by Rev Chikane, save for the last sentence.

Ad par 10

A further complaint raised by Rev Chikane was that *"the Court was completely white, from the Judge to the Prosecutors, defence lawyers and the accused."*

This is unfortunate, but the following should be noted:

(i) The prosecutor, Adv Ackermann, was appointed and directed to do these cases by the former NDPP, Mr B Ngcuka. This was later endorsed by Adv Pikoli.

(ii) The Judge President, the Honourable Mr Justice B Ngoepe, appointed the judge who presided over the trial.

(iii) The accused had a right to be represented by a legal representative of their own choice.

(iv) The prosecutor had no control over who the accused were.

With regard to the complaint of the proceedings having been conducted in Afrikaans, Adv Ackermann took the following pro-active measures in ensuring that the court proceedings would be accessible to the gallery:

> The indictment, sentence and plea agreement as well as his address to the Court were translated into English and 40 copies thereof were distributed to all stakeholders prior to the commencement of the trial.

It would have been prudent for a court interpreter to be present to translate the proceedings. This would have made the proceedings more victim-friendly.

Ad par 11

I do not have any comments on Rev Chikane's opinion in this regard, save to state that the NPA did not act unilaterally.

Yours sincerely

ADV MJ MPSHE SC
ACTING NATIONAL DIRECTOR PUBLIC PROSECUTIONS

MJM 3F

/Z56 forms

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INTERNAL MEMORANDUM

TO: DR MS RAMAITE SC
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ADV AR ACKERMAN SC
SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
AND HEAD: PCLU

SUBJECT: TRC TASK TEAM

DATE: 5 JUNE 2008

Dear Dr Ramaite

With reference to the meeting between you, Adv Macadam and myself earlier this morning, I confirm the following:

1. That Adv Macadam will supervise and manage Adv Mhaga's activities in respect of TRC matters;

2. That Adv Macadam will attend all meetings of the Task Team;

3. That Adv Macadam will be involved in all high level discussions with the Acting NDPP in connection with TRC matters;

4. That attention will be paid to the status of all investigations registered to date and in this regard, Dr Bukau will also be co-opted to deal with certain matters;

5. That the prosecutors will not perform functions which will usurp the duties of SAPS and NIA;

6. That the PCLU, as contemplated by the Guidelines, will be responsible for the operational management of TRC matters under your supervision and that of the NDPP.

An additional matter which I wish to bring to your attention is the Pebco 3 matter, where the accused are due to appear on a final remand in the Port Elizabeth High Court on 5 August 2008. The accused had, since 2004, appeared in the High Court on indictment, but on each occasion, the matter has been postponed, due to the fact that the review of their refusal of amnesty by the TRC has not been finalized. The DoJ&CD is responsible for compiling a record and enrolling the review before the TPD. To date, this has not taken place and on each occasion when we take this matter up, we are informed that documents are missing, etc. On more than one occasion, we had been asked to consider withdrawing the criminal case, because of the problems with finalizing the review.

The fact that the matter has not gone to trial is of considerable distress and dissatisfaction with the victims. They have complained to the Minister and have also displayed their dissatisfaction at court on the dates of the postponements.

A decision must be taken as to how the next court appearance will be managed. We believe that this should first be discussed between ourselves and the Acting NDPP, whereafter the Task Team must be consulted and thereafter, a memorandum submitted to the Minister.

Our *prima facie* views are that the Court would not grant another postponement and in any event, this would not be acceptable to the victims. The review is only for the benefit of the accused and one option would be to proceed with the prosecution. We however believe that a judge is highly unlikely to order a trial when the accused has the opportunity of receiving amnesty and is in no way to blame for the failure to have the review process finalized. We would also have to establish whether the matter is in fact at this stage ready for trial, since the witnesses were last consulted almost five years ago. The Court may require or we would be obliged to call someone senior from the DoJ&CD to testify under oath as to the reasons for the delay with the review. We see both the NPA and the DoJ&CD being criticized severely by the victims and the media.

Kind regards

AR ACKERMANN

MJM 38

TRC COMMITTEE MEMBERS

NAME	DEPT.	CONTACT No.	EMAIL	
Anton Ackermann	NPA (PCLU)	012-845 6474	arackermann@npa.gov.za	
Mthunzi Mhaga	NPA (PCLU)	012-845 6398	mcmhaga@npa.gov.za	
Dr S Ramaite	NPA (NSSD)	012-845 6765	msramaite@npa.gov.za	Convenor
Marlyn Raswiswi	Justice	012-315 1730 0826600463		
Yvonne Mabule	NIA	012-427 4498 0827872853	yvonnem@nia.gov.za	
Philip Jacobs	SAPS	012-395 0063	jacobspc@saps.gov.za	
Josias Lekalakala	SAPS	0825745870	mjlekalakal@telkomsa.net	
Brian Koopedi	NIA	012-4262602 0824168357	bkoopedi@nia.gov.za	
AT Mngwengwe	NPA(DSO)	012-845 6470	atmngwenwe@npa.gov.za	
NVE Ngidi	NPA(DSO)	012-845 6401	nvengidi@npa.gov.za	
		PRINCIPALS		
Adv Vusi Pikoli	NPA(NDPPP)	012-845 6758		
Kalyani Pillay	NPA	012-845 6749		
Loyiso Jafta	Presidency	012-300 5458		
M Simelane	DG justice	012-315 1730		
ME Manzini	NIA			

MJM3C

MINUTES OF TRC COMMITTEE MEETING 12 October 2006

Members Present:

1. Adv Vusi Pikoli (NPA)
2. Adv Kalyani Pillay (NPA)
3. Mr ME Manzini (NIA)
4. Mr Loyiso Jafta (PRESIDENCY)
5. Mr Simelane (DG JUSTICE)
6. Dr Ramaite (NPA & Convenor)
7. Adv Anton Ackermann (NPA)
8. Comm. Philip Jacobs (SAPS)
9. Mr Brian Koopedi (NIA)
10. Mr NVE Ngidi (DSO)
11. Mr AT Ngwengwe (DSO)
12. Ms Yvonne Mabule (NIA)
13. Ms Marlyn Raswiswi (JUSTICE)
14. Mr Josias Lekalakala (SAPS)
15. Mthunzi Mhaga (NPA)

Apologies : none — National Commissioner.

1. Opening Remarks by the NDPP who gave a detailed background of the cases emanating from the conflict of the past with particular reference to TRC matters. He indicated that the establishment of the committee is derived from the policy guidelines which were approved by parliament in December 2005 on prosecution of all TRC matters. The NDPP had attended a meeting with DGs from SAPS, NIA, justice and a representative from the office of the Presidency where it was decided that a committee should be established. Cases in possession of PCLU and SAPS have to be identified and an update on their status is also required. SAPS has to provide investigating officers for all cases identified for prosecution. The NDPP emphasised the fact that he will decide on each prosecution and not the committee. The role of the committee will be to make recommendations to the NDPP on each case.
2. Mr Manzini indicated that these cases need to be prioritised and the process needs to be fast tracked.
3. Dr Ramaite indicated that there is a need for a task team of investigators to work on these cases.
4. The NDPP further indicated that Dr Ramaite is the convenor for the committee and the PCLU will report to Dr Ramaite directly.

The meeting was then closed after the NDPP asked the committee to meet after the meeting with the Principals.

Committee Meeting

Dr Ramaite requested PCLU and SAPS to compile an audit report of all cases in their possession and that the PCLU will take charge of investigations being assisted by SAPS. The committee will then deal with all cases including matters that have been closed by the PCLU. Mr Ngidi indicated that committee members will not be rubber stamper to decisions already made by the PCLU and he was supported by Mr Koopedi who said they are prepared to go through volumes of records in all cases.

Mthunzi was then mandated to arrange a suitable date for the next meeting. Indeed a date was arranged for the 25/10/2006 at the DSO boardroom.

mJm30

Helena H. Zwart

From: Helena H. Zwart
Sent: Thursday, June 05, 2008 1:20 PM
To: Silas Ramaite
Subject: TRC Task Team

)ear Dr Ramaite

\ttached please find a memo from Adv Ackermann, addressed to yourself.

Regards

Helena

MJ M3D

/Z56 forms

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INTERNAL MEMORANDUM

TO: **DR MS RAMAITE SC**
DEPUTY NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: **ADV AR ACKERMAN SC**
SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
AND HEAD: PCLU

SUBJECT: **TRC TASK TEAM**

DATE: **5 JUNE 2008**

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6. That the PCLU, as contemplated by the Guidelines, will be responsible for the operational management of TRC matters under your supervision and that of the NDPP.

An additional matter which I wish to bring to your attention is the Pebco 3 matter, where the accused are due to appear on a final remand in the Port Elizabeth High Court on 5 August 2008. The accused had, since 2004, appeared in the High Court on indictment, but on each occasion, the matter has been postponed, due to the fact that the review of their refusal of amnesty by the TRC has not been finalized. The DoJ&CD is responsible for compiling a record and enrolling the review before the TPD. To date, this has not taken place and on each occasion when we take this matter up, we are informed that documents are missing, etc. On more than one occasion, we had been asked to consider withdrawing the criminal case, because of the problems with finalizing the review.

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Kind regards

AR ACKERMANN

TRC File

MJM3E

IZ56 forms

Office of the Head
Priority Crimes Litigation Unit
VGM Building
PRETORIA

INTERNAL MEMORANDUM

TO: ADV MJ MPSHE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

FROM: ADV RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
AND DEPUTY HEAD: PCLU

SUBJECT: TRC CASES

DATE: 9 JUNE 2008

P. O. Box 752,
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South Africa

Tel: (012) 845 6431
Cell: 082 498 6033

Dear Adv Mpshe

The NPA Annual Plan required of the PCLU that it formulate an action plan whereby TRC cases would be promptly and effectively disposed of. More specifically, I was appointed to manage this plan.

As a consequence thereof, Adv Ackermann SC and I met firstly with Adv Mzinyathi SC and thereafter with Dr Ramaite SC. Dr Ramaite SC agreed that I should attend the Task Team meetings as well as any strategic discussions involving himself and you. I also recommended that Dr Bukau be involved so as to assist Adv Mhaga on an operational level.

Dr Ramaite SC is not available for the remainder of the month. There is however one matter which requires urgent attention, namely the *Pebco 3* prosecution. The accused in this matter appeared on indictment in the Port Elizabeth High Court in 2004. On every occasion that the matter has been in court, it has been postponed so as to enable the review of the refusal of the amnesty to be heard by the full bench of the TPD. Last year, the

matter was postponed as a final date to 5 August 2008. The responsibility for arranging the review lies with the DoJ&CD.

To date, no date for the hearing has been fixed, although Adv Ackermann SC and I were given the assurance that this would be either early or mid- 2008. Obviously, the Judge President would not be able to convene a full bench to hear the review between now and 5 August 2008. It would be enormously damaging for the Pebco 3 matter to be struck from the roll due to a failure on the part of a State department. In my view, the only way in which a postponement can be obtained is if a date for the review is set for the third or forth quarter of this year's court sessions.

Although I intend taking up the matter with Tessie Bezuidenhout as a matter of urgency, I would recommend that you contact the Director General: DoJ&CD and request him also to ensure that the matter is expedited.

Another matter which requires attention is the status of the criminal investigation. As I recall, the matter was brought to court as a DSO investigation, but the investigators have now resigned. Consideration will have to be given to either appointing new investigators or to the matter being referred to SAPS. The reason why this is important is that the State may be required to demonstrate that it is ready to proceed with the prosecution on 5 August 2008.

Kind regards

RC MACADAM

MJM4

Helena Zwart (H)

From: Helena H. Zwart
Sent: 09 July 2008 04:41 PM
To: Anton R. Ackerman
Subject: TRC work
Importance: High

Dear Anton

While I am out the office next week, I recommend that you oversee the following work on TRC matters:

1. Pebco 3:

1.1 Tessie Bezuidenhout promised to come to the office so that an affidavit can be compiled confirming the fact that the record of the review had been filed with the High Court and giving reasons for the fact that this was not done already. She must be contacted and arrangements made for the affidavit to be compiled.

1.2 Adv Bukau was given a copy of my letter to Koole's attorney, placing certain facts on record and confirming that it was in his client's best interests that the matter be postponed. She should contact him and obtain a written confirmation.

1.3 Jan Wagener undertook to furnish an updated medical report in respect of Van Zyl, confirming that he is not fit to appear in court and also indicating that the matter should be postponed pending the review. I did not have time this week to meet again with him. However, one of the advocates should meet with him and resolve these issues. He has a spare copy of the CD which should be collected from his office.

1.4 Marion is meeting with the victims in PE from 20 – 22 July 2008. I have asked him to contact Madeleine to get the details of the victims support group which the Minister appointed to work with the families and that he should liaise with them in his contact with the families. I had also raised the desirability of Adv Mhaga being present in PE at the same time to meet with the families and explain the reasons for the further postponement of the matter.

1.5 It must also be established by Marion whether Venter and Mogai are still available and confirm their statements.

1.6 Consideration must be given to whether it is necessary for Marion to also submit an affidavit for use at the Court hearing. This would be to confirm that the witnesses, upon whose strength the prosecution was instituted, are still available.

1.7 Christo Nel indicated that the matter will be heard before either Jansen J or Liebenberg J and that he did not foresee that there would be any objection to a postponement. According to Jan Wagener, the earliest date for the review would be November 2008. It is likely that judgment would be reserved and probably only handed down in February 2009. Further, according to him, the party losing the review would definitely appeal to the SCA. It is therefore desirable that the matter again be postponed to August 2009 so as to enable the appeal to be finalised.

1.8 Van Zyl never applied for amnesty for assault. Therefore, even if the review was decided in his favour, he would still face prosecution on the assault charge. Koole has not applied for a review and therefore, can still be prosecuted for kidnapping and assault. If all of the urgent matters have been addressed, then the advocates should be instructed to locate the missing evidence in the docket. Andrew Leask has indicated that a member of his staff can download the data on "Eagle I". I have given Adv Bukau Leask's email, containing her contact details. Wagener's disk should also be perused. It would appear that Piet Jonker at one stage made material available for the purpose of compiling the record of the review. Arrangements should be made with Tessie Bezuidenhout for one of the advocates to review the documentary evidence which forms part of the review since certain of the missing portions of the docket could be filed there. A comprehensive memo should be compiled, setting out in a systematic

manner all further investigations necessary should the matter go to trial. The arrangement with the DSO as far as Marion is concerned is merely to confirm the availability of the witnesses upon whose evidence the decision to prosecute is taken. A new investigating officer would have to be appointed, so the instruction would have to be written in such a manner that a newcomer would be able to identify what is required. An executive summary of all the evidence should be compiled.

1.9 The evidence given by the State witnesses should be perused to establish whether there are any contradictions between such evidence and their statements in the docket. Any such contradictions should be described in detail and an opinion expressed as to whether they are fatal as far as the witnesses' credibility is concerned.

2. Anton Lubowski

2.1 Late last year, Mrs Lubowski requested her husband's murder to be reinvestigated and alleged that an explanation should be provided why Torie Pretorius and Neels de Lange did not follow up evidence which her attorneys had provided earlier to them.

2.2 Adv Mhaga apparently had meetings with various people. He should compile a comprehensive report, describing in detail what was conveyed to him by them and what follow-up actions, if any, were undertaken by himself. He should also file any documents acquired by him and should submit a report, setting out the relevance of such documentation.

2.3 A convicted diamond smuggler, Courtney Clark, repeatedly phoned Helena, requiring an appointment with me to arrange *inter alia* the arrest of Torie Pretorius. He was informed that I could not speak to him as I was not authorised to gather intelligence. Peter Bishop of the DSO also contacted him and explained that any allegations would have to be made to an investigating officer and followed up according to police procedures. Today, his advocate phoned me and I advised her that if he had any information on the Lubowski matter, he should reduce it to writing and submit it to her. She should peruse it and submit it to the PCLU if she considers it relevant to the Lubowski matter. It was specifically explained to her that any allegations could only be followed up by SAPS. It was explained to her that only Namibia had jurisdiction for acts committed in that country and that consideration could only be given if evidence was presented of a conspiracy formulated in South Africa as a result of which Achesen committed the murder. I pointed out to her that to date, no such evidence has been forthcoming and she agreed that it was unlikely that there would be a breakthrough.

3. St James/Heidelberg Tavern

3.1 The documentary evidence relating to these matters in a box under the table next to the safe should be analysed and a comprehensive report compiled, identifying all aspects thereof that would be relevant to Mphahlele.

3.2 The amnesty hearings are on the Justice website. An advocate must be appointed to peruse the evidence of the applicants in order to establish to what extent they implicate Mphahlele in the attacks.

3.3 Most of his claims to have ordered the attacks were made to the media. A comprehensive memorandum, setting out the law relating to the admissibility of this evidence must be compiled. Particular attention must be paid to the fact that the media will claim privilege and how this claim can be dealt with.

3.4 A detailed memorandum outlining all further investigations must be compiled.

3.5 His book is also in the office and must be read in order to determine its relevance to the investigation.

4. Simelane matter

4.1 A detailed analysis of the evidence in the docket must be conducted, identifying problem areas including legal issues and all aspects requiring investigation.

4.2 The TRC evidence must be analysed in order to establish whether it materially contradicts the statements in the docket.

4.3 A detailed analysis must be made of Howard Varney's report and the merits of his points in favour of a prosecution carefully analysed.

Kind regards

Chris

Helena Zwart (H)

From: Helena H Zwart
Sent: 01 October 2008 04:32 PM
To: Anton R. Ackerman
Subject: FW: Anton Lubowski

FYI

From: Helena H. Zwart
Sent: 01 October 2008 04:31 PM
To: Silas Ramaite
Subject: Anton Lubowski

Dear Silas

As you are aware, we forwarded a letter to Mrs Lubowski informing her that the allegations that her husband was murdered as a consequence of a conspiracy formulated in South Africa would have to be investigated by SAPS within the TRC Guidelines framework, but that this process cannot be taken forward until the Task Team reconvenes. In response, she has briefed an advocate to pursue legal options open to her to compel the NPA to act. I have had two lengthy conversations with the advocate, explaining to him the need for proper investigations to be conducted before any decision can be taken and pointing out to him the fact that executive direction is necessary before the Task Team can function. He will now take further instructions from the family, but obviously, we will be at a later stage again brought under pressure and may well face legal challenges which could place us in an embarrassing position.

My assessment of the matter is as follows:

1. There is no evidence of a conspiracy upon which a successful prosecution can be conducted.

2. Some considerable time ago, the D'Oliveira Investigation Unit obtained statements from the Namibian Police who investigated the deceased's murder and also obtained affidavits or conducted interviews with former SADF operatives and/or commanding officers. Various conflicting allegations were made by former CCB members, pointing to an involvement of the CCB with the murder of Lubowski. No proper attempt was made to reconcile these versions and more significantly, information obtained during interviews was never followed up by obtaining affidavits and corroboratory evidence. The upshot of all of this is to justify a suspicion that the deceased was in fact killed in pursuance of a CCB conspiracy, but one is left entirely in the dark as to where the conspiracy was formulated and who the conspirators were. It is common cause that prior to the change of Government in 1994, the former security forces destroyed all sensitive documentation.

3. In the light thereof, I believe that it is highly unlikely at this stage that evidence would emerge which would justify a successful prosecution. However, because we are dealing with a human rights abuse and our Constitution requires of us to conduct our business in a manner which upholds human rights, we are obliged to direct the police to follow up and obtain finality on these outstanding issues so that if we make a decision not to prosecute, we can justify this decision on the basis that there is no outstanding evidence.

4. Normally when we make a decision not to prosecute, we make all the evidence available to the family so that they can decide whether they do not want to obtain a certificate *nolle prosequi*. We might also face a request in terms of the Access to Information Act. Although I have said that the evidence is contradictory, it is highly sensational in that it implicates former generals and suggests that foreign assassins were paid out of State funds and that State structures were used to frustrate the Namibian investigations. This would obviously be sensational newspaper reporting. In my view, Government would have to be properly briefed on all these allegations before any release to the family, but it would only be appropriate for such a briefing to be given once all the outstanding investigations have been clarified.

All of the above emphasises the need to have finality on these TRC matters and I recommend that you advise the Acting NDPP accordingly

Kind regards

Chris Macadam

Helena Zwart (H)

From: Helena H. Zwart
Sent: 10 December 2008 01:36 PM
To: Silas Ramaite
Cc: Anton R. Ackerman
Subject: TRC matters
Importance: High

Dear Silas

This serves to provide a recap of 2008's issues:

1. No fresh cases requiring investigation were reported after the Lubowski matter in December 2007.

2. The Ginwala Commission report did not make any findings which would justify holding the work on the TRC cases in obeyance. The Ginwala report indicates that Government's complaints were confined to the Van der Merwe matter and that Government subsequently indicated that Government elected not to pursue their complaints. The Commission noted Adv Pikoli's statement that the Task Team was there to assist the NPA in making decisions.

3. The constitutional challenge to the Guidelines was argued on 24 November 2008, but judgment has been reserved.

4. As at November 2008, both SAPS and NIA indicated their willingness to again commence work on TRC matters. I recommended an in-house meeting with them prior to the close of business this year, but it would appear that it is impractical that this would take place before 2009.

5. The breakdown of individual cases is as follows:

5.1 ***S v Van Zyl & Koole*** (kidnapping/murder of the Pebco 3):

The accused were indicted in the Port Elizabeth High Court as early as 2004. Their case has now been postponed to late June 2009 for the High Court review of the refusal of amnesty in respect of Van Zyl. We assisted Justice in compiling the record of the review, which was lodged with the Pretoria High Court in July 2008. Van Zyl is seriously ill and may not be in a position to be prosecuted. His co-accused has not applied for a review of the refusal of amnesty and could still be prosecuted provided the two State witnesses are available.

5.2 *Anton Lubowski* Assassination

This matter has attracted ongoing negative publicity throughout 2008, due to the fact that the complaint laid in December 2007 has not been investigated. The family have gone to the length of appointing counsel to represent them. I have had a number of communications with him. Although Lubowski was murdered in Namibia, a South African Court would have jurisdiction if he was killed in pursuance of a conspiracy formulated in South Africa. The right to prosecute any such conspiracy will prescribe in September 2009. The D'Oliveira Unit conducted an incomplete enquiry suggesting complicity of the CCB in the assassination. Although it would appear unlikely that evidence would be forthcoming to justify a prosecution, the outstanding issues must be investigated and the family given feedback prior to the prescription of the offence. In this regard, SAPS will be required to investigate.

5.3 The kidnapping and murder of the *Cradock 4*

The victims are applicants in the constitutional challenge and have made a number of public statements concerning the fact that no prosecution has been instituted in this matter. At present, the only available evidence is a statement by De Kock to the effect that Van Zyl, the accused in the Pebco 3 matter, telephonically confessed to him that he was involved in this case and the fact that one of the amnesty applicants made a confession to the family prior to the amnesty hearing. SAPS must investigate these allegations to determine whether either of the two confessions could stand up in court. Another complicating factor is that in the event

of a prosecution being instituted, the accused will apply for their refusal of amnesty to be taken on review.

5.4 The kidnapping and disappearance of *Nokuthula Simelane*

The victims are also applicants in the constitutional challenge and have also appointed counsel to advance their case. Their counsel did call for a prosecution on a charge of kidnapping against a low ranking member of the Security Forces. Adv Mpshe has however authorised that a formal inquest be held so as to get the full picture of the person's disappearance and most likely, murder. SAPS must appoint an investigating officer to locate the witnesses who must testify at the inquest. No arrangements have been made to date for the holding of the inquest.

5.5 The *Heidelberg Tavern and St James Church Massacres*

The father of one of the deceased and a parliamentarian representing other victims have called for the prosecution of the current leader of the PAC. He has not applied for amnesty, but has made a number of public statements to the effect that he ordered the two attacks. We have located the existing Court records relating to the matters, but SAPS will have to conduct a series of investigations.

5.6 Warrant of arrest: *Philip Powell*

In 2008, Powell made representations via a local attorney for the cancellation of a warrant of arrest issued in respect of a possession of arms case going back to 1994. We compiled a memo for the Acting NDPP advising him to take this matter up with the Acting National Commissioner and Acting DG of NIA. We are not aware of what has transpired further in this matter. The background to this matter is the allegation that a large quantity of armaments, removed to KwaZulu-Natal, have not been recovered. In the light of the 2009 general elections, this must clearly raise an issue of national security and it is essential that this matter be dealt with prior to the elections.

5.7 The *Samora Machel* air crash

This matter has to date not been dealt with as a TRC matter, despite the fact that the TRC held a special hearing into the case and no one applied for amnesty. The former Minister for Safety & Security made a statement that SAPS was conducting a full investigation into the matter. The matter periodically surfaces in the media and also affects our country's relationship with Mozambique. Consideration should be given to whether this matter should not be incorporated into the TRC investigations.

5.8 The murder of *Rick Turner*

This also has not been dealt with as a TRC matter. Dr Pretorius however received information regarding the possible whereabouts of the firearm used to assassinate Turner and his daughter has filed a request for access to information. It must also in respect of this matter be decided whether it should form part of the TRC cases.

5.9 The compilation of a data base of TRC material

This matter was not taken forward, because NIA required a hard copy inventory to be compiled prior to scanning onto an electronic data base. Subsequently, the Document Centre has substantially systematically written up the files and consequently, this matter can again be taken forward with NIA.

6. As can be seen from the above breakdown, the majority of matters can only be taken forward with the assistance of SAPS and NIA. There has been general public criticism of the fact that no progress has been made on the cases, aggravated by the fact that victims have in certain cases appointed lawyers and consequently, the prospect of litigation is real. In certain of the matters, there is also the risk of the offences prescribing before they can be decided on, which would also place the NPA in a very bad light. The fact that elections will take place in 2009, most likely in mid-April, must also be taken into consideration, because in the past, the TRC cases have featured prominently on the election agendas of the various political parties.

7. My recommendation is that, as a matter of urgency in 2009, when the parties are available, a meeting should be set up with the Acting NDPP, yourself and myself to obtain his approval on the way forward. As soon as the meeting with the Acting NDPP has taken place, efforts should be made to reconvene the Task Team so that work can commence.

Kind regards

Chris Macadam

MJM 7

3/16/2

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

MEMORANDUM

TO: **MR ME SURTY, MP**
MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

FROM: **ADV MJ MPSHE SC**
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT: **TRC TASK TEAM**

DATE: **17 FEBRUARY 2009**

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to inform the Minister of my intention to reconvene the TRC Task Team and to advise him of matters relating thereto.

2. BACKGROUND

2.1 The TRC Guidelines provide for the creation of a Task Team made up of representatives from SAPS, NIA and DoJ&CD to, within the scope of their mandates, assist the members of my office to evaluate the TRC material. In terms of the Guidelines, the duty to decide whether or not to prosecute lies with me.

2.2 Since 2007, the Task Team has not sat, due to the fact that matters relating to it were tabled before the Ginwala Commission. The effect thereof was that investigations into TRC matters could not continue.

2.3 The victims were dissatisfied with the lack of progress being made in their matters and in certain cases, appointed lawyers who declared the intention to institute legal proceedings against the NPA. Certain interventions from my office were necessary in urgent matters.

2.4 The Ginwala Commission did not make any findings which impact on the functioning of the Task Team and consequently, I have deemed it imperative to reconvene the Task Team so that work on the TRC cases can commence.

3. BRIEFING

3.1 Members of my office have met with the Divisional Commissioner of the Detective Service of SAPS and the Deputy Director General: Operational Support of NIA. Both agencies have indicated their willingness to again participate in the Task Team and to perform duties within their agencies' mandates.

3.2 After I have received feedback from you, I intend submitting written invitations to the relevant Directors General, inviting them to nominate staff members to form part of the Task Team and to arrange a date for the first meeting of the Task Team.

3.3 No requests to investigate TRC matters have been received since November 2007 and it is anticipated that once the matters on hand have been dealt with, that the chapter on these cases may be closed. In its report released in 1998, the TRC did in fact recommend that a time limit should be imposed on such prosecutions.

3.4 The following matters are on hand at present:

3.4.1 ***S v Van Zyl & Ano***

The accused were indicted in the Port Elizabeth High Court as early as 2004. Their case has now been postponed to late June 2009 for the High Court review of the refusal of amnesty in respect of Van Zyl.

3.4.2 ***Anton Lubowski* Assassination**

Although the deceased was murdered in Namibia, the family have requested the NPA to investigate the possibility of the murder being committed in pursuance of a conspiracy formulated in South Africa. Because the enquiry is limited to

a conspiracy charge, this offence will prescribe in September 2009.

3.4.3 **The kidnapping and murder of the *Cradock 4***

The victims are co-applicants in the application to have the TRC Guidelines declared unconstitutional. The case was the subject of an inquest presided over by the Judge President of the Eastern Cape Division of the High Court and amnesty was refused in respect of the Security Branch members who came forward, admitting complicity in the murder.

3.4.4 **The kidnapping and disappearance of *Nokuthula Simelane***

The victim disappeared in 1983 and no evidence has come forward regarding her suspected murder, nor have her remains been recovered. Some information relating to her kidnapping and torture was obtained by the TRC. I have decided in this matter that it would be most appropriate to hold a formal inquest.

3.4.5 **The *Heidelberg Tavern and St James Church Massacres***

The current Head of the PAC has claimed responsibility for ordering these attacks. He has never applied for amnesty and victims have called for his prosecution.

3.4.6 **Warrant of arrest: *Philip Powell***

This relates to a receipt of a substantial quantity of armaments by Philip Powell from former Vlakplaas Commander de Kock. Powell has made representations that a warrant for his arrest be cancelled. The TRC granted amnesty to De Kock and others in connection with the matter and made findings against Powell.

3.4.7 **The *Samora Machel* air crash**

This matter has to date not been dealt with as a TRC matter, despite the fact that the TRC held a special hearing into the case and no one applied for amnesty. The former Minister for Safety & Security made a statement that SAPS was conducting a full investigation into the matter. The matter periodically surfaces in the media and also affects our country's relationship with Mozambique. In order to enable

this matter to be effectively investigated, I have decided that this matter must now be dealt with by the Task Team.

3.4.8 **The murder of *Rick Turner***

Information has been received regarding the firearm which was used in the killing. This information must be followed up by SAPS.

3.4.9 **Allegations against Security Branch member, General Basie Smit**

When Vlok and others pleaded guilty to the poisoning of Rev Chikane, they implicated General Smit as being involved in the plot. He never applied for amnesty and was not prepared to plead guilty. A case against him based on these allegations has been investigated.

4. All of the above matters, except for the Pebco 3 case, require investigations by SAPS before I can make a decision whether are sufficient grounds to institute prosecutions or not.

5. Although the Pretoria High Court has declared the Guidelines unconstitutional and an appeal has been noted, there is no reason why the investigations cannot proceed in the interim.

6. Given the unique circumstances surrounding TRC cases, NIA has been requested to compile a threat analysis of the risks attached to such investigations. I will forward the analysis to you upon receipt thereof so that you can brief the affected Ministries.

7. I will furnish you with a further report after the first meeting of the Task Team.

ADV MJ MPSHE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
DATE: 03.03.09.

NOTED

It may be useful that the Minister first discuss these matters with the IMC Ministers so that the acting NDPP can be advised how to proceed especially on what the mandate of the NPA is on these matters if at all.

26/3/9

ADV M SIMELANE
DG: DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT
DATE:

I cannot find fault with the approach proposed. In fact, in law, NDPP must proceed with prosecutions or not

NOTED (requested. To ensure this does not take place in isolation, the Task Team was established, as part of ensuring policy. As this is a sensitive matter, I agree with urgent consultations with NSC + President

ADV J DE LANGE
DEPUTY MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT
DATE: 12/3/9

✓

NOTED

Support Adv's view

MR ME SURTY, MP
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
DATE: 2009-07-23

Investigations must proceed!
However, matter can be raised in IMC meeting.

PROCLAMATION NOTICE 264 OF 2025

by the
PRESIDENT of the REPUBLIC of SOUTH AFRICA

JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES

In terms of section 84(2)(f) of the Constitution of the Republic of South Africa, 1996, I hereby appoint a Judicial Commission of Inquiry to investigate allegations of whether efforts or attempts were made to stop the investigation or prosecution of the Truth and Reconciliation Commission cases with the terms of reference in the Schedule attached hereto and appoint the Honourable Madam Justice S Khampepe as its Chairperson and the Honourable Mr Justice F D Kgomo and Adv A Gabriel, SC, as members of the Commission.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this 26th day of May Two thousand and twenty-five.

Mr CM Ramaphosa
President

By Order of the President-in-Cabinet:

Ms MT Kubayi
Minister of the Cabinet

SCHEDULE

TERMS OF REFERENCE
OF THE
JUDICIAL COMMISSION OF INQUIRY TO INQUIRE INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS HAVING BEEN MADE TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES

A Judicial Commission of Inquiry ("the Commission") is hereby appointed in terms of section 84(2)(f) of the Constitution of the Republic of South Africa, 1996. The Commission is appointed to investigate matters of public and national interest concerning allegations regarding efforts or attempts having been made to stop the investigation or prosecution of Truth and Reconciliation Commission ("TRC") cases.

1. The Commission must, in relation to the period since 2003, inquire into, make findings, report on and make recommendations concerning the following, guided by the Constitution, relevant legislation, policies and guidelines—
   - 1.1 whether, why, and to what extent and by whom, efforts or attempts were made to influence or pressure members of the South African Police Service or the National Prosecuting Authority to stop investigating or prosecuting TRC cases;
   - 1.2 whether any members of the South African Police Service or the National Prosecuting Authority improperly colluded with such attempts to influence or pressure them; and
   - 1.3 whether any action should be taken by any Organ of State, including possible further investigations to be conducted or prosecutions to be instituted, where appropriate, of persons who may have acted unlawfully by—
     - 1.3.1 attempting to influence or pressure members of the South African Police Service or the National Prosecuting Authority to stop investigating or prosecuting TRC cases; or

1.3.2 members of the South African Police Service or the National Prosecuting Authority colluded with or succumbed to attempts to influence or pressure such members to stop investigating or prosecuting TRC cases; and

1.4 whether, in terms of the law and fairness, the payment of any amount in constitutional damages to any person is appropriate.

2. Interested parties in the Commission, include the following parties:
   2.1 The parties in the application proceedings under North Gauteng Division of the High Court, Pretoria, in the case of *L B M Calata and 22 Others v the Government of the Republic of South Africa and 5 Others (case number 2025-005245)*; and
   2.2 families of or victims in TRC cases, other than those applicants referred to in subparagraph 2.1, who have a substantial interest in the matter set out in paragraph 1, and who are admitted as parties in the Commission under the regulations that are made under the Commissions Act, 1947 (Act No. 8 of 1947).

3. These Terms of Reference may be added to, varied or amended by proclamation from time to time.

4. The Commissions Act, 1947, shall apply to the Commission, subject to such amendments, including amendments in relation to the Terms of Reference of the Commission, and exemptions as may be specified by proclamation from time to time.

5. Regulations may be made, after consultation with the Chairperson of the Commission, in terms of the Commissions Act, 1947, and shall apply to the Commission in order to enable the Commission to conduct its work meaningfully and effectively and to facilitate the gathering of evidence by conferring on the Commission powers as necessary, including the power to enter and search premises, secure the attendance of witnesses and compel the production of documents.

6. The Commission shall where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator.

7. The Commission must—
   7.1 complete its work within a period of 180 days from the date of this proclamation; and
   7.2 submit its report to the President within 60 days after the date on which the Commission completed its work.

PROKLAMASIE KENNISGEWING 264 VAN 2025

van die
PRESIDENT van die REPUBLIEK van SUID-AFRIKA

REGTERLIKE KOMMISSIE VAN ONDERSOEK TEN EINDE ONDERSOEK IN TE STEL NA BEWERINGS VAN POGINGS WAT GEMAAK IS OM DIE ONDERSOEK OF VERVOLGING VAN DIE WAARHEIDS-EN-VERSOENINGSKOMMISSIE SAKE TE STOP

Ingevolge artikel 84(2)(f) van die Grondwet van die Republiek van Suid-Afrika, 1996, stel ek hierby 'n Regterlike Kommissie van Ondersoek aan ten einde ondersoek in te stel na bewerings van pogings wat gemaak is om die ondersoek na of vervolging van die Waarheids-en-Versoeningkommissie sake te stop, met die opdrag in die Bylae en stel ek hierby die Agbare Regter S Khampepe as Voorsitter en die Agbare Regter F D Kgomo en Adv A Gabriel, SC, as lede van die Kommissie, aan.

Gegee onder my Hand en die Seël van die Republiek van Suid-Afrika te Pretoria op hede die 26ste dag van Mei Twee duisend vyf-en-twintig.

Mr CM Ramaphosa
President

Op Las van die President-in-Kabinet:

Ms MT Kubayi
Minister van die Kabinet

BYLAE
OPDRAG
VAN DIE
REGTERLIKE KOMMISSIE VAN ONDERSOEK TEN EINDE ONDERSOEK IN TE STEL NA BEWERINGS VAN POGINGS WAT GEMAAK IS OM DIE ONDERSOEK OF VERVOLGING VAN WAARHIEDS-EN-VERSOENINGSKOMMISSIE SAKE TE STOP

'n Regterlike Kommissie van Ondersoek ("die Kommissie") word hierby ingevolge artikel 84(2)(f) van die Grondwet van die Republiek van Suid-Afrika, 1996, aangestel. Die Kommissie word aangestel ten einde aangeleenthede van openbare en nasionale belang te ondersoek met betrekking tot bewerings van pogings wat gemaak is om die ondersoek of vervolging van Waarheids-en-Versoeningskommissie ("WVK") sake te stop.

1. Die Kommissie moet, met betrekking tot die tydperk sedert 2003, ondersoek instel na, bevindings maak, verslag doen oor en aanbevelings maak met betrekking tot die volgende, met inagneming van die Grondwet, toepaslike wetgewing, beleid en riglyne—
   1.1 of, hoekom, en die mate woortoe en deur wie, pogings aangewend is om invloed of druk te plaas op lede van die Suid-Afrikaanse Polisiediens of Nasionale Vervolgingsgesag om ondersoek of vervolging van WVK sake te stop;
   1.2 of, enige lede van die Suid-Afrikaanse Polisiediens of die Nasionale Vervolgingsgesag onbehoorlik met sodanige pogings om hulle te beïnvloed of druk op hulle te plaas, saamgewerk het; en
   1.3 of, enige stappe deur 'n Staatsorgaan geneem moet word, met inbegrip van moontlike verdere ondersoeke gedoen moet word of vervolgings ingestel moet word, waar toepaslik, of persone wat onregmatig mag opgetree het deur—

1.3.1 gepoog het om invloed of druk op lede van die Suid-Afrikaanse Polisiediens of die Nasionale Vervolgingsgesag te plaas om die ondersoek of vervolging van WVK sake te stop; of

1.3.2 lede van die Suid-Afrikaanse Polisiediens of die Nasionale Vervolgingsgesag saamgewerk het met of oorgegee het aan pogings om sodanige lede te beïnvloed of druk op hulle te plaas om die ondersoek of vervolging van WVK sake te stop; en

1.4 of, ingevolge die reg en regverdigheid, die betaling van enige bedrag vir grondwetlike skade aan enige persoon na behore is.

2. Belanghebbende partye in die Kommissie, met inbegrip van die volgende partye:

2.1 Die partye in die aansoek verrigtinge in die Noord-Gauteng Afdeling van die Hoë Hof, Pretoria, in die saak van *L B M Calata and 22 Others v the Government of the Republic of South Africa and 5 Others (saak nommer 2025-005245)*; en

2.2 families van of slagoffers in WVK sake, anders as daardie applikante in subparagraaf 2.1 bedoel, wat 'n substansiële belang in die aangeleentheid in paragraaf 1 uiteengesit het, en wat as partye in die Kommissie togelaat is kragtens die regulasies wat kragtens die Kommissiewet, 1947 (Wet No. 8 van 1947), gemaak is.

3. Hierdie Opdrag kan, van tyd tot tyd, aangevul, verander of gewysig word by proklamasie.

4. Die Kommissiewet, 1947, is van toepassing op die Kommissie, behoudens sodanige wysigings met betrekking tot die Opdrag van die Kommissie, en vrystellings as wat, van tyd tot tyd, by proklamasie gespesifiseer word.

5. Regulasies kan gemaak word, na oorleg met die Voorsitter van die Kommissie, ingevolge die Kommissiewet, 1947, wat op die Kommissie van toepassing is, ten einde die Kommissie in staat te stel om sy werk behoorlik en effektief te kan doen en om die insamel van getuienis te vergemaklik deur om op die Kommissie die bevoegdhede op te lê as wat nodig mag wees, met inbegrip van die bevoegdheid om persele te betree en deursoek, die bywoning van getuies te verseker en om die oorlegging van dokumente te vereis.

6. Die Kommissie moet, waar toepaslik, enige aangeleentheid vir vervolging, verdere ondersoek of vir byeenroeping van 'n afsonderlike ondersoek, na die toepaslike wetstoepassingsagentskap, Staatsdepartement of reguleerder verwys.

7. Die Kommissie moet sy—

7.1 werk binne 180 dae vanaf die datum van hierdie proklamasie voltooi; en

7.2 verslag binne 60 dae nadat die Kommissie se werk voltooi is, aan die President oorhandig.

VPP1 199

STATEMENT BY PRESIDENT THABO MBEKI TO THE NATIONAL HOUSES OF PARLIAMENT AND THE NATION, ON THE OCCASION OF THE TABLING OF THE REPORT OF THE TRUTH AND RECONCILIATION COMMISSION: CAPE TOWN, APRIL 15, 2003.

Madame Speaker and Deputy Speaker;
Chairperson and Deputy Chairperson of the Council of Provinces;
Deputy President;
Chief Justice and Members of the Judiciary;
Former Members of the Truth and Reconciliation Commission;
Ministers and Deputy Ministers;
Distinguished Premiers;
Honoured Traditional Leaders;
Leaders of the Chapter Nine Institutions;
Honourable Leaders of our Political Parties;
Your Excellencies, Ambassadors and High Commissioners;
Honourable Members;
Distinguished Guests;
Fellow South Africans:

We have convened today as the elected representatives of the people of South Africa to reflect on the work of the Truth and Reconciliation Commission, to examine its Recommendations and to find answers, in practical terms, to the question - where to from here!

We wish to acknowledge the presence of Commissioners of the erstwhile TRC, who took time off their busy schedules to join us in commending the Report to our national parliament.

I am confident that I speak on behalf of all Honourable Members when I say to these Commissioners, and through them, to Archbishop Desmond Tutu and the other Commissioners not present here today, that South Africa sincerely appreciates the work that they have done. Our thanks also go to the staff of the Commission and all who contributed to the success of the work of the TRC, which we are justified to celebrate today.

They did everything humanly possible to realise the objectives of a process novel in its conception, harrowing in its execution and, in many respects, thankless in balancing expectation and reality. Our assessment of the TRC's success cannot therefore be based on whether it has brought contrition and forgiveness, or whether at the end of its work, it handed us a united and reconciled society. For this was not its mandate. What the TRC set out to do, and has undoubtedly achieved, is to offer us the signposts in the Long March to these ideals.

What it was required to do and has accomplished, was to flag the dangers that can beset a state not premised on popular legitimacy and the confidence of its citizens, and the ills that would befall any society founded on prejudice and a belief in a "master race".

The extent to which the TRC could identify and pursue priority cases; its ability to bring to its hearings all relevant actors; the attention that it could pay to civil society's role in buttressing an illegitimate and illegal state; and the TRC's investigative capacity to pursue difficult issues with regard to which the actors had decided to spurn its call for co-operation – all these weaknesses were those of society and not the TRC as such.

And, we make bold to say that all these complexities make the product of the work of the TRC that much more outstanding and impressive.

The pain and the agony that characterised the conflict among South Africans over the decades, so vividly relived in many hearings of the Commission, planted the seed of hope – of a future bright in its humanity and its sense of caring.

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It is a future whose realisation gave life to the passion for the liberation of our people, of Oliver Tambo and Chris Hani, the tenth anniversary of whose passing away we mark this month. This includes others such as Robert Mangaliso Sobukwe and Steve Bantu Biko, who passed away 25 years ago this year and last year respectively. They joined and have since been joined by many other patriots to whom freedom meant life itself.

We are indebted to all of them; and we shall work to ensure that their memory lives on in the minds of generations to come, inspired by our common determination that never again should one South African oppress another!

At a critical moment in our history, as a people, we came to the conclusion that we must, together, end the killing. We took a deliberate decision that a violent conflict was neither in the interest of our country nor would it solve our problems.

Together, we decided that in the search for a solution to our problems, nobody should be demonised or excluded. We agreed that everybody should become part of the solution, whatever they might have done and represented in the past. This related both to negotiating the future of our country and working to build the new South Africa we had all negotiated.

We agreed that we would not have any war crimes tribunals or take to the road of revenge and retribution.

When Chris Hani, a great hero of our people was murdered, even as our country was still governed by a white minority regime, we who represented the oppressed majority, said let those who remained in positions of authority in our country carry out their responsibility to bring those who had murdered him to book. We called on our people neither to take the law into their hands nor to mete out blind vengeance against those they knew as the beneficiaries of apartheid oppression.

We imposed a heavy burden particularly on the millions who had been the victims of this oppression to let bygones be bygones. We said to them – do not covet the material wealth of those who benefited from your oppression and exploitation, even as you remain poor.

We walked among their ranks saying that none among them should predicate a better future for themselves on the basis of the impoverishment of those who had prospered at their expense. We said to them that on the day of liberation, there would be no looting. There would be celebrations and no chaos.
We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.

We said to our people that they should honour the traditions they had built and entrenched over centuries, never to hate people because of their colour or race, always to value all human beings, and never to turn their backs on the deeply-entrenched sentiment informed by the spirit of ubuntu, to forgive, understanding that the harm done yesterday cannot be undone today by a resolve to harm another.

We reminded the masses of our people of the values their movement for national liberation had upheld throughout a turbulent century, of everything they had done to defend both this movement and its values, of their obligation never to betray this noble heritage. Our people heeded all these calls.

By reason of the generosity and the big hearts of the masses of our people, all of us have been able to sleep in peace, knowing that there will be no riots in our streets. Because these conscious masses know what they are about, the Truth and Reconciliation Commission was able to do its work enjoying the cooperation of those who for ages had upheld the vision of a united humanity, in which each would be one's brother and sister. These are an heroic people whose greatest reward is the liberation of their country.

Of them, the TRC says: "Others did not wish to be portrayed as a 'victim'. Indeed, many said expressly that they regarded themselves instead as soldiers who had voluntarily paid the price of their struggle...Many have expressed reservations about the very notion of a 'victim', a term which is felt to denote a certain passivity and helplessness...Military operatives of the liberation movements generally did not report violations they experienced to the Commission, although many who were arrested experienced severe torture. This is in all likelihood a result of their reluctance to be seen as 'victims', as opposed to combatants fighting for a moral cause for which they were prepared to suffer such violations. The same can be said for most prominent political activists and leadership figures...The Commission did not, for example, receive a single Human Rights Violation statement from any of the Rivonia trialists."

Some of these, who had to go through the torture chambers of the apartheid regime to bring us our liberty, are with us in this chamber today. There are others who sit on the balcony as visitors, who lost their loved ones whom they pride as liberators, and others who also suffered from repression.

Surely, all of us must feel a sense of humility in the face of such selfless heroism and attachment to principle and morality, the assertion of the nobility of the human spirit that would be demeaned, denied and degraded by any suggestion that these heroes and heroines are but mere 'victims', who must receive a cash reward for being simply and deeply human.

I know there are some in this House who do not understand the meaning of what I have just said. They think I have said what I have said to avoid the payment of reparations to those whom the TRC has identified as 'victims', within the meaning of the law.

Indeed, the TRC itself makes the gratuitous comment (para 16, p 163, Vol 6) that: "Today, when the government is spending so substantial a portion of its budget on submarines and other military equipment, it is unconvincing to argue that it is too financially strapped to meet this minimal (reparations) commitment."

Apart from anything else, the government has never presented such an argument. It is difficult to understand why the Commission decided to make such a statement.

Elsewhere in Vol 6, the Rev Frank Chikane, Director General in the Presidency and former General Secretary of the South African Council of Churches, is falsely reported as having made a presentation to the Amnesty Committee, which he never did.

He is then said to have told this Committee that he had participated in killing people. We do not understand how this grave and insulting falsification found its way into the Report of the TRC. We are pleased to report that Archbishop Tutu has written to Rev Chikane to apologise for this inexplicable account.

The poet, Mongane Wally Serote teaches us: 'to every birth its blood'. And so, today we acknowledge the pain that attended the struggle to give birth to the new life that South Africa has started to enjoy. In this era of increased geopolitical tension, we dare celebrate as South Africans that we found home-grown solutions that set us on a course of reconstruction and development, nation-building, reconciliation and peace among ourselves.

At this time, when great uncertainty about the future of our common world envelops the globe, we dare stand on mountain-tops to proclaim our humble contribution to the efforts of humanity to build a stable, humane and safer South Africa, and by extension, a more stable, more humane and safer world.
Honourable Members;

If we should find correct answers to the question, where to from here, we will need to remind ourselves of the objectives of the TRC from its very inception, so aptly captured in the preamble to the Promotion of National Unity and Reconciliation Act:

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"...the Constitution of the Republic of South Africa, 1993 provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race , class, belief or sex;
"...the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;
"...it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;
"...the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".

I am certain that we are all at one that the pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation among the people of South Africa and the reconstruction of our society.

These are the larger and fundamental objectives that should inform all of us as we work to give birth to the new South Africa. The occasion of the receipt of the Report of the TRC should give us an opportunity to reflect on these matters.

Both singly and collectively, we should answer the question how far we have progressed in the last nine years towards the achievement of the goals of national unity, national reconciliation and national reconstruction. Both singly and collectively, we have to answer the question, what have we contributed to the realisation of these goals.

These larger questions, which stand at the heart of what our country will be, did not fall within the mandate of the Truth and Reconciliation Commission. The TRC was therefore but an important contributor to the achievement of the larger whole, occupying an important sector within the larger process of the building of a new South Africa.

As stated in the Act, the TRC had to help us to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights occurred, and to make the findings known in order to prevent a repetition of such acts in future.

It had to help us to promote understanding and avoid vengeance, to extend reparation to those who had been harmed and discourage retaliation, to rely on the spirit of ubuntu as a deterrent against victimisation.
The TRC has done its work as was required. As stipulated in the TRC Act, we are here to make various recommendations to our national parliament, arising out of the work of the TRC.

As the Honourable Members are aware, there is a specific requirement in the law that parliament should consider and take decisions on matters relating particularly to reparations. It would then be the task of the Executive to implement these decisions.

The law also provides that the national legislature may also make recommendations to the Executive on other matters arising out of the TRC process, as it may deem fit.

Let us now turn to some of the major specific details that the TRC enjoins us to address.

The first of these is the matter of reparations.
First of all, an integrated and comprehensive response to the TRC Report should be about the continuing challenge of reconstruction and development: deepening democracy and the culture of human rights, ensuring good governance and transparency, intensifying economic growth and social programmes, improving citizens' safety and security and contributing to the building of a humane and just world order.

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The TRC also argues for systematic programmes to project the symbolism of struggle and the ideal of freedom. This relates to such matters as academic and informal records of history, remaking of cultural and art forms, erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names. The government accepts these recommendations.

Special emphasis will continue to be paid to rehabilitation of communities that were subjected to intense acts of violence and destruction. Experience gained with the projects in Katorus in Gauteng and Mpumalanga in KwaZulu/Natal demonstrates that great progress can be made in partnership between communities and government.

Further, with regard to specific cases of individual victims identified by the TRC Act, government has put in place and will intensify programmes pertaining to medical benefits, educational assistance and provision of housing and so on. From time to time, Ministers have elaborated and will continue to expatiate on the implementation of these and other related programmes.

The TRC has reported that about 22 000 individuals or surviving families appeared before the Commission. Of these, about 19 000 required urgent reparations, and virtually all of them, where the necessary information was available, were attended to as proposed by the TRC with regard to interim reparations.

With regard to final reparations, government will provide a once-off grant of R30 000 to those individuals or survivors designated by the TRC. This is over and above other material commitments that we have already mentioned.

We intend to process these payments as a matter of urgency, during the current financial year. Combined with community reparations, and assistance through opportunities and services we have referred to earlier, we hope that these disbursements will help acknowledge the suffering that these individuals experienced, and offer some relief.

We do so with some apprehension, for as the TRC itself has underlined, no one can attach monetary value to life and suffering. Nor can an argument be sustained that the efforts of millions of South Africans to liberate themselves, were for monetary gain. We are convinced that, to the millions who spared neither life nor limb in struggle, there is no bigger prize than freedom itself, and a continuing struggle to build a better life for all.

The second of the specific details in the TRC recommendations pertains to the issue of amnesty. A critical trade-off contained in the TRC process was between "normal" judicial processes on the one hand, and establishment of the truth, reparations and amnesty on the other.

Besides the imperatives of managing the transition, an important consideration that had to be addressed when the TRC was set up, was the extent to which the new democratic state could pursue legal cases against perpetrators of human rights violations, given the resources that would have to be allocated to this, the complexities of establishing the facts beyond reasonable doubt, the time it would take to deal with all the cases, as well as the bitterness and instability that such a process would wreak on society.

The balance that the TRC Act struck among these competing demands was reflected in the national consensus around provision of amnesty – in instances where perpetrators had provided the true facts about particular incidents – and restorative justice which would be effected in the form of reparations. Given that a significant number of people did not apply for amnesty, what approach does government place before the national legislature and the nation on this matter?

Let us start off by reiterating 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.

Yet we also 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. Among these are individuals who were misled by their leadership to treat the process with disdain. Others themselves calculated that they would not be found out, either due to poor TRC investigations or what they believed and still believe is too complex a web of concealment for anyone to unravel. Yet other operatives expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases: and this was not to be.

This reality cannot be avoided.

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 right violations.

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.

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.

This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts.

It is critically important that, as a government, we 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.

This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts.

Thirdly, 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.

Relevant Departments are examining the practical modalities of dealing with this matter; and they will also establish whether specific legislation is required in this regard.

We shall also endeavour to explain South Africa's approach on these matters to sister-governments across the world. Our response to any judicial matters from these countries will be handled in this spirit and through the legal system. In this regard, we wish to reiterate our call to governments that continue to do so, that the maltreatment of former anti-apartheid fighters, based on the legal definitions of an illegal regime characterised by the United Nations as a crime against humanity, should cease.

In the recent past, the issue of litigation and civil suits against corporations that benefited from the apartheid system has sharply arisen. In this regard, we wish to reiterate that the South African Government is not and will not be party to such litigation.

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In addition, we consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation.

While Government recognises the right of citizens to institute legal action, its own approach is informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society. Accordingly, we do not believe that it would be correct for us to impose the once-off wealth tax on corporations proposed by the TRC.

Consultations are continuing with the business community to examine additional ways in which they can contribute to the task of the reconstruction and development of our society, proceeding from the premise that this is in their own self-interest. In addition to intensifying work with regard to such tasks as poverty eradication, and programmes such as Black Economic Empowerment, encouraging better individual corporate social responsibility projects, implementation of equity legislation and the Skills Training Levy, we intend to improve the work of the Business Trust.

In this context, we must emphasise that our response to the TRC has to be integrated within the totality of the enormous effort in which we are engaged, to ensure the fundamental social transformation of our country. This requires that at all times, we attain the necessary balance among the various goals we have to pursue.

The TRC also recommends that what it describes as the beneficiaries of apartheid should also make contributions to a reparation fund. The government believes that all South Africans should make such contributions. In the pursuit of the goal of a non-racial society, in which all South Africans would be inspired by a common patriotism, we believe that we should begin to learn to work together, uniting to address the common national challenges, such as responding to the consequences of the gross violations of human rights of which the TRC was seized.

In this regard, I am certain that members of our government will be among the first to make their contributions to the reparation fund, despite the fact that they stood on one side of the barricades as we engaged in struggle to end the apartheid system.

Many in our country have called for a National Day of Prayer and Traditional Sacrifice to pay tribute to those who sacrificed their lives and suffered during the difficult period of oppression and repression whose legacy remains with us. The government accepts this suggestion and will consult as widely as possible to determine the date and form of such prayer and traditional sacrifice. This is consistent with and would be an appropriate response to the proposals made by the TRC for conferences to heal the memory and honour those who were executed.

We shall also continue to work in partnership with countries of the sub-continent, jointly to take part in the massive reconstruction and development effort that SADC has identified as critical to building a better life for all. The peoples of Southern Africa, including the majority in South Africa endured untold privations and were subjected to destabilisation and destruction of property and infrastructure. They all deserve the speeding up of programmes of integration, reconstruction and development that governments of the region have agreed upon.

Madame Speaker;
The Truth and Reconciliation Commission has made many detailed observations and recommendations on structures and systems, which will be dealt with by relevant Ministers and Departments.

For the purpose of reparations, the government has already established the President's Fund, which is now operational, and has, as we earlier indicated, successfully dealt with the matter of urgent reparations. Like the TRC, we do hope that citizens from all sectors will find it within themselves to

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make a contribution to this Fund. Most of the resources that have been allocated for individual and community reparations that we referred to above will be sourced from this Fund, over and above the normal work of the relevant Departments.

We concur with the TRC that intensive work should be undertaken on the matter of monuments as well as geographic and place names. A Trust with the requisite infrastructure, headed by Mongane Wally Serote has been set up to implement the main project in this regard, which is the construction of the Freedom Park whose constituent parts are the Memorial, the Garden of Remembrance and the Museum. This should start by the tenth anniversary of freedom in 2004.

The National Directorate of Public Prosecutions and relevant Departments will be requested to deal with matters relating to people who were unaccounted for, post mortem records and policy with regard to burials of unidentified persons. We would like to encourage all persons who might have any knowledge of people still unaccounted for to approach the National Directorate of Public Prosecutions, the South African Police Service and other relevant departments.

The Department of Justice and Constitutional Development will monitor the implementation of all these programmes, and it will report to Cabinet on an on-going basis.

What we have identified today, arising out of the report of the TRC, forms part of the panoply of programmes that define the first steps in a journey that has truly begun. South African society is changing for the better. The tide has turned and the people's contract for a better tomorrow is taking shape.
The goals we defined for ourselves a decade ago, as we adopted the Interim Constitution, to pursue national unity, to secure peace and the well-being of all South African citizens, to achieve national reconciliation and the reconstruction of our society, have not fully been realised, despite the progress we have made.

The situation we face demands that none of us should succumb to the false comfort that now we live in a normal society that has overcome the legacy of the past, and which permits us to consider our social tasks as mere business as usual.

Rather, it demands that we continue to be inspired by the determination and vision that enabled us to achieve the transition from apartheid rule to a democratic order in the manner that we did. It demands that we act together as one people to address what are truly national tasks.

We have to ask ourselves and honestly answer simple questions.
Have we succeeded to create a non-racial society! The answer to this question is no!
Have we succeeded to build a non-sexist society! The answer to that question is no!
Have we succeeded to eradicate poverty! Once more the answer to that question is no!
Have we succeeded fully to address the needs of the most vulnerable in our society, the children, the youth, people with disabilities and the elderly! Once again the answer to this question is no!

Without all this, it is impossible for us to claim that we have met our goals of national reconciliation and reconstruction and development. It is not possible for us to make the assertion that we have secured the well-being of all South African citizens.

The road we have travelled and the advances we have made convey the firm message that we are moving towards the accomplishment of the objectives we set ourselves. They tell us that, in the end, however long the road we still have to travel, we will win.

In the larger sense, we were all victims of the system of apartheid, both black and white. Some among us suffered because of oppression, exploitation, repression and exclusion. Others among us suffered because we were imprisoned behind prison walls of fear, paralysed by inhuman beliefs in our racial superiority, and called upon to despise and abuse other human beings. Those who do such things cannot but diminish their own humanity.

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To be true to ourselves as human beings demands that we act together to overcome the legacy of this common and terrible past. It demands that we do indeed enter into a people's contract for a better tomorrow.

Together we must confront the challenge of steering through a complex transition that demands that we manage the historical fault-lines, without papering over the cracks, moved by a new and common patriotism.

It says to all of us that we must honour those who shed their blood so that we can sit together in this Chamber by doing all the things that will make it possible for us to say, this South Africa that we have rebuilt together, truly belongs to all who live in it.

I am honoured to commend the Report of the Truth and Reconciliation Commission to our National Houses of Parliament and the nation.

Thank you.

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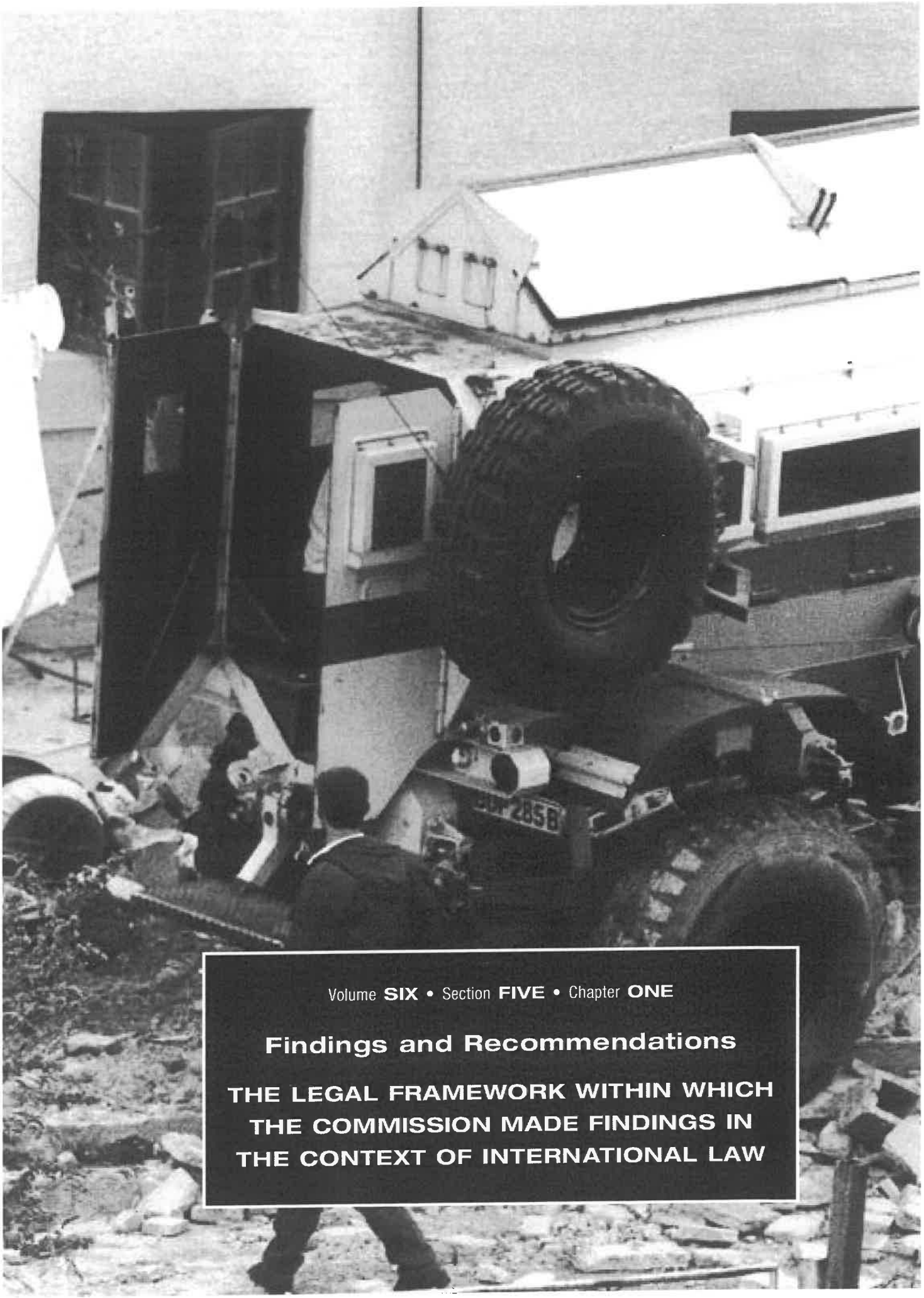

Volume **SIX** • Section **FIVE** • Chapter **ONE**

Findings and Recommendations

THE LEGAL FRAMEWORK WITHIN WHICH THE COMMISSION MADE FINDINGS IN THE CONTEXT OF INTERNATIONAL LAW

Volume **SIX** Section **FIVE** Chapter **ONE**

Legal Framework

THE LEGAL FRAMEWORK WITHIN WHICH THE COMMISSION MADE FINDINGS WITHIN THE CONTEXT OF CURRENT INTERNATIONAL LAW

INVESTIGATING GROSS HUMAN RIGHTS VIOLATIONS

1. The Truth and Reconciliation Commission (the Commission) was charged with the task of investigating and documenting gross violations of human rights committed during the period March 1960 to May 1994. In the course of doing so, it was required to compile as complete a picture as possible of the conflicts of the past.

DEFINING GROSS HUMAN RIGHTS VIOLATIONS

2. The Promotion of National Unity and Reconciliation Act No. 34 of 1995, (the Act) defined a gross human rights violation as:

the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date [10 May 1994] within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive;[1]

3. The language used in the Act to describe gross human rights violations deliberately avoided the use of terms associated with the legal definitions of crimes in South African law. Thus 'killing' was used rather than 'murder' in order to allow the Commission to examine these violations without having to consider legal justifications or defences used by perpetrators for such conduct. The Commission could therefore make findings that those who had suffered these violations were victims. Chapter Four of Volume One sets this out more elaborately.

1 Section 1(1)(ix).

Interpreting the definitions

Killing

4. 'Killing' was interpreted to include the following:

   a the killing of civilians, irrespective of whether they were deliberately targeted or innocent bystanders caught in the crossfire, and

   b those who were executed for *politically motivated* crimes, irrespective of whether the killing had the sanction of the state, tribunals set up by the liberation movements or 'people's courts' established by communities.[2]

5. The only exception that the Commission took into account was that of combatants who had died in the course of the armed conflict and were clearly identified as such. The Commission's position in this regard is further elaborated in Volume One, Chapter Four of the Final Report. In this the Commission was guided by the Geneva Conventions' distinction between 'combatants'[3] and 'protected persons'[4].

Torture

6. The Commission accepted the international definition of torture: that is, the intentional infliction of severe pain and suffering, whether physical or mental, on a person for any of the following purposes:

   a obtaining from that or another person information or a confession;

   b punishing a person for an act that s/he or a third party committed or is suspected of having committed;

   c intimidating her, him or a third person; or

   d any reason based on discrimination of any kind.

7. Pain or suffering that arises from, is inherent in, or is incidental to a lawful sanction does not qualify as torture.[5]

2 These interpretations reflect the Commission's position on the death penalty and political killings, which is in line with international human rights law.

3 Geneva Conventions, Article 43 (Paragraphs 1 and 2) of Additional Protocol I of 1977.

4 Geneva Conventions, Common Article 3 of all four conventions of 1949. See Appendix 1.

5 Article 1(1), Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

Abductions

8. This term was defined as the 'forcible and illegal removal or capturing of a person'. It was applied to those cases where people had 'disappeared' after having last been seen in the custody of the police or of other persons who were using force. It does not include those who were arrested or detained in terms of accepted human rights standards.

Severe ill-treatment

9. This term was defined by the Commission as:

acts or omissions that deliberately and directly inflict severe mental or physical suffering on a victim, taking into account the context and nature of the victim.

10. The Commission took a number of factors into account when determining on a case-by-case basis whether an act qualified as severe ill-treatment. These included the duration of the suffering or hardship, its physical or mental effects and the age, strength and state of health of the victim. Violations included rape, sexual abuse, severe assault, harassment, solitary confinement, detention without trial, arson and displacement. A fuller list of acts that constituted violations is included in the Commission's Final Report.[6]

ESTABLISHING ACCOUNTABILITY

11. One of the main objectives of the Commission was to establish the identity of the individuals, authorities, institutions and organisations involved in the commission of gross violations of human rights. The Commission was also tasked with establishing accountability for the violations, and determining the role played by those who were involved in the conflicts of the past. In dealing with these complex issues, the Commission was guided by the provisions of section 4 of its enabling Act.

12. The Commission made findings of accountability in respect of the various role players in the conflict on the basis of the evidence it received. It should be noted that it did this in its capacity as a commission of inquiry and not as a court of law. The Commission's findings are, therefore, made on the basis of probabilities and should not be interpreted as judicial findings of guilt, but rather as findings of accountability within the context of the Act.

6 Volume One.

13. The Commission based its conclusions on the evidence and submissions placed before it. It did not focus only on legal and political accountability, but also on establishing moral responsibility.

Moral responsibility

14. In its Final Report, the Commission stated:[7]

A responsible society is committed to the affirmation of human rights and, to addressing the consequences of past violations) which presupposes the acceptance of individual responsibility by all those who supported the system of apartheid or simply allowed it to continue to function and those who did not oppose violations during the political conflicts of the past.

15. In the Final Report, the Commission defines not only legal and political accountability, but also boldly asserts the notion of moral responsibility. The Commission finds that all South Africans are required to examine their own conduct in upholding and supporting the apartheid system. The abdication of responsibility, the unquestioning obeying of commands, submitting to fear of punishment, moral indifference, the closing of one's eyes to events or permitting oneself to be intoxicated, seduced or bought with personal advantages are all part of the multi-layered spiral of responsibility that lays the path for the large-scale and systematic human rights violations committed in modern states.

16. There were those who were responsible for creating and maintaining the brutal system of apartheid; those who supported this brutal system and benefited from it, and those who benefited from the system simply by being born white and enjoying the privileges that flowed from that. Others occupied positions of power and status and enjoyed great influence in the apartheid system, even though they had no direct control over the security establishment and were not directly responsible for the commission of gross human rights violations. It is only by acknowledging this benefit and accepting this moral responsibility that a new South African society can be built. What is required is a moral and spiritual renaissance capable of transforming moral indifference, denial, paralysing guilt and unacknowledged shame into personal and social responsibility. This acceptance of moral responsibility will allow all those who benefited from apartheid – including the business community and ordinary South Africans – to share in the commitment of ensuring that it never happens again.

7 Volume One, Chapter Five, para 101.

17. Those who must come under special scrutiny are those who held high office, those who occupied positions of executive authority and those cabinet ministers whose portfolios did not place them in a direct supervisory capacity over the security forces. While the Commission's findings are not judicial findings, the Commission finds them to be morally and politically responsible for the gross human rights violations committed under the apartheid system, given:
    a the specific responsibilities of cabinet ministers who oversaw aspects of the apartheid structure in areas that formed key aspects of apartheid's inhumane social fabric (education, land removals, job reservation, the creation of the Bantustans, for example);
    b the knowledge they had (given the extensive information regarding apartheid crimes in the public domain), or the knowledge that they are presumed to have had, given their access to classified information – at the highest level – about gross violations of human rights, and
    c their power to act, given their official leadership positions.

LEGAL ACCOUNTABILITY

18. In deliberating on its findings, the Commission was guided by international humanitarian law and the Geneva Conventions.

Apartheid as a crime against humanity

19. The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations (UN) General Assembly in 1973, states in Article 1 that apartheid is a crime against humanity. The Convention is one of a series of General Assembly and Security Council resolutions condemning apartheid as a crime against humanity. This legal categorisation has been echoed in the jurisprudence of the International Court of Justice and the International Law Commission's Draft Articles on State Responsibility and Crimes against the Peace and Security of Mankind. The classification of apartheid as a crime against humanity has been confirmed, and apartheid has been treated as similar to other egregious crimes such as genocide, slavery and colonialism in international sources as wide-ranging as the African Charter on Human and People's Rights and the International Criminal Tribunal for the former Yugoslavia.

20. The International Law Commission's description of a crime against humanity[8] has been interpreted to suggest that such a charge can be brought against a single individual for a single act if that act is on a large scale, and/or if that act can be situated in a systemic pattern of violations[9]

Implications of this classification for the prosecution of human rights crimes under apartheid

21. While executing its mandate, the Commission gained a deep understanding of the apartheid system as a whole and its systematic discrimination and de-humanisation of those who were not white. Moreover, the Commission received a number of submissions from various institutions and structures, requesting that it interpret its mandate more broadly than was defined in the founding Act. Whilst taking these submissions very seriously, the Commission was bound by its legislative mandate to give attention to human rights violations committed as specific acts, resulting in killing, abduction and severe physical and/or mental injury, in the course of the past conflict. Although the Commission endorsed the internationally accepted position that apartheid was a crime against humanity, the focus of its work was not on the effects of the laws and policies passed by the apartheid government. The Commission has been criticised in some quarters for this approach.

22. It could be argued that the new government has an obligation, in terms of inter national law, to deal with those who were responsible for crimes committed under apartheid, even though their acts were considered legitimate by the South African government at the time. On the other hand, the international community declared apartheid to be a crime against humanity and saw the apartheid government as illegitimate. It can therefore be argued that crimes under apartheid have international implications and demand an appropriate response from the new state.

23. However, the Commission acknowledged in its Final Report that the urgent need to promote reconciliation in South Africa demanded a different response, and that large-scale prosecution of apartheid criminals was not the route the country had chosen. This does not mean, however, that those who were in power during the apartheid years should not acknowledge that the crimes committed in the name of apartheid were grave and heinous. Had there been no such

8 ILC, 1886 Draft Code of Crimes against the Peace and Security of Mankind.

9 Judgment of Tadic case, 7 May 1997, para 649.

settlement, had the negotiating parties not decided to put reconciliation first, there would have been serious consequences for members of the former Cabinet and Tricameral Parliament, for those who held high office in the security forces, intelligence and the judiciary, and for others who were responsible by virtue of their positions of authority and responsibility.

24. The liberation movements were cognisant of this at the time of negotiations. They were, however, also sharply aware of the fact that prosecutions could endanger the peace process; hence the need for an accountable amnesty provision which did not encourage impunity, while at the same time taking account of the rights of victims. Furthermore, it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law.

Importance of this classification for reparation

25. The recognition and finding by the international community that apartheid was a crime against humanity has important consequences for the victims of apartheid. Their right to reparation is acknowledged and can be enforced in terms of international law.

26. The classification of apartheid as a crime against humanity emphasises the scale and depth of victimisation under apartheid and, to that extent, adds further weight and urgency to the need to provide adequate and timely responses to the recommendations of the Commission. It also enhances the legitimacy of the Commission's recommendations in respect of reparations, which now require urgent implementation. The classification also gives greater legal legitimacy to the Commission's recommendations for the institutional reform of apartheid institutions (including the security forces, public administration, the judiciary and business).

27. The Constitutional court in the Azanian People's Organisation (AZAPO) case took the issue further. Not only did it recognise the rights of victims, but it also confirmed the statutory duty of the state to provide an appropriate reparation policy for victims emanating from the Commission process.

Importance of this classification for the struggle of the liberation movements against the apartheid state

28. As elaborated more fully in the section on African National Congress (ANC) violations (see below), the legal designation of apartheid as a crime against humanity has important consequences for the struggle conducted by the liberation movements. In terms of international law, the designation of apartheid as a crime against humanity has ensured that the legal status accorded to the war waged against the former apartheid state is that of a 'just war' or *'ius ad bellum'*.[10]

29. The effect of this designation is to render as just the moral, political and legal status of the struggle against apartheid.

30. The criteria for determining whether a struggle can be regarded as a just war are: (i) that those who waged it turned to armed conflict to fight an unjust system, and (ii) that they did this in a context where alternative routes for legal and political action had not only failed, but were likely to trigger further repression.

31. Thus those who waged war against the illegitimate apartheid state had legitimacy conferred upon them in terms of international law.

32. However, a distinction needs to be drawn between the means and the cause. The fact that the cause is just does not automatically confer legitimacy on all conduct carried out in the pursuit of that war (*ius in bello)*. International law imposes a continued obligation on the liberation struggle to employ just means, even in the conduct of a just war.

33. The laws that apply to the conduct of a just war rest on two broad principles: the principle of necessity and the principle of humanity. Simply interpreted, this means that 'that which is necessary to vanquish the enemy may be done', but that 'that which causes unnecessary suffering is forbidden'.

34. The balancing of these two principles has been the subject of much debate and writing in international law.

35. In essence, these principles have meant that combatants in a conflict or war situation enjoy certain rights. If they are captured and disarmed, they are considered to be prisoners of war and must be treated accordingly. This

10 Volume One, Chapter Four.

requires of the party in command of the situation that prisoners of war be safe-guarded against execution or deliberate injury. In the event that they are *hors de combat*[11] because they have surrendered or have been wounded or captured and disarmed, they must be protected. Warfare cannot be continued against them. These principles also apply to non-combatants or civilians (as they are now known). The laws of war require that civilians or non-combatants may not be subjected to deliberate or indiscriminate attacks, reprisal killings, seizures, hostage taking, starvation or deportation, nor may they have their cultural objects and places of worship destroyed.

36. Both civilians and combatants in conflict circumstances are protected against criminal sanctions unless they have been accorded due process of law.

INTERNATIONAL HUMANITARIAN LAW

The Geneva Conventions

37. The Geneva Conventions were adopted in 1949 and additional Protocols I and II in 1977. The Conventions are considered to be binding in international law. Virtually every government in the world has accepted their tenets by ratifying them. However, even where states have not ratified the treaty, they have the force of 'customary international law' – that is, they bind governments irrespective of whether those governments have formally ratified the treaty accepting their obligations. The apartheid state acceded to the Geneva Conventions in 1952. It did not, however, ratify or accept the additional protocols, and sought to argue that it could not be bound by their provisions. However, because the international community does not regard ratification as a criterion for holding a state to be bound, it is generally accepted that, even though the previous government did not ratify these conventions, it was formally bound by the principles enunciated by these bodies during the relevant period, as they are expressions of customary international law on state responsibility for the commission of gross human rights violations.

38. In the case of the ANC, President Oliver Tambo signed a declaration at the headquarters of the International Committee of the Red Cross, Geneva, on 28 November 1980, committing the ANC to be bound by bound by the Geneva Conventions and Protocol I.[12]

11 Out of the fight.

12 See the Appendix to Chapter Three of this section for a full text of the statement and declaration.

Applicability of the Geneva Conventions to the South African conflict

39. The Commission's mandate encompassed the period March 1960 to 10 May 1994, the date of President Mandela's inauguration. Given that Protocols I and II were adopted in 1977, it is appropriate to consider what law was applicable to the conflict raging in South Africa. Of particular note are those sections of the Protocol dealing with grave breaches.

40. The Geneva Conventions and Protocol I draw a distinction between acts that constitute a 'grave breach' and acts that constitute a 'regular breach'.[13]

41. These definitions become important when dealing with those acts or means used during conflict which the Commission found to constitute gross human rights violations. Furthermore, the provisions of the relevant Conventions and Protocol I become particularly important when dealing with the bombing incidents (Khotso House, the Magoo and Why Not Bars, the London ANC office and so on).

The period March 1960 to 1977

42. During the period March 1960 to 1977, the principal treaties that applied to the conflict were the Geneva Conventions, and in particular Common Article 3. Protocols I and II had not yet been drafted.

43. Common Article 2 of the Geneva Conventions states explicitly that, with the exception of Common Article 3 and the Martens Clause, the Conventions exclusively address armed conflicts between states.

44. Whilst on the face of it this may be interpreted to mean that the Geneva Conventions had no application during that period, this is not the case, as a number of bodies within the UN passed resolutions relating to the armed conflict in South Africa. The resolutions covered subjects ranging from apartheid to colonialism and the right to self-determination. In this regard, Resolution 31029(XXXVIII) of the UN General Assembly adopted in 1973 provided as follows:

13 Appendix 2 to this chapter sets out those acts that constitute a grave breach.

The armed conflict involving the struggle of people against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments are to apply to persons engaged in armed struggle against colonial and alien domination and racist regimes.

45. It can, therefore, be argued that the conflict in South Africa was regarded not as an internal conflict but as an international armed conflict.

46. One should also have regard to the provisions of Common Article 3, which expressly provide that this Article applies 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Given that South Africa had acceded to the Geneva Conventions in 1952 and has remained a party ever since, there can be no doubt that it was bound by these provisions.

47. The ANC at this time was a non-state actor and lacked the authority or legal capacity to ratify or accede to the Geneva Conventions. However, the ICRC commentary to Common Article 3 makes it clear that non-state parties to non-international armed conflicts become bound to apply the provisions of Common Article 3 upon ratification or accession by the state party to the conflict. Moreover, the ANC itself, in terms of public statements made during this period, considered itself bound by the core principles enshrined in international humanitarian law. The provisions of Common Article 3, therefore, applied to the military and political activities of the ANC during this period.

48. Violations in terms of Common Article 3 fall under the following four sections:

a violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b taking of hostages;
c outrages upon personal dignity, in particular humiliating and degrading treatment, and
d the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognised as indispensable by civilised peoples.

49. These provisions apply to 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention, or any other cause'.

The period March 1977 to 1980

50. It is during this period that Protocol I of the Geneva Conventions was drafted specifically to cover the conflict situations in South Africa and Israel.

51. It is important to note that Protocol I was intended to supplement the existing Geneva Conventions and to ensure that national liberation movements were protected in the conflicts that were taking place.

52. In this regard, Article 1(4) of Protocol I sought to confer prisoner of war status on national liberation movement combatants involved in the conflicts in South Africa and Israel. The article provides that 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' are to be treated as international armed conflicts and not as internal conflicts.

53. The effect of this was to bring the conflicts in South Africa and Israel under the ambit of the Geneva Conventions, and specifically of Protocol I.

54. As discussed above, the apartheid government did not accede to the additional protocols, particularly Protocol I. This was in the main due to the fact that it was of the view that Article 1(4) of Protocol I was intended to legitimise the struggle of the liberation movements and provide additional protection for their members.

55. As a liberation movement, the ANC did not apply to the ICRC to ratify or accede to this protocol, thus one can conclude that common Article 3 and not Protocol I continued to apply to the ANC.

The ANC and international humanitarian law: The period 1980 to 1994

56. In 1980, the ANC declared itself to be bound by the general principles of international humanitarian law applicable to the conduct of armed conflicts. The then ANC President Oliver Tambo deposited a declaration[14] with the ICRC

14 See Appendix 3.

declaring the ANC bound by the Geneva Conventions and Protocol I. In fact, the declaration ought to have been deposited with the Swiss Government; but it is the intention of the party making the declaration that is important. By submitting the declaration, the ANC intended to hold itself bound by the Geneva Conventions and Protocol I.

57. As a result of this declaration, the ANC bound itself to apply Protocol I and the Geneva Conventions. In terms of Article 96(3) of Protocol I, the protocol and the Geneva Conventions came into effect immediately in respect of the conflict, despite the fact that the apartheid state had not acceded to the additional protocol.

58. The importance of the declaration is that the ANC became bound to uphold the same obligations and burdens as other parties to the Conventions and Protocols. It also enjoyed the same rights and benefits. The preamble to Protocol I provides that the provisions of the Geneva Conventions and Protocol I:

must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction, based on the nature or origin of the armed conflict or on causes espoused by or attributed to the Parties to the conflict.

59. As discussed above, while the ANC had bound itself unilaterally by way of the declaration to the provisions of Protocol I, the apartheid government did not consider itself so bound. It treated members of the liberation movements as criminals rather than as prisoners of war. The ANC regularly sought to challenge the jurisdiction of the courts on the basis that they were entitled to prisoner-of-war status and invoked the protection of these treaties in an attempt to commute the death sentences of numerous political prisoners. In this they were unsuccessful. Professor John Dugard commented in a book that he wrote on the status of an ANC prisoner of war:[15]

The issue that most starkly illustrates the conflict between perceptions of international law in South Africa is the dispute over the status of captured ANC combatants. From the perspective of most Whites, ANC combatants cannot be accorded prisoner-of-war status as this would confer legitimacy on the ANC and condone the acts of its members. On the other hand, many Blacks view them as 'freedom fighters' engaged in a just struggle entitled to be treated as POW's and not ordinary criminals.

15 Article by John Dugard: *Denationalization of Black South Africans in pursuance of Apartheid*

Furthermore, the General Assembly has recognized the legitimacy of the struggle of the national liberation movements and demanded that the ANC combatants be treated as prisoners-of-war in accordance with the provisions of the Geneva Conventions of 1949 to include 'armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination'.

The doctrine of state responsibility

60. The doctrine of state responsibility has emerged through the development of customary international law. In summary, it states that the state is accountable for the commission of gross human rights violations as follows:
    a It is strictly responsible for the acts of its organs or agents or persons acting under its control.
    b It is responsible for its own failure to prevent or adequately respond to the commission of gross human rights violations.

61. It is important to note that South Africa did not until recently become a state party to the principal international human rights instruments. In 1998, the newly democratically elected government ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide convention) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

62. This does not mean that South Africa was not bound by these principles of customary international law at the relevant times. They are regarded as expressions of customary international law on state responsibility for human rights violations and have emerged from the broad rubric of human rights law, which includes the Conventions referred to above, the Universal Declaration of Human Rights, regional human rights instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention for Human Rights, the African Charter on Human and People's Rights, and the judgments of the various human rights bodies such as the decisions of the European Court of Human Rights, the Inter-American Court and Commission of Human Rights and the Human Rights Committee.

63. The decisions of the tribunals for the former Yugoslavia and Rwanda have also had an impact on how the law has developed.

64. The basic principles that have emerged from international customary law can be summarised as follows:

Interpretation of these principles by international human rights bodies, which have application to the question of state accountability

65. In the Velasquez-Rodrigues case[16], the Inter-American Commission on Human rights held that states are strictly responsible for the conduct of their organs or agents who violate human rights norms, whether or not such actors have over-stepped the limits of their authority.

66. Thus a state will be held responsible for the actions of an official where excessive force is used that is contrary to law and policy. In South Africa, the practice of the former state was to indemnify the security forces in those incidents where they had used excessive force.

67. It is important to note that, in terms of international law, the state will be held accountable for the act of an agent. The motive or intent of the agent is considered to be irrelevant to the analysis of the crime. In addition, if an agent of the state uses his or her official status to facilitate or cover up a murder s/he commits for personal reasons, the state may still be held responsible for such a gross violation.

68. Another important principle that has evolved from the Velasquez-Rodrigues case is the fact that a state is held responsible for violations perpetrated by any of the organs or structures under its control. In these instances, state responsibility may be invoked independently of any individual responsibility for the crime. All that is required is for the claimant to establish that an agent of the state committed the violation. The fact that the identity of the individual agent who perpetrated the violation is not established does not matter.

69. A difficulty that has been identified in matters of this nature is that the state is the repository of information and is also the party most interested in suppressing the truth. Circumstantial evidence is often all that exists. International human rights law is cognizant of this and thus places the burden on the state to justify it's actions in the face of credible allegations of abuses by state agents.

16 The Inter-American Court of Human Rights, 29 July 1988 (Series C, No. 4)

70. In the case of Kurt v Turkey[17], the European Court of Human Rights held that, once the applicant had shown that the victim was in the custody of the security forces, the responsibility to account for the victim's subsequent fate shifted to the authorities.

71. In the case of Ireland v UK, the European Court of Human Rights applied a strict liability test when dealing with the government of the United Kingdom. In this case, the European Court considered allegations by the Irish[18] that the United Kingdom authorities operating in Northern Ireland were engaged in practices that violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, the Irish alleged that these practices included extrajudicial arrest and internment as well as the use of a coercive set of 'five techniques' in the process of interrogation in order to induce confessions.

72 The court found that that the actions of the UK authorities amounted to a practice 'incompatible with the convention', noting specifically 'the accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system'.

73. Having heard the evidence, the court commented as follows:

It is inconceivable that the higher authorities of a State should be unaware of the existence of such a practice. Furthermore, under the convention, those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected.

74. The development of the principle of strict liability in dealing with states rein forces that liability in international law. In other words, the state is under an obligation to organise its institutional apparatus so as to ensure that fundamental human rights are protected and, where they are violated, to 'investigate and punish those responsible and to provide reparation to the victim'.

17 74 Reports of Judg. Dec. 1152, 1998 111.
18 N Ireland v United Kingdom (1978) 25 European Court of Human Rights (Series A).

The accountability of states in respect of omissions or tolerance of violations

75. International human rights law has evolved to the point where states can be held responsible because they have failed to prevent a violation or to respond to violations as required by international law.

76. The court in the Velasquez-Rodrigues case describes such failure as 'the lack of due diligence to prevent the violation or to respond to it'.

77. This principle expands the accountability of the state to cover the official tolerance of actions, even where proof of the victim's fate is unavailable. The facts of the Velasquez-Rodrigues case revealed evidence of a pattern of forced disappearances. The evidence included the fact that 'it was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel or the police, or persons acting under their orders ...' The Court also heard evidence that the disappearances followed a similar pattern and were carried out in a systematic manner. These facts, taken together with the fact that officials failed repeatedly to prevent or investigate the crimes, were sufficient to hold the state responsible once the case at hand was shown to fit the pattern.

78. The Inter-American Court of Human Rights noted as follows:

If it can be shown that there was an official practice of disappearances in Honduras carried out by the government or at least tolerated by it, and if the disappearance can be linked to that practice, the allegations will have been proven to the court's satisfaction.

79. The court went further and held:

that where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible.

80. Thus the concept of state responsibly or liability for a failure to act or prevent or punish violations is not limited to cases where the perpetrators are state agents and problems exist with regard to a lack of evidence. The state may be held accountable even where private persons or groups act to deprive individuals of their fundamental rights, if it fails to act to investigate and punish such actions.

81. The key factor in testing responsibility is whether a human rights violation has been committed with the support or tolerance of the public authority or if the state has allowed the violation to go unpunished.[19]

82. The European Court of Human Rights has also held that private citizens may hold the state responsible for tolerating human rights abuses that have been carried out. Thus for example, a state whose legal framework leaves individuals vulnerable to violations of their fundamental rights without adequate recourse, or fails to enact laws restraining the excessive use of force by the authorities, or neglects to punish such abuses, may be held accountable at the international level for failing to guarantee rights recognised under international law.

19 See Godinez-Cruz, Inter-American Court of Human Rights, 20 Jan 1989 (Series C No. 5); Gangaram Panday, Inter-American Court of Human Rights, 21 Jan 1994 (Series C No. 16).

APPENDIX 1

Applicability of the Geneva Conventions to South Africa

The provisions of the Geneva Conventions that apply to the situation in South Africa are set out below:

1. Common Article 2 to the Geneva Conventions

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

2. Common Article 3 to the Geneva Conventions

In the case of armed conflict not of an international character occurring in the territory of one or more of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms, and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall, in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To the end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder, of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

(2) The wounded and the sick shall be collected and cared for.

Any impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict shall further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

3. Fifth paragraph of Protocol I

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Article 1(2) of Protocol I

In cases not covered by this Protocol or by any other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Article 1(3) of Protocol I

This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

Article 1(4) of Protocol I

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as 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.

Article 96(3) of Protocol I

The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

(a) The Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;

(b) The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and

(c) The Conventions and this Protocol are equally binding upon all Parties to the conflict.

Article 1(1) of Protocol II

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which 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 and to implement this Protocol.

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APPENDIX 2

These Conventions and Protocols must be read together with the 1980 'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively Injurious or to have Indiscriminate Effects' and the concomitant 'Protocol on Prohibitions or Restrictions on the use of Mines, Booby Traps and Other Devices' (Protocol II).

Article 3 of Protocol II reads as follows:

General restrictions on the use of mines, booby traps and other devices

This Article applies to:

(a) Mines;

(b) Booby-traps; and

(c) Other devices.

1. It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.

2. The indiscriminate use of weapons to which this Article applies is prohibited. Indiscriminate use is any placement of such weapons:

   (a) Which is not on, or directed at, a military objective; or

   (b) Which employs a method or means of delivery which cannot be directed at a specific military objective; or

   (c) Which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

3. All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions, which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

At Article 2, paragraphs 4 and 5, 'Other devices', 'Military Objective' and 'Civilian objects' are defined in the following terms:

'Other devices' means manually emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

'Military objective' means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

'Civilian objects' are all objects which are not military objectives as defined in paragraph 4.

Frederic de Mulinen, in his handbook published by the ICRC[20] makes the following statement:

43. Sparing of Civilian Persons and Objects:
    Constant care shall be taken to spare the civilian population, civilian persons and civilian objects.
44. Information needed:
    The Commander shall keep himself informed on concentrations of civilian persons, important civilian objects and specially protected establishments.
50. Conduct of Attack
51. Choice of Objectives;
    Within tactically equivalent alternatives, the directions, objectives and targets of attack shall be chosen so as to cause the least civilian damage.
52. Verification:
    The Military character of the objective or target shall be verified by reconnaissance and target identification
53. Weapons
    To restrict civilian casualties and damages, the means of combatant weapons shall be adapted to the target

Thus an operative or soldier who operates outside of the scope of the Conventions is punishable in accordance with ordinary law and loses the protection of the status of a combatant.

20 De Mulinen, Frederic. Handbook on the Law of War for Armed Forces. Geneva:ICRC, 1987, Part 5: Conduct of Operations.

'Grave Breaches' specified in Protocol I (Articles 11 and 85)

The following acts:

- Seriously endangering, by any wilful and unjustified act or omission, physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of an armed conflict, in particular physical mutilations, medical or scientific experiments, removal of tissue or organs for transplantation which is not indicated by the state of health of the person concerned or not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and in no way deprived of liberty.

The following acts, when committed wilfully and if they cause death or serious injury to body and health:

- Making the civilian populations or individual civilians the object of attack;
- Launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.
- Launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects;
- Making non-defended localities and demilitarised zones the object of attack;
- Making a person the object of an attack in the knowledge that he is *hors de combat*;
- The perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs.

The following acts, when committed wilfully and in violation of the Conventions and the Protocol:

- The transfer by the occupying power of parts of its own population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside this territory;
- Unjustifiable delay in the reparation of prisoners of war or civilians;
- Practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

- Attacking clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given, causing as a result extensive destruction thereof when such objects are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort;
- Depriving a person protected by the Conventions or by Protocol I of the rights of fair and regular trial.

'Grave breaches' specified in the four 1949 Geneva Conventions (Articles 50, 51, 130, 147 respectively)

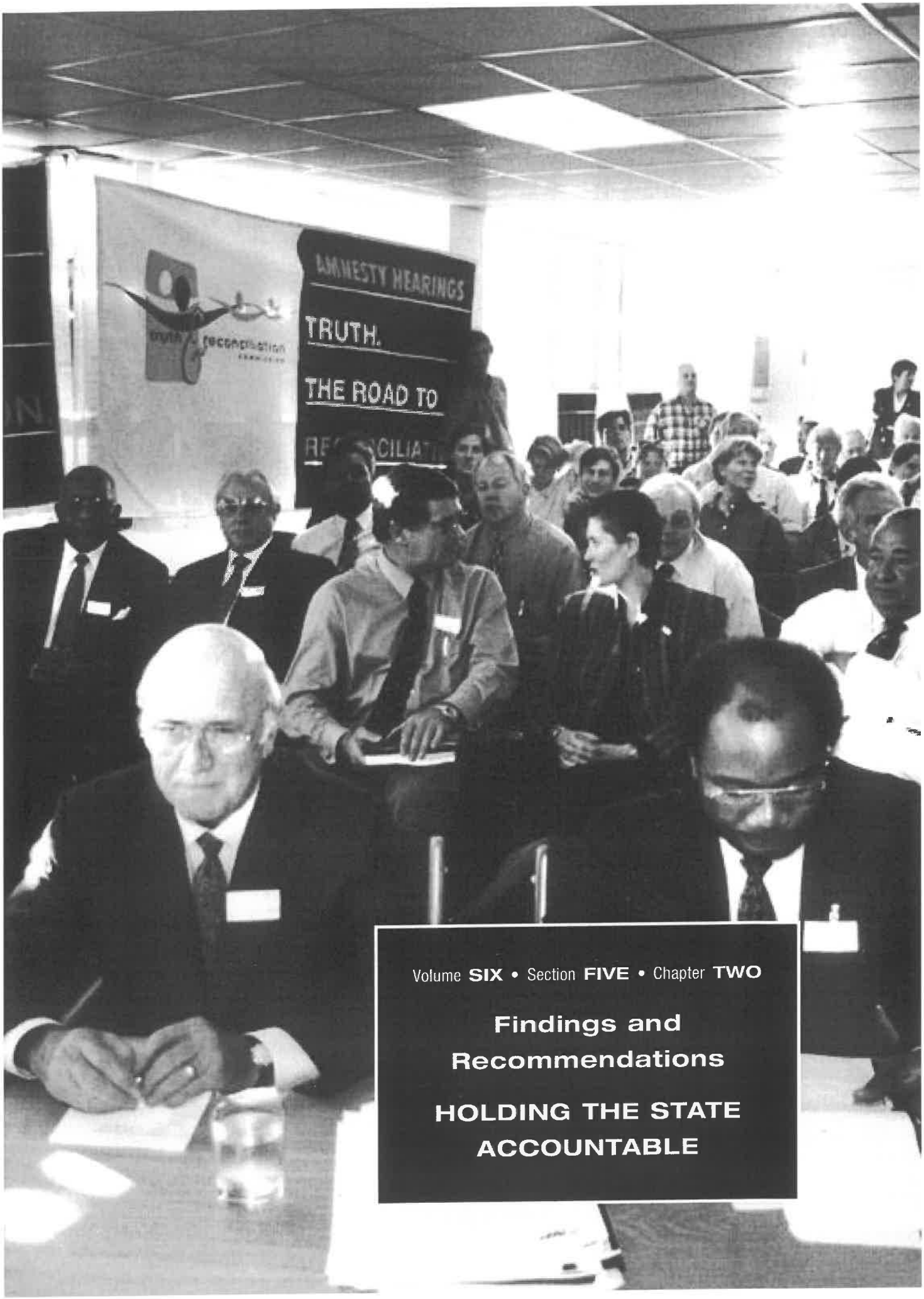
- Wilful killing;
- Torture or inhuman treatment;
- Biological experiments;
- Wilfully causing great suffering;
- Causing serious injury to body or health;
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

'Grave breaches' specified in the third and fourth 1949 Geneva Conventions (Articles 130 and 147 respectively)

- Compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile Power;
- Wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Conventions.

'Grave breaches' specified in the fourth 1949 Geneva Conventions (Articles 147)

- Unlawful deportation or transfer;
- Unlawful confinement of a protected person;
- Taking of hostages.



Volume **SIX** • Section **FIVE** • Chapter **TWO**

Findings and Recommendations

HOLDING THE STATE ACCOUNTABLE

Volume **SIX** Section **FIVE** Chapter **TWO**

Holding the State Accountable

1. In its five-volume Final Report, the Truth and Reconciliation Commission (the Commission) was guided by Section 4 of its enabling Act[21] in evaluating the role played by those who were involved in the conflicts of the past. The relevant sections read as follows:

   The functions of the Commission shall be to achieve its objectives, and to that end it shall –

   (a) Facilitate and where necessary initiate or co-ordinate, enquiries into....

   (iii) The identity of all persons, authorities, institutions and organizations involved in gross violations of human rights;

   (iv) The question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs or of any political organization, liberation movement or other -group or individual; and

   (v) Accountability, political or otherwise, for any such violations.

2. Describing how findings were made, the Commission stated:

   ... the Commission is of the view that gross violations of human rights were perpetrated in the conflicts of the mandate era. These include:

   The state and its security, intelligence and law-enforcement agencies, the SAP, the SADF and the NIS ...[22]

3. The Commission wishes to restate its position in its Final Report that, whilst it has made adverse findings on the basis of the evidence it received, it remains a commission of inquiry and, as such, is not bound by the same rules of evidence as a court of law. The Commission based its findings on a balance of probabilities and its conclusions should not be interpreted as judicial findings of guilt but rather as findings of responsibility within the context of its enabling Act.

4. In making these findings, the Commission was guided in its deliberations by international humanitarian law and the Geneva Conventions. The Commission

21 The Promotion of National Unity and Reconciliation Act No. 34 of 1995.

22 Volume Five, Chapter Six, p. 209.

also endorsed the internationally accepted position that apartheid was a crime against humanity.

5. Whilst the Commission was obliged by its enabling act to evaluate the conduct of all those responsible for committing gross human rights violations, the Commission did not hold that all parties were equally responsible for the violations committed in the mandate period. Indeed, the evidence before the Commission has revealed that the former state was the major violator.

6. The Commission wishes to restate that a legally constituted and elected government is expected to act lawfully and in accordance with accepted international principles of humanitarian law. A state must be held to a higher standard of moral and political conduct than any other role player in a violent conflict. After all, a state has at its command powers, resources, privileges, obligations and responsibilities that liberation movements and other role players do not.

7. The Commission's primary finding in its previous report was that:[23]

The predominant portion of gross violations of human rights was committed by the Former State through its security and law-enforcement agencies.

Moreover, the South African State in the period from the late 1970's to early 1990's became involved in activities of a criminal nature when, amongst other things, it knowingly planned, undertook, condoned and covered up the commission of unlawful acts, including the extra-judicial killings of political opponents and others, inside and outside South Africa.

In pursuit of these unlawful activities, the State acted in collusion with certain other political groupings, most notably the Inkatha Freedom party (IFP).

8. The Commission made its findings at a time when the amnesty process had not yet been completed. The amnesty process is now complete and the Amnesty Committee has completed its report.[24] This chapter will show that amnesty decisions have tended to support the original findings of the Commission. In dealing with the findings and an analysis of the amnesty process, it is necessary to review how international humanitarian law has evolved to deal with conflicts and gross human rights violations.

23 Volume Five, Chapter Six, p. 212.

24 See Section One of this volume.

THE APPLICATION OF INTERNATIONAL LAW TO THE SOUTH AFRICAN SITUATION

Introduction

9. The Commission made findings against the South African government and its security forces based on the information it received. These included statements from victims, submissions by organs of civil society, political parties, international human rights groups, local non-governmental organisations (NGOs) and community-based organisations (CBOs), confessions made by amnesty applicants and many other interested parties.

10. It was, however, the statements made by individual victims and perpetrators to the Commission that presented the most compelling picture of the reign of terror conducted by the organs and agencies of the former state. Overwhelmingly, these statements revealed a picture of the gross human rights violations that were perpetrated by the state. These included the widespread use of torture, the use of excessive and indiscriminate force in public order policing, the abduction and disappearance of activists and the extrajudicial killing of political opponents and activists.

11. The Commission was able to investigate a number of cases thoroughly and also used its section 29 powers to hold subpoena hearings which effectively compelled many perpetrators to apply for amnesty.

12. In order to ensure the integrity of the information that it received, the Commission applied a policy of low-level corroboration to each case before declaring a person to have been a victim. Many have criticised this policy. However the Commission did not have the capacity to conduct a full-scale investigation into each case. Therefore, it selected cases and conducted strategic investigations. The Commission acknowledges the fact that more thorough investigations may have yielded more information about particular individuals and incidents. However, it is the Commission's view that it is unlikely that this would have impacted on its view of the role that the former state played in the commission of gross human rights violations, nor on its view that the former state acted in a criminal manner.

13. It is indeed the Commission's opinion that more information would simply have strengthened the patterns that had already emerged.

14. The Commission recorded the fact that patterns of abuse manifested themselves throughout South Africa in much the same way. These were not isolated incidents or the work of mavericks or 'bad apples'; they were the product of a carefully orchestrated policy, designed to subjugate and kill the opponents of the state. In any event, the Commission's findings are supported by the submissions made by many victims to various human rights organisations during the apartheid period.

15. The Commission has also been criticised for making findings without having completed the amnesty process. It should be noted, however, that the Commission did take cognisance of the information contained in many applications. Further, the Commission did not make findings in respect of specific incidents where applications had not been heard or where the Amnesty Committee had not yet made a decision.

FINDINGS OF THE COMMISSION IN RESPECT OF THE FORMER STATE AND ITS ORGANS

Categories of gross human rights violations defined in the Act

State responsibility for torture

16. The Commission found in its five-volume Final Report that torture was systematic and widespread in the ranks of the South African Police (SAP) and that it was the norm for the Security Branch of the SAP during the Commission's mandate period.

17. The Commission also found that the South African government condoned the practice of torture. The Commission held that the Minister of Police and Law and Order, the Commissioners of Police and Commanding Officers of the Security Branch at national, divisional and local levels were directly accountable for the use of torture against detainees and that Cabinet was indirectly responsible.

18. The Human rights instruments that are pertinent to the question of torture include:
    a. The International Covenant on Civil and Political Rights;
    b. The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, and
    c. The International Convention on the Elimination of All Forms of Racial Discrimination.

19. These Conventions require that no one shall be arbitrarily deprived of life and that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

20. The Convention Against Torture requires that each State Party 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'. The Convention allows no exception to this, and for that reason it is important to note the following:

No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency may be invoked as a justification for torture.

21. The Commission made its findings on torture based on evidence received from victims through the human rights violations process, perpetrators in amnesty applications and evidence given before the Commission by senior politicians and security force officials of the former government. In addition, local and international human rights groups made a number of submissions to the Commission, based on the studies they had carried out during the apartheid period.

22. The Commission received over 22 000 statements from victims alleging that they had been tortured. In most instances, the torture had been at the instance of members of the security forces.

23. The Commission received a number of applications from amnesty applicants applying for more than ninety-eight incidents of torture and severe assaults.

24. It is important to note that, although the Commission received over 22 000 statements from victims and only very few amnesty applications for torture, many human rights groups estimated that more that 73 000 detentions took place in the country between 1960 and 1990. It was established practice for torture to accompany a detention. Detention, arrest and incarceration without formal charges were commonplace in South Africa at that time. Whilst a plethora of laws existed to silence political dissent, the notorious section 29 of the Internal Security Act 74 was used to detain people indefinitely, without access to a lawyer, family member, priest or physician. Section 29 also permitted the state to hold a detainee in solitary confinement.

25. It is accepted now that detention without trial allowed for the abuse of those held in custody, that torture and maltreatment were widespread and that, whilst officials of the former state were aware of what was happening, they did nothing about it.

26. The torture techniques that have been identified through these cases are the following: assault; various forms of suffocation, including the 'wet bag' or 'tubing' method; enforced posture; electric shocks; sexual torture; forms of psychological torture, and solitary confinement.

27. A submission made to the Commission based on a study released by doctors between September 1987 and March 1990[25] found that 94 per cent of detainees in the study claimed either physical or mental abuse. The study found that the beating of detainees was widespread and that half of those alleging physical abuse still showed evidence of the abuse on physical examination. On assessment of their psychological status, 48 per cent of the former detainees were found to be psychologically dysfunctional.

28. Deaths in detention were also commonplace and were the result of the treatment meted out to persons in custody.

29. The Commission found that a considerable number of deaths in detention were a direct or indirect consequence of torture, including those cases where detainees had taken their own lives. The Commission declared those deaths to be induced.

30. In its Final Report, the Commission found that 'little effective action was taken by the state to prohibit or even limit [the use of torture] and that, to the contrary, legislation was enacted with the specific intent of preventing intervention by the Judiciary'.[26] The Commission found that the South African government condoned the use of torture as official practice.[27]

25 Affiliated to NAMDA practicing at a clinic near the centre of Durban.

26 Volume Two, Chapter Three, p. 220.

27 Ibid.

31. Whilst the Commission received thousands of statements alleging torture, few amnesty applications were received specifically for torture. Those received were from applicants Andries Johannes van Heerden [AM3763/96]; Willem Johannes Momberg [AM4159/96]; Stephanus Adriaan Oosthuizen [AM3760/96]; PJ Cornelius Loots [AM5462/97]; Jacques Hechter [AM2776/96]; Christo Nel [AM6609/97]; Lieutenant Colonel Antonie Heystek [AM4145/97]; Colonel Anton Pretorius [AM4389/96]; Helm 'Timol' Coetzee [AM4032/96]; Johannes Jacobus Strijdom [AM5464/97]; Paul van Vuuren [AM6528/97]; Roelof Venter [AM2774/96]; Eric Goosen [AM4158/96]; Marius Greyling [AM8027/97]; Karl Durr [AM8029/97]; Frans Bothma [AM8030/97]; Andy Taylor [AM4077/96]; WCC Smith [AM5469/97]; Jeffrey Benzien [AM5314/97], and Gert Cornelius Hugo [AM3833/96].[28]

32. It is clear that it was the norm for agents of the state to carry out various torture practices on those who were in their custody or incarcerated. In dealing with questions of accountability, one needs to establish whether the state was aware of the torture taking place and whether it took any action to prevent it happening. In other words, did the state take any action against its agents for the commission of torture and, once it knew that torture was widespread, did it do anything to prevent its repetition?

33. The former government conceded that torture occurred, but claimed that it represented the actions of a few renegade policemen. Former President FW de Klerk stated in his submission to the Commission that:

The National Party is prepared to accept responsibility for the policies that it adopted and for the actions taken by its office bearers in the implementation of those policies. It is however not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the Party was not aware and which it never would have condoned.[29]

34. Contrary to Mr de Klerk's claim of ignorance of the practice, Mr Leon Wessels, the National Party's former deputy Minister of Police, conceded that it was not possible to deny knowledge of torture. Mr Wessels testified at a special hearing on the role of the State Security Council that:

it was foreseen that under those circumstances people would be detained, people would be tortured, everybody in the country knew that people were tortured.[30]

28 For details see Volume Two, Chapter Three, pp. 214–18. See also section on Torture and Death in Custody, pp 187–214.

29 Second submission by the National Party, 14 May 1997, p. 10.

30 Johannesburg hearing, 14 October 1997.

35. The principles that have been enunciated earlier in this chapter can be summarised as follows:
    a The state is held strictly responsible for the conduct of its agents who commit gross violations of human rights.
    b State responsibility may be invoked even where the identity of the agent is unknown.
    c The state has the evidentiary burden to explain its action in the face of credible allegations of abuse by state agents.
    d States are also held responsible for 'lack of due diligence to prevent the violation or to respond to it' (official tolerance).

36. A key factor here is proving that the human rights violation took place with the support or tolerance of public authority or that the state allowed the violation to go unpunished.

37. The Commission noted in its Final Report that victim statements and amnesty applicants implicated a number of senior officers for having had knowledge of or having covered up incidents of torture. In the case of Mr Stanza Bopape, the then Commissioner of Police covered up the actions of the officers responsible for Bopape's death. Condonation of torture by superior officers was further evidenced by the fact that most well-known torturers were promoted to higher positions.

38. The Commission also noted that no prosecutions resulted from allegations of torture, even though the use of torture emerged in most political trials. The cases of Ahmed Timol, Neil Aggett and Lindy Mogale are pertinent.

39. Magistrates and judges seldom protected detainees or ruled in their favour, even though a pattern of abuse was familiar.

40. In a number of cases, the families of victims or detainees themselves laid charges against the state, resulting in out-of-court settlements.

41. More distressing is the fact that many judges and magistrates continued to accept the testimony of detainees, despite the fact that most of them knew that the testimony had been obtained under interrogation and torture whilst in detention. In this way, the judiciary and the magistracy indirectly sanctioned this practice and, together with the leadership of the former apartheid state, must be held accountable for its actions.

42. A number of human rights bodies made representations to the state about the treatment of detainees and persons in custody. In April 1982, the Detainees Parents Support Committee met with the Minister of Law and Order and the Minister of Justice to submit a dossier that included seventy-six statements alleging torture. The dossier named ninety-five individuals as perpetrators and covered the period 1978 to 1982. The ninety-five individuals were all members of the Security Branch and came from eighteen different branch offices. Of the eighteen offices detailed, John Vorster Square, Protea police station and the office in Sanlam building in Port Elizabeth headed the list. A report was subsequently made to parliament, which was informed that forty-three of these cases had been investigated and that eleven of the claims were unfounded. Presumably the remaining thirty-one were found to be of substance, yet no action was taken.

43. In May 1983, the Ad Hoc Committee of the Medical Association of South Africa (MASA) published a report as a supplement to the South African Medical Journal in which it stated that:[31]

there are insufficient safeguards in the existing legislation to ensure that that maltreatment of detainees does not occur. Persuasive evidence has been put before the Committee that where harsh methods are employed in the detention and interrogation of detainees, this may have extremely serious and possibly permanent effects on the physical and mental health of the detainee...

44. The only response from government was a set of directives issued by the Minister of Law and Order in December 1982 as safeguards for those detained under Section 29 of the Terrorist Act. Paragraph 15 stated that:

A detainee shall at all time be treated in a humane manner with proper regard to the rules of decency and shall not in any way be assaulted or other wise ill-treated or subjected to any form of torture or inhuman or degrading treatment.

45. The state did not bother to ensure that the directives were explained and no system was put in place to monitor whether detainees were being treated properly or that their human rights were being safeguarded.

46. The case of Mr Stanza Bopape implicates a number of superior officers in the cover-up and tolerance of torture.

31 This followed the study done by NAMDA referred to earlier.

47. Given the statements of victims, their families, the testimony of amnesty applicants such as Messrs Charles Zeelie, Jeffrey Benzien, Andy Taylor and Paul van Vuuren, and Generals Loggerenberg, Van der Merwe and others on the practice of torture and the condonation and cover up by superior officers when cases went horribly wrong, there can be no doubt that torture was widespread, well known and tolerated.

48. Although aware of the opprobrium being directed at them for this practice, the state continued to do nothing to end it. The state also did nothing about the violators or the agency that harboured them, the Security Branch. No mechanisms were put in place to monitor whether torture was still happening, nor to prevent it from happening. Neither the superior officers nor the officers carrying out the torture were sanctioned in any way. The attitude of the former state can only be described as one that 'tolerated and officially condoned' the practice of torture and the actions of their agents.

49. The Commission therefore confirms the findings it previously made, based on the further evidence it has received that the former state and its agents were responsible for the torture of those they regarded as opponents; and that the state perpetuated a state of impunity by tolerating and sanctioning the practice of torture, the legacy of which still exists today.

Abductions

50. The Commission received fifty-seven amnesty applications for eighty incidents of abduction. The fifty-seven applications included the abduction of thirty-five Umkhonto we Sizwe (MK) operatives, eighteen of whom were abducted inside the country and seventeen outside South Africa.

51. Of the fifty-seven abductions, more than twenty-seven resulted in the death of the victim. This raises the possibility that targeted assassinations may have been the perpetrators' intention from the outset.

52. The Commission also received more than 1500 statements dealing with disappearances, including enforced disappearances.

53. The Commission stated in its Final Report that the former state's primary purpose in carrying out abductions was to obtain information. Abductees were often killed in a bid to protect the information that had been received.

54. The victims of these abductions either belonged to MK or supported the movement internally. Amnesty applicants testified that they found it preferable to abduct rather than detain officially. Once the information was obtained, the abducted person would be killed. In many other instances, applicants testified that they attempted to 'turn' or 'recruit' individuals into working for the state. The Commission also learnt that, where the attempt to turn the abductee failed, killing the individual became necessary – although many amnesty applicants denied this. However, in terms of international law, families merely have to prove that the abductee was last seen alive in the hands of an agent of the state for the obligation or onus to explain the deceased's whereabouts to fall on the state.

55. The Commission also stated in its Final Report that this *modus operandi* allowed for greater freedom to torture without fear of consequences. The testimony of many *askaris* at amnesty hearings was at odds with that of white members in their particular units. In their testimony, *askaris* highlighted the brutality of the torture and abuse that many abductees were subjected to. The cases of Nokuthula Simelane[32] and Moses Morodu[33] offer examples of this.

56. It is also possible that operatives lost all sense of reality when dealing with abductees and became totally enmeshed in the brutality of the moment. Had the abductee been released or the body found, the heinous behaviour of the abductors and torturers would have been revealed. This was possibly an even more powerful motive to conceal the truth.

57. In its findings on extrajudicial killings, the Commission noted that a particular pattern was established: that is, political opponents were abducted, interrogated and then killed. In evidence that emerged through the amnesty process, another pattern emerged: that of abduction followed by torture or undue pressure to inform and/or become an informer or *askaris*. Those who did not succumb in this way were killed. Information was then leaked to MK that those who had been captured had been turned and had become *askaris*. The most devastating effect of this practice was that those who were abducted did not come home and that families had to live with the political stigma that their loved ones were perceived to be traitors.

32 Amnesty hearings, Pretoria, 28–30 June 1999 and 29–30 May 2000; AC/2001/185.

33 Amnesty hearing, 26 October 1999; AC/2000/010.

58. These abductions must be distinguished from those incidents where the intention of the perpetrators at the outset was to assassinate political opponents. In such operations, the abduction itself was merely a means to capturing the person, and the interrogation and torture that followed were secondary to the intention to kill.

59. Thus the cases of Griffiths Mxenge, Topsy Madaka and Siphiwe Mthimkulu, the 'Pebco Three', the 'Cradock Four' and the Ribeiros should be classified as political assassinations rather than abductions. Here the intention of the perpetrators was to eliminate the individuals concerned and to silence them forever.

60. In the KwaNdebele group of cases, abduction was followed by interrogation, torture and beatings and the abductee was then returned. The intention of these abductions was to intimidate and silence opposition.

61. The principle of customary international law is to hold the state responsible in instances such as these on a strict liability basis. Thus, the former state must be held strictly responsible for the abductions, disappearances and deaths of the abductees. The state is held responsible even in those instances where the perpetrator may not have intended that the final consequence of the abduction would be the death of the abductee. The intention of the perpetrator is irrelevant; the fact of the matter is that death ensued.

62. In those instances where the purpose of the abduction was killing, the state incurs responsibility for both the killing and the abduction. In terms of the accepted principle, even where the perpetrator responsible for the abduction or the disappearance has not been identified, it simply needs to be established that forced disappearance was committed by a police agent. In such an instance, the state is held responsible for accounting for the disappearance.

63. International human rights law places the burden on the state to account for the actions of its agents. Thus it is not sufficient for the state to allege (as it did in the cases of Nokuthula Simelane[34] and the four MK members abducted from Lesotho (namely Nomasonto Mashiya, Joyce Keokanyetswe 'Betty' Boom, Tax Sejamane and Mbulelo Ngono)[35] that they recruited or turned these agents and that were returned to exile in order to infiltrate the movement.

34 Amnesty hearings, Pretoria, 28–30 June 1999 and 29–30 May 2000. See also AC/2001/185.

35 See amnesty hearings, Johannesburg, 10–13 October 2000 and Bloemfontein 13–15 November 2000.

64. In all of these cases, using the strict liability test, it is likely that the state would be held criminally liable for their disappearances. In the case of Kurt v Turkey, the European court of human rights held that, once the applicant was in the custody of the security forces, the responsibility to account for the victim's subsequent fate shifted to the authorities.

65. In terms of international law and a state's responsibility to guarantee human rights, a state can be held responsible for failing to prevent or respond to a violation. As early as the 1980s, the former state was aware of the fact that disappearances were taking place. Allegations were mounting against the security forces as being responsible.

66. The question is: what did the state do to investigate the allegations being made or what action did the state take against those alleged to be involved in such practices?

67. Although it has been shown that agents in the employ of the state were responsible for the abductions of many political activists, that a pattern had been established and that this had become part of an orchestrated grand plan, the leadership of the former state continued to deny its responsibility for these gross human rights violations. Indeed, in the light of the above, Mr de Klerk might want to reconsider his theory of 'bad apples and mavericks'[36]. There is no doubt that the apartheid state must be held responsible for the actions and deeds of its agents and that the state's failure to investigate or to take action created a climate of impunity and criminality in the security forces.

68. A key factor when deciding whether a state is responsible is whether the violation has taken place with the support or tolerance of the authority or the state has allowed the violation to go unpunished. In this instance, the state allowed the death squads to act with impunity and abduct, interrogate, torture and kill. Nothing was done to stop them, even when the disappearances became public.

69. Instead the state continued to claim innocence and chose rather to sully the reputations of those who had been abducted and killed. As a result, the minds and memories of family members and loved ones have been haunted by uncertainty, suspicion and mistrust as they continue to wonder whether the loved one was a spy and why the loved one has not returned home.

36 Evidence by Mr FW de Klerk on behalf of the National Party to the TRC, 14 May 1997.

70. The amnesty cases and the evidence of the victims before the Commission have been sufficient to establish a pattern and an assumption that these victims must have died at the hands of the forces that abducted them. In this regard, efforts must be made to restore their dignity and true reputations as patriots who paid the price and were killed in the violence of the past.

71. The law must also take its course in dealing with those who came forward with half-truths and lies. Efforts must be made to integrate and ease the lot of those who became *askaris*. In most instances, their testimony was at considerable variance with that of their white colleagues and superiors. We may never know what pressure was placed on them to 'turn'. What we do know is that, in those instances where they did not succumb or refused to do so, they were killed horribly. The cases of Simelane and Masiya are examples of this.

State responsibility for extrajudicial killings

72. The Commission noted in its Final Report that, as the levels of conflict intensified in the country, the security forces came to believe that it was far preferable to kill people extrajudicially than to rely on the legal process. Many amnesty applicants testified to this in their applications. Deaths in detention began in the 1960s and were attributed to suicides, accidents and natural causes. [37]

73. Thereafter came the clandestine killings and the death squads. A factor that may account for the rise in extrajudicial deaths and the setting up of death squads was the law that required an inquest in the case of an unnatural death. In order to have an inquest, a body must be produced and examined. While the dead cannot speak for themselves, a forensically examined body could and often did.

74. Inquests are the judicial arena in which the magistracy has shown blind and obdurate loyalty to the former state over the rule of law. In most inquest hearings, despite evidence to the contrary, the word of the police and particular members of the Security Branch was accepted almost unquestioningly, often leaving families and those who defended them astonished.

75. The value of the inquest proceedings was that, in many instances, families of victims were represented by lawyers, who did their utmost to uncover the truth and used the law to do it. This is where the reputation of the former government

37 See Volume Two, Chapter Three, pp. 205–15.

came unstuck. The apartheid government was obsessed with rule by law, and laws were created to cover almost every illegitimate act they could get away with. However, it was legal proceedings in inquest matters that stripped away the veneer of legitimacy and revealed the venality of the agents of the state. The adverse publicity that the government attracted abroad as a result of these deaths in detention forced the state to go underground and look for other mechanisms to deal with persons perceived to be political opponents.

76. Brigadier Jack Cronje [AM2773/96], one of the first officers to appear before the Amnesty Committee, testified that the Security Branch was given orders in 1986 to drop all restraint when dealing with the enemies of the state.

It didn't matter what was done or how we did it, as long as the floodtide of destabilization, unrest and violence was stopped.

77. This, in effect, gave the security forces *carte blanche* to maim and kill, allowing the former apartheid state to move even further into the criminal arena. This was particularly so in the case of its internal operations, where it had to operate at a covert and clandestine level so that no operation was traceable to the state. It was this that led directly to the setting up of various death squads in the country – such as the Civil Co-operation Bureau (CCB) and Vlakplaas – and the training of surrogate forces such as the hit squads in KwaZulu and Natal.

78. In its quest for legality, the former state tried to draw a veil of legitimacy over its operations in the neighbouring states. Even today the military argues that its operations were legitimate, authorised and thus legal. Raids were increasingly openly acknowledged. These raids remain questionable in international law.

79. The fact that our amnesties may not be valid across our borders has meant that there have been almost no applications for amnesty from members of the military.

80. A factor that the state also relied on was that assassinations could be blamed on the liberation movements and, where people disappeared, the police often claimed that those involved had gone into exile. The fact that there was nobody to draw attention to the actions of the state meant that there was no call for an inquiry or inquest, thus creating a further level of impunity for agents of the state. As time went on, the deeds became more daring and more grisly. This is, of course, the problem with license and impunity, where political actions become increasingly blurred and descend into total criminality. It accounts for

why people like Colonel Eugene de Kock and some amnesty applicants will remain in custody. Some of their actions were acts of sheer criminality.

81. The Commission relied on a preliminary analysis of amnesty applications. Three years later, now that the amnesty process is complete, it is clear that the information that emerged from the amnesty hearings confirms the patterns and classifications made in the Final Report.

82. The archive of the Commission has been considerably enriched by the detail that has emerged through the amnesty hearings.

83. Amnesty applications can be categorised as follows:
    a abductions followed by killing (discussed earlier);
    b assassinations of persons considered to have a high political profile both inside and outside the country;
    c assassinations of individual MK and Azanian People's Liberation Army (APLA) personnel both inside and outside the country, and
    d cross-border raids.

84. Again, if one examines the picture that emerges from the amnesty process, it is clear that authorisation for individual assassinations took place at different levels. Agents believed that they had a general mandate to kill political opponents whom they believed to be contributing towards the instability of the state. Evidence in the 'Pebco Three' hearing confirms that there had been an instruction from the Minister of Law and Order to 'destabilise the Eastern Cape'. The testimony in amnesty hearings supports the view that, as far as external operations were concerned, approval was usually sought from Security Branch headquarters.

85. TREWITS[38], which was set up in 1986, probably represented the state's attempt to collect and share intelligence between all structures, with the intention of operating in a more co-ordinated manner and planning joint operations. Given the fact that both National and Military Intelligence sat on this structure, the state cannot deny that intelligence was used to identify and then eliminate those regarded as political opponents.

86. It is the entrapment operations of the state that really engender a sense of revulsion and horror because they targeted not trained military cadres, but callow township youth who were perceived to be threats to the state because of their

38 See Volume Two, Chapter Three, pp. 275–98 for a discussion on the establishment of TREWITS and target development.

political beliefs. The operations involved mainly youth and school activists who were perceived to be potential MK recruits. The nature of the different operations reveals real evil in their planning and execution. The incident of the 'Nietverdiend Ten'[39] and the KwaNdebele youth[40] highlight the grisly machinations of state agents.

87. The supply of defective hand grenades to the Duduza youths by the Soweto security structure defies all rules of justice.[41] What kind of state targets its own youth in this way? How can a politician fail to ask questions after hearing about these incidents?

88. The decision to grant amnesty in this instance raised some serious questions for the Commission. Did we not take reconciliation too far? Surely the killing of youths cannot be justified as political, and raises questions about the proportionality factor.

89. The amnesty applicants have confirmed their own role in the extrajudicial killings of political opponents. In terms of their actions, they have breached the provisions of the Geneva Conventions and the principles enshrined in international humanitarian law. They have also contravened South Africa's own domestic law. In confirming that they acted as members of the security forces, their actions create a problem for the former state, which must shoulder the responsibility for their actions. There can be little doubt that, in setting up these covert death squads, the former state could have had no misunderstanding about the intention of these units, and indeed intended that those identified as political opponents would be identified, targeted for assassination and ultimately killed. When a state resorts to acting or causing its agents to act outside the boundaries of the law, it acts criminally and must be seen as a criminal state. In the Commission's opinion, the former state must be held responsible for the killings of political opponents in that it knowingly planned, authorised, sanctioned, condoned and covered up the commission of these unlawful acts. It acted extrajudicially and criminally, thus leading the Commission to conclude that it ultimately became a criminal state.

90. The findings of the Amnesty Committee support that view.

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39 Amnesty hearings, Johannesburg, 21–31 October 1996; Pretoria, 24 February–13 March 1997 & 6–8 April 1999; AC/1999/30, AC/1999/31, AC/1999/188, AC/1999/190, AC/1999/192, AC/1999/193, AC/1999/194, AC/1999/197; Final Report, Volume Two, Chapter Three, pp. 264–5.

40 Amnesty hearings, Johannesburg, 21–31 October 1996; Pretoria, 24 February–13 March 1997 & 13 April 1999; AC/1999/30; AC/1999/33, AC/1999/189, AC/1999/191;AC/1999/248; Final Report, Volume Two, Chapter Three, p. 264.

41 Volume Two, Chapter Three, pp. 259–398; Volume Three, Chapter Six, pp. 628–631; Amnesty hearings, Pretoria, 2–5 August 1999; AC/2000/58.

COMMAND RESPONSIBILITY

Introduction

91. In dealing with the question of Command responsibility, a key case that has come to embody the contradictions in modern International law is that of General Tomayuki Yamashita.[42] General Yamashita was tried by a United States Military Commission at the end of the Second World War for atrocities committed by Japanese forces in the Philippines – which included murder, rape and pillage. On the 6 February 1946, General Douglas MacArthur affirmed the death sentence imposed on General Yamashita.

92. Yamashita appealed to the United States Supreme Court, arguing that he had neither committed the crimes for which he had been found responsible nor ordered that they be committed. Writing the judgment for the Appeal Court, Chief Justice Harlan Fiske Stone rejected Yamashita's appeal and stated:

[T] his overlooks the fact that the gist of the charge is an unlawful breach of duty by an army commander to control the extensive and widespread atrocities specified ...It is evident that the conduct of military operations by troops whose excesses are unrestrained by the order or efforts of their commander would almost certainly result in violations...Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

93. Justices Wiley B Rutledge and Frank Murphy dissented. Judge Murphy wrote:

Nowhere was it alleged that that [Yamashita] personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.

94. These conflicting views raised in the Yamashita case represents the two main schools of thought on the question of command responsibility. On the one hand, General MacArthur, Chief Justice Stone and the military commission considered it to be a dereliction of duty for a Commander not to control the behaviour of his troops. The approach embodies a 'should have known or must have known' approach. Justice Murphy's dissent represents the other view, namely that prosecutors must prove that a commander knew about the commission of

42 Yamashita v. Styer, Commanding General, U.S. Army Forces, Western Pacific, US Supreme Court 327 U.S. 1 (1946).

widespread crimes by his troops before his failure to take action against such conduct makes him criminally liable.

95. Not surprisingly, the second is the approach that is followed today. Article 86 of Protocol I of 1977 (additional to the Geneva Convention of 1949 regarding the duty of the parties to an international armed conflict to act against grave breaches) provides that 'if they knew, or had information which should have enabled them to conclude in the circumstances at the time' such crimes were taking place, they are required to 'take all feasible measures within their power to prevent or repress their commission'.

96. One of the most important statements made in modern history is that made by the prosecution in its summation at Nuremberg in the High Command case:

Somewhere, there is unmitigated responsibility for these atrocities. It is to be borne by the troop? Is it to be borne primarily by the hundreds of subordinates who played a minor role in this pattern of crime? We think it is clear that it is not where the deepest responsibility lies. Men in the mass, particularly when organized and disciplined in armies, must be expected to yield to prestige and authority, the power of example...Mitigation should be reserved for those upon whom superior orders are pressed down, and who lack the means to influence general standard of behavior. It is not, we submit, available to the commander who participates in bringing the criminal pressures to bear, and whose responsibility it is to ensure the preservation of honorable military traditions.[43]

97. Yet the Nuremberg Military Tribunal refused to apply this 'almost strict liability' standard. Instead, it established that in order to hold a superior responsible for the criminal acts of his subordinates:

there must be a personal dereliction that can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to wanton, immoral disregard of the action of his subordinates amounting to acquiescence.

98. In the United States v Leeb[44], the tribunal found that the commander must have had knowledge of an order or have acquiesced in its implementation.

43 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 to 1 October 1946 (Sessions 187 and 188, 26–27 July 1946).

44 Von Leeb (High Command Case), Trials of the Major War Criminals before the International Military Tribunal under Control Council Law, Nuremberg, No. 10 (1951).

99. The statute adopted by the Security Council for the operations of the tribunal for the former Yugoslavia follow the standard of Protocol I and the dissenting view of Justice Murphy in the Yamashita case.

100. In essence, this view provides that commanders are culpable only if they knew about crimes that were being committed by their forces and did not do what they could to stop them.

101. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Celebici, concluded that Protocol I was customary international law.

102. The international tribunals set up for the former Yugoslavia and Rwanda have made rulings on the question of command responsibility. Their rulings are pertinent to understanding international customary law on this point, with particular reference to two categories of individual responsibility for commanders or other superiors. They examine their potential responsibility, which may arise because of their role either in planning, instigating or assisting perpetrators of the violations, and that which they incur for the actions of their subordinates. In both instances, the legal implication of the omissions on the part of state authorities is also canvassed.

Responsibility for complicity

103. In dealing with the atrocities of the past, the search for justice and accountability has meant that it is important to go beyond those who commit the crimes – the trigger-pullers – and to identify those who are complicit in the violations because they planned and conceptualised them.

104. In international law this concept has been formulated in various legal instruments. At Nuremberg, Council Control Law No. 10 singled out accessories, consenting participants, those connected with plans to commit crimes, and members of organisations associated with the crime. Likewise, Article 111 of the Genocide Convention criminalised conspiracy, incitement and complicity in the commission of genocide. The International Law Commission included complicity in its elaboration of the Nuremberg principles. Article 7 (1) of the ICTY statute provides that:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

105. In a further legal development, the Rome Statute of the International Criminal Court criminalises a range of associated acts, such as ordering, soliciting, inducing, aiding, abetting or assisting in the commission of the crime in a detailed scheme that conditions guilt on specific acts or mental state.

106. The tribunals have interpreted each of the elements of Article 7(1). In terms of the Blaskic case[45], an 'order' does not need to be in writing or in any particular form. It can be explicit or implicit and can be proved through leading evidence of a circumstantial nature. Nor does it require that the superior give the order directly to the perpetrator. In the Akayesu[46] case, the court held that it was the *mens rea* of the superior that was important, not the *animus* of the perpetrator – that is, the subordinate who executes the order. If one applies this principle to the occasion when Minister le Grange instructed General Petrus Johannes Coetzee to assemble a team to strike at the offices of the ANC in London in 1982, it becomes clear that he took part in the crime. Minister le Grange is deceased but, had be been alive, he would no doubt have needed to apply for amnesty for this act to escape potential prosecution. In this instance, General Coetzee applied for amnesty for his role in the London bombing.

107. General Mike Geldenhuys, the then Commissioner of Police, expressed his opposition to the fact that serving policemen were to be used. He appears thereafter to have played no role beyond remaining silent. Minister le Grange instructed General Coetzee that, notwithstanding his objections: 'the government had decided to that the operation would need to go ahead'. Commissioner Geldenhuys could in all probability be held responsible for his omission in that he knew of the intention to commit a crime in another country and did nothing about it.

108. In the Tadic[47] case, the trial chamber of the ICTY elaborated on the meaning of 'accomplice' liability and concluded that the accomplice is guilty if 'his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident' and that he 'had knowledge of the underlying act'. This test was not challenged and has been adopted by other chambers of the ICTY. In the Akayesu case, the ICTR defined 'planning' to mean 'one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases'.

45 Appeals Chamber, ICTY, paras 281–2 citing The Prosecutor v Jean Paul Akayesu, Judgement of ICTR Trial Chamber, 2 September 98.

46 Appeals Chamber, ICTY, paras 281–2 citing The Prosecutor v Jean Paul Akayesu, Judgment of ICTR Trial Chamber, 2 September 98.

47 Prosecution v Dusko Tadic, Judgment of the Trial Chamber II, 7 May 1997, ICTY.

109. 'Instigating' was defined as 'prompting another to commit an offense with a causal connection between the instigation and the perpetration of the crime'. The ICTY held that whilst 'a causal relationship between the instigation and the physical perpetration of the crime needs to be demonstrated (i.e. that the contribution of the accused has an effect on the commission of the crime), it is not necessary to prove that the crime would not have been perpetrated without the accused's involvement'.

110. If one applies these principles to our situation, Minister le Grange would have been held responsible for the 1985 incident known as Operation Zero Zero. In terms of testimony before the Amnesty Committee, Le Grange authorised a plan that provided for the issue of defective hand grenades to a number of young Congress of South African Students (COSAS) activists on the East Rand. The hand grenades were to be used in operations against the state. However, the timing devices had been tampered with, which resulted in seven youths being killed and eight severely injured. In addition, a young woman who was suspected of being an informer was 'necklaced'[48], making her one of the first necklace victims in the country. Whilst Minister le Grange might not have known that Ms Maake Skosana would be killed, there is a causal link between her death and the hand grenade incident.

111. In 1987, the then Minister of Law and Order Adriaan Vlok [AM4399/96] authorised the destruction of Cosatu House[49] in central Johannesburg on the night of 3 May 1987. A team from Vlakplaas, assisted by the Witswatersrand Security Branch and including its technical and explosives sections, undertook the operation. Although nobody was killed, there were approximately twenty people in the building at the time. The building itself was extensively damaged. Minister Vlok could technically have been charged for attempted murder.

112. In July 1988, Minister Vlok authorised the placing of dummy explosives in several cinemas around South Africa to provide a pretext for the seizure and banning of the film, *Cry Freedom*, which details the death of detainee Steve Biko at the hands of the Port Elizabeth Security Branch. This action followed a number of unsuccessful attempts to exert pressure on the Publications Control Board to ban the film. In giving reasons for his actions before the Commission, Minister Vlok expressed the view that he had tried the legal route and failed,

48 Burnt to death using petrol and a tyre placed around the victim.

49 Headquarters of the Congress of South African Trade Unions (COSATU).

and had therefore resorted to illegality as he had judged 'that this film would have been a risk as it was inciteful'.

113. In August 1988, Minister Vlok was allegedly ordered by then State President PW Botha to render Khotso House 'unusable', but to do so without loss of life. Khotso House was the headquarters of the South African Council of Churches, considered to be an opponent of the former state. Numerous anti-apartheid organisations, including the United Democratic Front, also had offices in the building. This case provides an interesting study as, in his evidence before the Amnesty Committee, Minister Vlok testified that, although he had not been given specific instructions to bomb Khotso House, he could not think of a legal way to carry out the State President's injunction. He also testified that, since President Botha had said that 'it should involve no loss of life', he was led to believe that that Mr Botha had been suggesting unlawful means. This operation, which was also conducted by Vlakplaas with assistance from the Witwatersrand security Branch and the explosives section at security Branch Headquarters, took place on the night of 31 August 1988. Given the legal principles enunciated above, there can be little doubt that Mr PW Botha remains liable for these operations.

114. All of these operations indicate that there was direct political authorisation for these unlawful activities, which involved loss of life and/or the potential for loss of life and damage to property.

115. The pattern that was followed by successive apartheid governments was to pass to laws to legitimise their conduct. When that failed, they did not hesitate to act outside of the law and resort to criminality.

116. In the Blaskic case[50], aiding and abetting was defined as providing practical assistance, encouragement or moral support with a substantial effect on the perpetration of the crime. In terms of the Blaskic decision, an omission may constitute aiding and abetting as long as the 'failure to act had a decisive effect on the commission of the crime'. The *mens rea* in such a case consists of 'knowledge that his acts assist the commission of the crime' and the accused must have 'intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct'. The Blaskic judgment notes that: 'it is sufficient that the aider and abettor knows that one of a number of crimes will be committed'.

50 Appeals Chamber, ICTY, paras 281–2 citing The Prosecutor v Jean Paul Akayesu, Judgement of ICTR Trial Chamber, 2 September 98.

117. In the Foca case[51], the trial chamber described 'aiding and abetting' as a contribution which may take the form of 'practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime. In this instance, the assistance need not have a causal connection to the act of the principal and it may involve an act or omission and take place before, during or after the commission of the crime'. In order for an individual to be held responsible for aiding and abetting, s/he must know that the acts assist in the commission of a specific crime by the principal. While the individual is not required to share the principal's *mens rea*, 'he must know of the essential elements of the crime (including the perpetrator's *mens rea)* and take the conscious decisions to act in the knowledge that he thereby supports the commission of the crime.'

Command responsibility (omissions)

118. Under international law, an individual may be held responsible for omissions by the doctrine of superior or command responsibility. As set out earlier in this section, this doctrine is ancient in origin and emerged as an important principle particularly after World War II. It has also been a subject of considerable importance for international tribunals, which have recognised command responsibility as a principle firmly established in international law.

119. Article 7(3) of the ICTY statute reflects this rule:

The fact that any of the acts was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

120. The command responsibility principle is also present in Article 86(2) of the First Additional Protocol to the Geneva Conventions of 1949, which provides that:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

51 Appeals Chamber, ICTY, para 391 citing The Prosecutor v Furandzija supra paras 235 and 249.

121. Command responsibility requires three elements following proof of the crime itself:
   a a superior–subordinate relationship between the accused and the perpetrator of the crime;
   b that the accused knew or had reason to know that the crime was about to be or had been committed; and
   c that the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator.

122. The same principle has been applied in dealing with civil responsibility under the Alien Tort Claims Act in the United States. In the case of Paul v April[52], a federal court held that Prosper Avril, a Haitian military dictator, was personally responsible for a systematic pattern of egregious abuses, since the perpetrators acted under his instructions and within the scope of the authority granted by him. The court heard evidence that he had known that the torture was being committed.

123. In the case of Forti v Suarez-Mason,[53] the court noted that:

under International law, responsibility for torture, summary execution or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.

124. Using this principle, all former heads of the apartheid state could be held responsible for the commission of gross human rights violations committed by their agents.

125. The meaning of each of the elements of command responsibility require some discussion.

Superior–subordinate relationship

126. Jurisprudence on this point envisions that the principle of superior responsibility encompasses heads of state, political leaders and other civilian superiors in positions of authority.

52 901 F. Supp. 339 (SD FLA 1994).
53 672 F. Supp. 1531, 1537-8 (N.D. CAL.1987).

127. In clarifying this issue, it is important to note the following:
   a The commander may be at any level.
   b The commander, even if in an *ad hoc* command position, is responsible for the acts of men operating under him.
   c Control may be direct or indirect.
   d Control may be *de facto* as well as *de jure*.

128. The Foca[54] case clarifies that a superior–subordinate relationship cannot be determined by reference to formal status alone. What must be established is whether the superior had the material ability to exercise his powers to prevent and punish the commission of the subordinates' offences.

129. It is clear that those superiors (either *de jure* or *de facto*, military or civilian) who are clearly part of a direct or indirect chain of command and who have the power to control or punish the acts of subordinates incur criminal responsibility.

130. The tribunals have not interpreted 'chain of command' literally but have held rather that as long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct is satisfied, the principle will hold.

Knowledge

131. Knowledge has been elaborated in international law to include: 'knew or had information which should have enabled them to conclude in the circumstances at the time'; 'knew or had reason to know'; 'either knew or, owing to the circumstances at the time should have known', and 'either knew, or consciously disregarded information which clearly indicated that subordinates have or are about to commit international crimes'. International law takes into account the law as elaborated after the World War II trials and the terms of Additional Protocol I to the Geneva Conventions, which was written in 1977.

132. The ICTY interpreted customary international law in the Celebic case to be that a superior cannot be held responsible unless:

He effectively knows, through direct or circumstantial evidence at his disposal, that his subordinates have committed or are about to commit the crimes; or

He has reason to believe that they have or are about to commit such crimes.

54 Appeals Chamber, ICTY.

133. The Celebic case draws a distinction between military commanders and civilian superiors, suggesting that a higher standard of proof will be required in the case of civilian superiors.

134. In the Blaskic case, the trial chamber restated the Celebic decision and then conducted its own review of the war crimes case from World War II. The trial chamber concluded that:

after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction.

135. After turning to the Additional Protocol, the trial chamber in this judgment found that:

if a commander has exercised due diligence in the fulfilment of his duties lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defense where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.

136. This standard does not mean that the superior must have information on subordinate offences in his actual possession in order for liability to attach. It is sufficient that the superior has some general information in his possession that, 'would put him on notice of possible unlawful acts by his subordinates'. The information may be written or oral and does not need to be in the form of reports submitted pursuant to a monitoring system; nor does it have to provide specific information about unlawful acts. In the Celebic case, the Appeals Chamber posits, for example, that if a military commander has received information that some of the soldiers under his command have a violent or unstable character or have been drinking prior to going out on a mission, this may be considered as meeting the knowledge requirement. In this regard, the fact that the state used individuals like Eugene de Kock, Ferdi Barnard and others like them may attach liability to those who appointed them to carry out these deeds. They should indeed have expected them to do so because of the identification of quirks in their character.

Reasonable and necessary measures

137. The question of whether a commander took appropriate steps to prevent atrocities is a factual issue and is dependent on the circumstances of each case. International law is clear that, whilst a superior cannot do the impossible, he can be held responsible for failing to take measures within his real capacity. The ICTY has also held that punishing a perpetrator after the event does not satisfy this obligation if the commander had reason to know beforehand that crimes might be committed. It is not necessary that there should be a causal link between the superior's omission and the violation.

138. The Kordic and Cerkez[55] cases deal with the twin obligations of preventing and punishing.

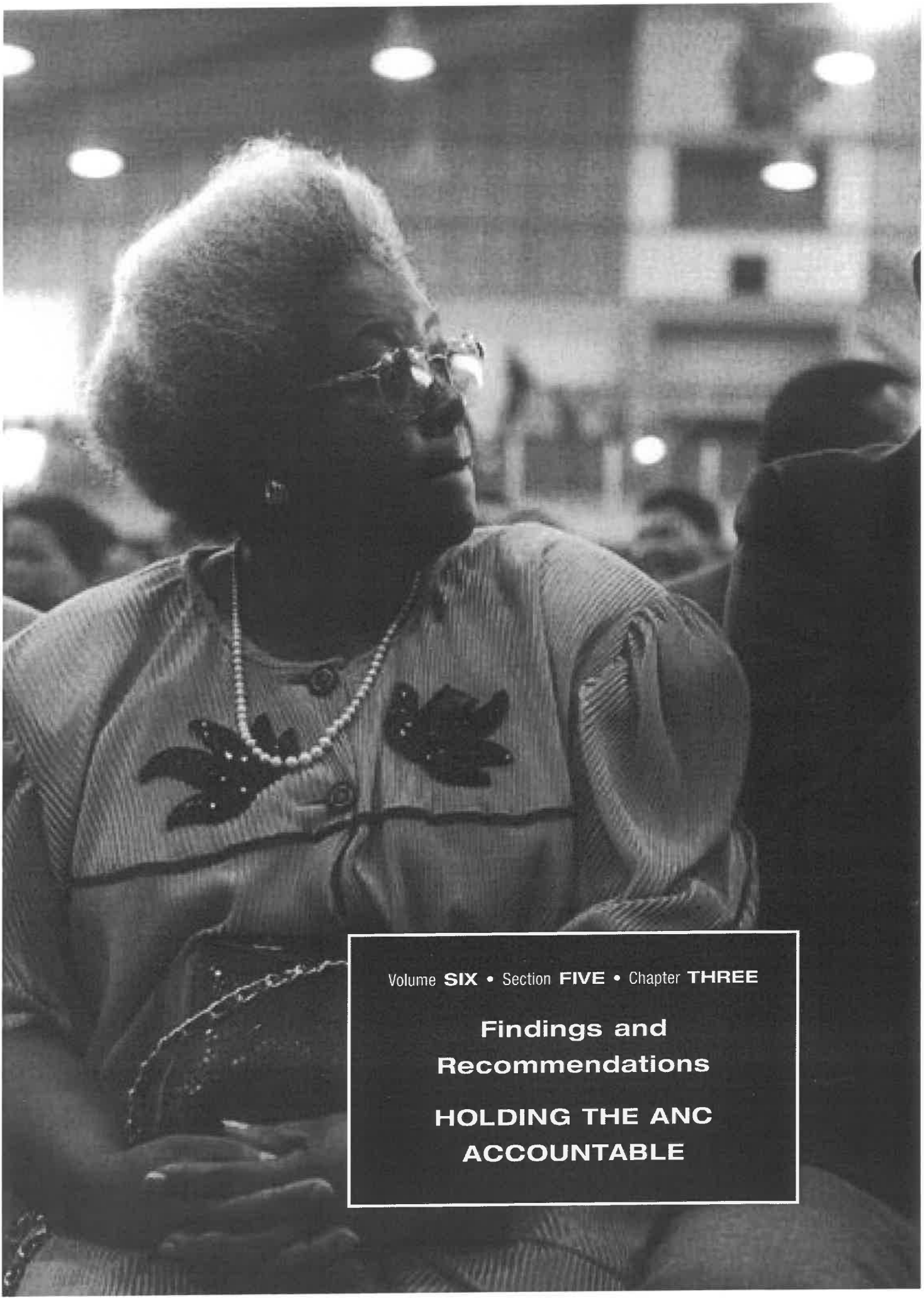
the duty to prevent should be understood as resting on a superior at any stage before the commission of a subordinate crime if he acquires knowledge that such a crime is being prepared or planned or when he has reasonable grounds to suspect subordinate crimes. The duty to punish naturally arises after a crime has been committed. Persons who assume command after the commission are under the same duty to punish. This dirty includes at least an obligation to investigate the crimes to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself. Civilian superiors would be under a similar obligation, depending upon the effective powers exercised and whether they include an ability to require the competent authorities to take action.

139. If one applies this test to some of the cross-border operations, a number of people could find themselves facing criminal action, given the fact that hardly anybody applied for amnesty for these operations.

140. General Coetzee testified as to his involvement in the Maseru raid and the raid on Gaborone. It is known that these raids were authorised by the former government, despite the fact that no minuted decision can be found in either the records of the State Security Council or Cabinet. Many high-ranking individuals, including Minister Vlok, have argued that, if such unlawful activity had been authorised , such authorisation would be reflected in minutes. The fact that these two raids were not reflected in minutes negates this argument.

141. It is clear that the Commission has no reason to change its findings. In addition, were the state to pursue a vigorous prosecution policy, many high-ranking politicians could find themselves sitting behind bars.

55 Trial Chamber, ICTY.



Volume **SIX** • Section **FIVE** • Chapter **THREE**

Findings and Recommendations

HOLDING THE ANC ACCOUNTABLE

Volume **SIX** Section **FIVE** Chapter **THREE**

Holding the ANC Accountable

INTRODUCTION

1. In its five-volume Final Report, the Truth and Reconciliation Commission (the Commission) fully endorsed the international law position that apartheid was a crime against humanity. It also recognised that both the African National Congress (ANC) and the Pan Africanist Congress (PAC) were internationally recognised liberation movements that conducted a legitimate struggle against the former South African government and its policy of apartheid.

2. The Commission noted that the ANC made submissions to the Commission, including handing over a report on internal inquiries it had conducted in exile. It is important to restate that the ANC was, in all respects, more frank and co-operative with the Commission than either the state or the PAC.

FINDINGS

3. The Commission noted that, of the three main parties to the conflict, only the ANC committed itself to observing the tenets of the Geneva Protocols and, in the main, conducting the armed struggle in accordance with international humanitarian law. This report acknowledges the commitment of the ANC to upholding the Geneva Protocols as well as its comparative restraint in conducting the armed struggle – at least in terms of the manner in which it identified its targets and its leadership's decision to instruct its cadres to abandon the land-mine campaign when it became clear that it was resulting in the deaths and injuries of innocent civilians.

4. However, the Commission drew a distinction between the conduct of a 'just war' and the question of 'just means'. The Commission found that, whilst its struggle was just, the ANC had, in the course of the conflict, contravened the Geneva Protocols and was responsible for the commission of gross human rights violations. For this reason the Commission held that the ANC and its organs – the National Executive Council (NEC), the Secretariat and its armed wing Umkhonto we Sizwe (MK) – had, in the course of their political activities

and in the conduct of the armed struggle, committed gross human rights violations for which they are morally and politically accountable.

THE POSITION AFTER THE HANDING OVER OF THE FINAL REPORT

5. As mentioned above, the Commission wishes to place on record that it sought in its findings to draw a distinction between a 'just war' and 'just means'. It did not criminalise the struggle. It was, however, obliged in terms of its mandate set out in its founding Act[56] to determine the question of responsibility for the commission of gross human rights violations.

6. On the eve of handing over its Final Report, the ANC sought to interdict the Commission from doing so. The essence of the application was to challenge the Commission's interpretation of the *audi alterem partem* rule and to compel the Commission to meet with it to discuss the proposed findings. This court challenge is dealt with in Section One, Chapter Four of this volume. The High Court of the Western Cape found against the ANC, thereby allowing the Commission to hand its report over to President Mandela. There was, however, a great deal of acrimony between the Commission and the ANC about the findings made. Yet the fact is that the Commission said nothing that had not already been brought to the Commission by the ANC itself. It was indeed the ANC's disclosures and acknowledgment that gross human rights violations had been committed in the conduct of the struggle that assisted the Commission in coming to its conclusions.

7. In February 1999, at a sitting of both houses of parliament convened to discuss the Report, Deputy President Thabo Mbeki reiterated his complaint that the ANC had not been able to meet with the Commission to discuss its findings against the ANC. He made the following statement:

What we had sought to discuss with the TRC pertained to such obviously important matters as the definition of the concept of gross violations of human rights in the context of a war situation and other issues relating to war and peace and the humane conduct of warfare. One of the central matters at issue was, and remains, the erroneous determination of various actions of our liberation movement as gross violations of human rights, including the general implication that any and all military activity which results in the loss of civilian lives constitutes a gross violation of human rights. Indeed, it could also be said that the erroneous

56 The Promotion of National Unity and Reconciliation Act No. 34 of 1995, (the Act).

logic followed by the TRC, which was contrary even to the Geneva Conventions and Protocols governing the conduct of warfare, would result in the characterisation of all irregular wars of liberation as tantamount to a gross violation of human rights. We cannot accept such a conclusion[57].

8. The Commission is not required to respond to criticism of its findings by the ANC and other critics. However, at the time that the findings of responsibility were made, the work of the Amnesty Committee was not complete and there was some expectation that the Commission would re-examine these findings in the light of the amnesty decisions and the evidence received through this process. In doing so, it is necessary to deal with both international law and international humanitarian law.

INTERNATIONAL HUMANITARIAN LAW

9. The Geneva Conventions were adopted in 1949 and South Africa acceded to them in 1952. In 1977, additional Protocols I and II were adopted. In 1980, the ANC deposited a declaration with the President of the International Committee of the Red Cross (ICRC) committing the ANC to international humanitarian law.[58]

10. The principles of international humanitarian law that apply to the situation in South Africa are set out in Chapter One of this section. The chapter also deals with the ANC's declaration that it would govern the conduct of its struggle in accordance with international humanitarian law.

Moral equivalence

11. One of the criticisms the ANC levelled at the Commission was that of 'moral equivalence'. The ANC claimed that the Commission equated the actions of those who fought a just cause against apartheid with those who fought in defence of an unjust cause.

12. The Commission's position has always been[59] that it was obliged by statute to deal even-handedly with all victims. Its actions in this respect were guided, amongst other things, by the principle that victims should be treated equally, without discrimination of any kind. Despite this, however, the Commission did not suspend moral judgment and drew a distinction between the actions of the state and those of the liberation movements.

57 Hansard: Feb 5–March 26 1999.

58 See the Appendix to this chapter.

59 See Volume One.

13. When dealing with the question of even-handedness and moral equivalence (whether making its findings against the state, the liberation movements or other parties), the Commission relied on internationally accepted human rights principles. In order to arrive at a definition of a gross human rights violation, the Commission relied on the definition contained in the Act and, in making its assessment, took into account the political context and the circumstances within which the violation had taken place.

14. This did not, however, mean that the Commission treated the conflict as a conflict between equal parties. The Commission recognised that the might of the state, with all its power and legitimacy (however ill-conferred) was in a far stronger position than were the liberation movements.

15. The Commission also never characterised the war that the former state waged against its own people as either morally or legally justified.

16. The Commission also took care not to use apartheid definitions of legal conduct.

IUS IN BELLO AND *IUS AD BELLUM*

17. The ANC also criticised the Commission for failing to deal adequately with the fact that the apartheid state acted in breach of the Geneva Conventions and the Additional Protocols. According to this view, the actions that the state considered to be legitimate were war crimes. For this reason it is important to elucidate the distinction between a 'just war' and 'just means'.

18. In its five-volume Final Report, the Commission stated the following:

The application of some of the principles and criteria of just war theory have proved difficult and controversial, especially when dealing with unconventional wars, that is wars of national liberation, civil wars and guerrilla wars within states. The distinction between means and cause is a dimension of just war theory that cannot be ignored. Often this distinction is made in terms of justice in war (ius in bello) and justice of war (ius ad bellum).

19. In dealing with the doctrine of justice in war, the Commission stated:

There are limits to how much force may be used in a particular context and restrictions on who or what may be targeted. Two principles dominate this body of law:

The use of force must be reasonably tailored to a legitimate military end;

Certain individuals are entitled to specific protection, making a fundamental distinction between combatants and non-combatants. Thus even an enemy soldier who is armed and ready for combat may be harmed and even killed, but a civilian or a sick, wounded or captured soldiers may not be harmed.

20. The Report stated further:

The Commission's confirmation that the apartheid system was a crime against humanity does not mean that all acts carried out in order to destroy apartheid was necessarily legal, moral and acceptable. The Commission with the international consensus that those who were fighting for a just cause were under an obligation to employ just means in the conduct of this fight.

As far as justice in war is concerned, the framework within which the Commission made its findings was in accordance with international law and the views and findings of international organisations and judicial bodies. The strict prohibitions against torture and abduction and the grave breach of killing and injuring defenceless people, civilians and soldiers 'hors de combat' required the Commission to conclude that not all actions in war could be regarded as morally or legally legitimate, even where the cause was just.

21. Given the ANC's own commitment to upholding the Geneva Conventions and the various principles of international humanitarian law – as well as its own Declaration in 1980 – it is difficult to understand why it wishes to pursue this argument. The Commission, however, stands by this distinction. Hans-Peter Gasser, a former Senior Legal Adviser to the ICRC has stated:

The rules of international law apply to all armed conflicts, irrespective of their origin or cause. They have to be respected in all circumstances and with regard to all persons protected by them, without any discrimination. In modern humanitarian law, there is no place for discriminatory treatment of victims of warfare based on the concept of 'just war'.

22. Professor Kader Asmal, a member of the ANC National Executive and a leading expert in international law, explained the ANC's commitment to the Geneva Conventions as follows:

The applicability of the humanitarian rules of war to conflicts between an incumbent state and a national liberation movement fighting for self-determination is

clearly accepted. The Protocols to the 1977 Geneva Conventions are intended to apply to such a conflict and were subscribed to by the ANC in 1980. Although the Apartheid state did not ratify the relevant Protocol, that Protocol merely codified pre-existing contemporary law on the subject. Thus both belligerents in South Africa were under an obligation to treat the conflict as one governed by the law of war. Under Article 85, paragraph 5 of the Geneva Protocol,' grave breaches' of the Convention and Protocol constitute war crimes.[60]

23. The report of the Motsuenyane Commission on conditions in the ANC camps in Angola spelt out the ANC's obligations under international humanitarian law, as well as the applicability of Article 75 of Protocol I of 1977 and Common Article 3 of the Geneva Conventions on the conditions and treatment of MK prisoners in their custody. The Motsuenyane Commission also referred to the African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. This report was accepted by the ANC and its findings were referred to the Commission.

24. Thus a just cause cannot mean that all restraint in the conduct of the war should be allowed to fall away. Although the cause of the liberation movements amounted to a just war, certain incidents that impacted on those who were *hors de combat* and 'civilians' were considered to be breaches of international law. A number of incidents involving indiscriminate bombings that led to the injury and death of civilians are regarded in law as breaches, the responsibility for which the group or movement that committed these acts must acknowledge.

25. This debate is a crucial one in modern times as the distinction between 'freedom fighter' and 'terrorist' becomes more blurred.

26. Again, the principle that derives is that the fact that the liberation movements' cause was just does not mean that they were not required to act justly in the conduct of that war. Thus the *ius in bello* cannot be separated from the *ius ad bellum.*

27. In essence, the effect of this distinction is to hold individuals, organisations, states and organs of the state accountable for their actions. Thus military commanders cannot evade the consequences of their orders; nor can subordinates evade punishment or accountability on the basis of having followed orders. The

60 Asmal,K, Asmal L, and Roberts, RS, Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance. Cape Town, David Phillip, 1996.

responsibility to act within the boundaries of international humanitarian law binds all actors, both state and non-state parties. According to Professor Kader Asmal:

Traditionally, these two branches of international law have addressed separate issues: international humanitarian law has been concerned with the treatment of combatants and non-combatants by their opponents in wartime, while international human rights law has been concerned with the relationship between states and their own national son peacetime. Yet, even in earlier times, they shared a fundamental concern: a commitment to human dignity and welfare, irrespective of the status of the individual (combatant or non-combatant) and of the circumstances under which his rights and responsibilities are to be exercised (peacetime or wartime)[61].

SPECIFIC FINDINGS

28. The Commission made its findings based, in the main, on frank and substantial submissions by the ANC and the testimony of both the political and military leadership at public hearings. In addition, the Commission took into account the statements of victims and testimony received from amnesty applicants and during section 29 hearings.

29. The Commission stated that:

The ANC has accepted responsibility for all actions committed by members of MK under its command in the period 1961 to august 1990. In this period there were a number of such actions – in particular the placing of limpet and landmines – which resulted in civilian casualties. Whatever the justification given by the ANC for such acts – misinterpretation of policy, poor surveillance, anger or differing interpretations of what constituted a 'legitimate military target' – the people who were killed or injured by such explosions are all victims of gross human rights violations of human rights perpetrated by the ANC. While it is accepted that targeting civilians was not ANC policy, MK operations nonetheless ended up killing fewer security force members than civilians.

61 Ibid.

30. With respect to the actions of MK during the armed struggle, the Commission found that:

Whilst it was ANC policy that the loss of civilian life should be avoided, there were instances where members of MK perpetrated gross violations of human rights in that the distinction between military and civilian targets was blurred in certain armed actions, such as the 1983 Church street bombing of the SAAF headquarters, resulting in gross violations of human rights through civilian injury and loss of life.

In the course of the armed struggle there were instances where members of MK conducted unplanned military operations using their own discretion, and, without adequate control and supervision at an operational level, determined targets for attack outside of official policy guidelines. While recognising that such operations were frequently undertaken in retaliation for raids by the former South African Government into neighbouring countries, such unplanned operations nonetheless often resulted in loss of life, amounting to gross violations of human rights. The 1985 Amanzimtoti shopping centre bombing is regarded by the Commission in this light.

In the course of the armed struggle the ANC through MK planned and undertook military operations which, though intended for military or security force targets sometimes went awry for a variety of reasons, including poor intelligence and reconnaissance. The consequences in these cases, such as the Magoo Bar incident and the Durban esplanade bombings were gross violations of human rights in respect of the injuries to and loss of lives of civilians.

While the Commission acknowledges the ANC's submission that the former South African government had itself by the mid-1980's blurred the distinction between military and 'soft' targets by declaring border areas 'military zones' where farmers were trained and equipped to operate as an extension of military structures, it finds that the ANC's landmine campaigns in the period 1985 –1987 in the rural areas of the Northern and Eastern Transvaal cannot be condoned, in that it resulted in gross violations of the human rights of civilians including farm labourers and children, who were killed or injured, The ANC is held accountable for such gross human rights violations.

Individuals who defected to the state and became informers and/or members who became state witnesses in political trials and/or became Askaris were often labelled by the ANC as collaborators and regarded as legitimate targets to be killed. The Commission does not condone the legitimisation of such individuals as military targets and finds that the extra-judicial killings of such individuals constituted gross violations of human rights.

The Commission finds that, in the 1980's in particular, a number of gross violations of human rights were perpetrated not by direct members of the ANC or those operating under its formal command but by civilians who saw themselves as ANC supporters. In this regard, the Commission finds that the ANC is morally and politically accountable for creating a climate in which such supporters believed their actions to be legitimate and carried out within the broad parameters of a 'people's war' as enunciated by the ANC.

31. If these findings are analysed, it can be seen that they fall into the following categories:
    a attacks ostensibly on military targets but where civilians are killed and injured;
    b unplanned and indiscriminate attacks on targets outside of official policy guidelines and which affect civilians;
    c planned military operations that go wrong and where civilians are killed;
    d the deliberate targeting of individuals labelled as traitors;
    e attacks carried out by MK on both military and civilian targets, and
    f attacks carried out by supporters of the ANC. In this regard, actions by UDF supporters and the SDUs are pertinent.

32. If one examines each of these categories in terms of the Geneva Conventions and Protocol I[62], they are clearly defined as grave breaches.
    a Articles 50, 51, 130 and 147 specify the following grave breaches of the four Geneva Conventions respectively: wilful killing; torture or inhuman treatment; biological experiments; wilfully causing great suffering; causing serious injury to body or health, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.
    b The following are considered to be grave breaches in terms of Articles 130 and 147 of the third and fourth Geneva Conventions: compelling a prisoner of war or a protected civilian to serve in the armed forces of the hostile power, and wilfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the conventions.
    c The following are considered to be grave breaches of the fourth Geneva Convention in terms of Article 147: unlawful deportation or transfer; unlawful confinement of a protected person, and taking of hostages.

62 See Appendix 2 to Chapter One of this section.

d Articles 11 and 85 of Protocol I specify what constitutes a grave breach. For our purposes, the following acts, when committed wilfully and if they cause death or serious injury to body and health constitute grave breaches: making the civilian population or individual civilians the object of attack; launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage civilian objects; making non-defended localities and demilitarised zones the object of attack; making a person the object of an attack in the knowledge that he is *hors de combat*, and depriving a person protected by the Conventions or by Protocol I of the rights of a fair and regular trial.

33. An analysis of the information received by the Commission confirms that there were no actions of note taken by MK inside South Africa during the period 1964 to 1975.

34. The period 1976 to 1984, however, saw a steady rise in the number of armed attacks. The Commission recorded a total of 265 incidents in this regard.

35. Another notable feature of this period are attacks on police stations and police officers, who were deemed to be collaborators and were therefore seen as legitimate targets for execution.

36. David Simelane and Obed Masina, for example, were granted amnesty for the killing of Sergeant Orphan Hlubi Chapi outside his Soweto home in June 1978. It was, however, the formation of the ANC Special Operations Unit in 1979 that led to the launch of several high-profile attacks on police stations, state infrastructure and a major attack on SADF personnel, namely the Church Street bombing. Here a car bomb placed outside the South African Air Force headquarters in Pretoria led to the deaths of nineteen people. In terms of the numbers of casualties, this was the most devastating attack by MK in its entire history. The Commission received amnesty applications for a total of seventy-nine incidents carried out by this unit during this period.[63]

63 See Section Three, Chapter Two in this volume.

37. The amnesty applications reveal that, whilst orders were given in certain cases, targets were for the most part selected by the unit in question. For example, Mr Maake, a member of the Nchabaleng unit which operated around Kwandabele, was responsible for the death of a local police officer. Maake testified at his amnesty hearing that decisions about specific operations were taken by the unit itself. Mr Shoke, a member of another unit, testified that:

What you must understand that guerrillas as opposed in fact to conventional forces, we exercise what we call command initiative, you rely on the initiative of the individual and everybody in MK was being prepared in fact to become a Commander.

38. Whilst some units testified to the fact that decisions were taken by consensus, there is no doubt that that a number of civilians were killed because of the individualised nature of target selection. In addition, assassinations frequently targeted police officers or individuals perceived to be collaborators with the former state. For example, the members of the elimination unit ('Icing Unit') engaged in six operations, including three assassinations, before they were caught in September 1986.

39. Evidence before the Commission in respect of targets indicates that attacks were aimed primarily at the state and its organs and those who were branded as collaborators, and that it was not ANC policy to engage in operations that deliberately targeted civilians. In his amnesty hearing, Aboobaker Ismail testified as follows:

We never set out deliberately to attack civilian targets. We followed the political objectives of the African National Congress in the course of a just struggle. However in the course of a war, life is lost, and the injury to and the loss of life of innocent civilians becomes inevitable. The challenge before us was to avoid indiscriminate killing and to focus on security forces.

40. Yet, despite the stated intentions and the clear policy of the ANC with regard to the selection of targets, the majority of these casualties were civilians.

41. Another facet of MK operations was the targeting of those regarded as collaborators. These included police officers, their family members, councillors, state witnesses in trials, and suspected informers. In terms of the Geneva Conventions and Protocol I to the Conventions, all of these killings are regarded as grave breaches and therefore constitute 'war crimes' in terms of the definitions.

42. In the submission made by the ANC to the Commission in response to its findings, the ANC made it clear that they regarded spies as legitimate targets for killings. In addition, they raised the fact that civilians killed in the course of attacks on military targets were permissible collateral damage.

43. After its Kabwe Conference, the ANC hardened its stance on civilians. The ANC stated in its submission to the Commission that the Kabwe Conference:

reaffirmed ANC policy with regard to targets considered legitimate: SADF and SAP personnel and installations, selected economic installations and administrative infrastructure. But the risk of civilians being caught in the crossfire when such operations took place could no longer be allowed to prevent the urgently needed, all round intensification of the armed struggle. The focus of the armed operations had to shift towards striking directly at enemy personnel, and the struggle had to move out of the townships to the white areas.

44. Testimony from amnesty applicants indicates that they clearly saw civilian casualties as a necessary consequence of military operations, almost an acceptable form of collateral damage.

45. It is equally clear that action was rarely taken against operatives or units who were responsible for these breaches of humanitarian law. Whilst the ANC acknowledged in its submission that a number of attacks carried out by MK were not in line with ANC policy, it is clear that the operatives concerned were not censured, nor were they repudiated by the movement. The ANC did, however, seek to educate the rank and file on what constituted ANC policy.

46. There is no doubt, however, that as the number of civilian casualties began to rise, ANC President Oliver Tambo and the leadership of the ANC became gravely concerned. In 1987, Mr Tambo expressed his concern about the number of unnecessary civilian casualties resulting from the landmine campaign and ordered that all cadres be fully educated about ANC policy with regard to legitimate targets. Failure to comply with these orders would be considered violations of policy and action would be taken against offenders.

47. In 1988, the NEC issued a statement on the conduct of the armed struggle and expressed its concern at the recent spate of attacks on civilians. Whilst amnesty applicants were fairly sanguine about the legitimacy of their targets, the political leadership was clearly concerned.

ACTS COMMITTED BY CIVILIANS PRIOR TO 1990

48. While MK operations undoubtedly contributed significantly to resistance activities, particularly in the pre-1990s period, civilian activity inside the country took place on a larger scale. The submission made to the Commission by the Foundation for Equality before the Law cited 80 507 unrest-related incidents in the period 1984 to 1992. It also referred to 979 cases of burning and 'necklacing'.

49. In its five-volume Final Report, the Commission described the United Democratic Front (UDF) as a loose federation that brought together a large number of social, civic and political organisations of differing backgrounds, racial constituencies and political orientations. The purpose of the UDF was to act as an umbrella body for opponents of the state who sought to achieve a non-racial, democratic and unitary state. Whilst its founding document stated that it was not a front for the banned liberation movement, it became increasingly supportive of the ANC.

50. The UDF became the rallying point for a wide range of affiliates comprising youth and civic organisations, scholar and student organisations, church and welfare organisations, trade unions, sporting and cultural organisations, and political and quasi-political organisations. It was able to mobilise very large groups of people for rallies and meetings, which were characterised by powerful oratory and wide-ranging demands for political change.

51. The Commission stated that, from 1985, the UDF sought to dismantle government and security force control and administration. It sought to promote and enact the concept of 'people's power', which envisaged administrative, welfare and judicial functions in the townships being assumed by community-based and sectoral organisations. This included the establishment of forums to administer civil and criminal justice through people's courts.

52. The Commission made the following findings against the UDF:[64]

The Commission acknowledges that it was not the policy of the UDF to attack and kill political opponents, but finds that members and supporters of UDF affiliate organisations often committed gross violations of human rights in the context of widespread State-sponsored or –directed violence and a climate of political intolerance.

64 Volume Five, Chapter Six, pp. 246–7.

The UDF facilitated such gross violations of human rights in that its leaders, office bearers and members, through their campaigns, public statements and speeches, acted in a manner which helped create a climate in which members of affiliated organisations believed that they were morally justified in taking unlawful action against State structures, individual members of State organisations and persons perceived as supporters of the State and its structures. Further, in its endorsement and promotion of the 'toyi-toyi', slogans and songs that encouraged and/or eulogised violent actions, the UDF created a climate in which such actions were considered legitimate. Inasmuch as the State is held accountable for the use of language in speeches and slogans, so must the mass democratic movement and liberation movements be held accountable.

The Commission finds that factors referred to in the paragraph above led to widespread excesses, abuses and gross violations of human rights by supporters and members of organisations affiliated to the UDF. These actions include:

- *The killing (often by means of 'necklacing'), attempted killing and severe ill-treatment of political opponents, members of state structures such as black local authorities and the SAP, and the burning and destruction of homes and properties;*
- *The violent enforcement of work stay aways and boycotts of, among others, private and public transport and private retail shops, leading to killing, attempted killing and severe ill-treatment;*
- *Political intolerance resulting in violent inter-organisational conflict with Azapo and the IFP, among others.*

The UDF and its leadership:

- *Failed to exert the political and moral authority available to it to stop the practices outlined above, despite the fact that such practices were frequently associated with official UDF campaigns such as consumer boycotts or campaigns against black local authorities. In particular, the UDF and its leadership failed to use the full extent of its authority to bring an end to the practice of necklacing, committed in many instances by its members and supporters.*
- *Failed to take appropriately strong or robust steps or measures to prevent, discourage, restrain and inhibit its affiliates and supporters from becoming involved in action leading to gross violations of human rights, as referred to above.*

- *Failed to exert sanctions or disciplinary action on member organisations whose members were involved in the gross violations of human rights described above, or failed to urge such member organisations to take appropriate actions against their members.*
- *The Commission notes that the political leadership of the UDF has accepted political and moral responsibility for the actions of its members. Accordingly the UDF is accountable for the gross violations of human rights committed in its name and as a consequence of its failure to take the steps referred to above.*

53. The Commission based its findings on the evidence it received both through the human rights violations and the amnesty processes. However, partially because the UDF had already disbanded by 1991, and because no central structure existed to encourage amnesty applications, the number of amnesty applications received do not tally with the figures that the Commission received in respect of violations. The Commission received eighty-five applications, which included fourteen acts not considered to be gross human rights violations. The remaining seventy-one applications dealt with offences ranging from arson affecting government property to gross human rights violations in which people were killed.

54. Whilst it was not UDF policy to kill, there is no doubt that the targeting of certain individuals and their families for killing and arson involving their property was tolerated and encouraged in certain quarters. Some of the most shocking incidents took place during this era. Many organisations targeted those they regarded as traitors and collaborators. Police officers, councillors in the former local government, informers and their families were regarded as fair game.

55. For example, in the amnesty application of Mr Mziwoxolo Stokwe for the killing of Mr Skune Tembisile Maarman, Stokwe testified that COSAS identified Maarman as a police informer and stoned him to death. Later he was necklaced. Eight people including Stokwe were charged for his killing. Stokwe and his group also launched attacks on the homes of perceived collaborators, including a school principal and two councillors.

56. When Stokwe discovered that one of the comrades, Ntiki Fibana, had agreed to appear as a witness for the State, the group decided to deal with her in the following way:

We got information that Ms Ntiki was at her home together with the police with intention of removing her property. We rushed to the place and when the police

saw the crowd they drove away, they left Ntiki inside the house. We took her out and set the house alight. Thereafter we stoned her to death and set her alight with the tyre on her neck. No meeting took a decision to kill Ms Ntiki, but we had to deal with the situation immediately as she was there during that conflict moment. After we killed, we had a meeting where we took a decision to cross the borders of South Africa, to Lesotho for military training and to join Umkhonto weSizwe.

57. Whilst these kinds of incidents are considered to be gross human rights violations, they need to be contextualised. At the time, the country was engulfed in violence in which the apartheid state was the primary actor. It had established covert units, including death squads, whose main intention was to assassinate those considered to be political opponents, and was using all its might to crush opposition. Youth were targeted and enticed into entrapment operations. It would have been quite impossible for the UDF leadership to control the violence and actions of groups within communities all over the country. While the leadership may have uttered words of restraint, it is unlikely that they would have been heeded. This context of violence gave rise to some of the worst excesses in our country.

58. In testimony before the Amnesty Committee, Mr Stokwe stated the following:

As a member of Cosas, when it was said that the country must be ungovernable, those were the means to try and send a message to the government. That is why we are in this present situation today. In a war, if you focus on a certain target and there are stumbling blocks in front of you, you would start with them because we would not be able to reach our goal because they were informers. So in order to reach our target, we had to start with them, so that was our strategy.

59. Amnesty was also sought for an incident in which a police officer, Mr Benjamin Masinga, was killed by members of UDF affiliated organisations. Masinga was taken from his house, attacked with sticks, stones, bricks and axes rendering him unconscious. He was dragged to a nearby school, was doused with petrol and was then set alight.

60. These and other incidents reveal that the perpetrators believed that they were acting under a broad political directive to eliminate those considered to be a threat to the struggle and the movement. In some instances they had contact with members of MK and the ANC but, even where this had been the case, they

testified that they were not acting under orders. They saw it as their role to make the country ungovernable and to eliminate those who were perceived to be 'collaborators'.

61. There is no evidence of UDF leadership encouraging killing or the commission of gross human rights violations. It is also clear from the testimony before the Commission that they did not play an active role in the commission of gross human rights violations. However, the general clarion call that they made to make the townships ungovernable and to eliminate those who collaborated led to the commission of gross human rights violations for which the leadership of the UDF must accept responsibility.

62. Information that emerged from the hearings of the Amnesty Committee strengthens the findings made by the Commission in its Final Report.

GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED BY THE ANC IN EXILE

Introduction

63. In its five-volume Final Report, the Commission recorded that it had received the reports of the Stewart, Skweyiya, Sachs and Motsuenyane Commissions of Inquiry. All of these commissions had been appointed by the ANC. The Commission also had sight of the report of the Douglas Commission. These commissions of inquiry investigated allegations of human rights abuses in the ANC camps and in exile. The Commission also received evidence from victims testifying to their experiences both in the camps and in exile.

64. The Commission must also record its appreciation to the ANC for the frank way in which it handled this question during its submissions to the Commission and during the two political party hearings. The disclosures made enabled the Commission to get a sense of the problems encountered when dealing with young people in the camps and how justice was dispensed in the camps. The ANC also handed over a file that dealt with a number of the executions that had taken place in the camps.

65. A number of section 29 hearings took place, during which those named as responsible for abuses were questioned about their role and the prevailing conditions. The Commission received twenty-one amnesty applications from

members of the ANC's security department. However, nine applications were later withdrawn. This deprived victims of the opportunity to find out what had happened to their loved ones.

66. The twelve remaining applications included four killings, three cases of negligence that may have contributed to deaths, one shooting and eleven cases of assault of persons in the custody of the ANC. All of these applications were granted. Eight of them were dealt with at a public hearing.

67. Whilst the movement at a leadership level made frank disclosures, the same cannot be said of the welfare desk. The Commission was required to deal with this desk on a daily basis in order to verify information supplied by victims and their families. In more than 250 instances, the Commission was unable to obtain any response from the welfare desk, thereby creating further suspicions in the minds of many families about the deaths or disappearances of loved ones.

68. The death of Mr Thabo Naphtali provides one example of this. In terms of the evidence given to the Commission, he was accidentally shot during a night skirmish in the camp at Viana. Although his family knew that he had gone into exile, the movement neither notified them that he had died nor informed of the circumstances of his death. They discovered these facts only at the amnesty hearing.

69. In terms of international law, the fact that persons died in custody at the hands of the ANC places the responsibility for their deaths on the ANC.

70. The Commission recorded the following findings, on the basis of the evidence before it:[65]

The ANC and particularly its military structures responsible for the treatment and welfare of those in its camps were guilty of gross violations of human rights in certain circumstances and against two categories of individuals, namely suspected 'enemy agents' and 'mutineers'.

The Commission found that suspected agents were routinely subjected to torture and other forms of severe ill treatment and that there were cases of such individuals being charged and convicted by Tribunals without proper attention to due process, sentenced to death and executed. The Commission found that the

65 Volume Five, Chapter Six, p. 242.

human rights of individuals so affected were grossly violated. Likewise, the Commission found that the failure to communicate properly with the families of such victims constituted callous and insensitive conduct.

The Commission also found that all so-called mutineers who were executed after conviction by military Tribunal, irrespective of whether they were afforded proper legal representation and due process or not, suffered a gross violation of their human rights.

With regard to the allegations of torture and ill treatment, the Commission found that although torture was not within ANC policy, the security department of the ANC routinely used torture to extract information and confessions from those being held in camps particularly in the period 1979–1989. The Commission noted the various forms of torture detailed by the Motsuenyane commission, namely the deliberate infliction of pain, severe ill-treatment in the form of detention in solitary confinement, and the deliberate withholding of food and water and/or medical care, and finds that they amounted to gross violations of human rights.

71. The Motsuenyane Commission submitted its report to the ANC in August 1993. Its conclusion was that there had been severe abuses in ANC detention camps over a number of years. In one detention camp, the Commission concluded that:

Quatro was intended to be a rehabilitation centre. Instead, it became a dumping ground for all who fell foul of the Security Department, whether they were loyal supporters accused of being enemy agents, suspected spies or convicts. All were subjected to torture, ill-treatment and humiliation far too frequently to achieve its purpose as a rehabilitation centre.

72. The Motsuenyane Commission also found that adequate steps were not taken in good time against those responsible for such violations.

Commentary

73. Testimony before the Amnesty Committee has confirmed that there were abuses in exile. The security department of the ANC routinely used torture and assault as a means to extract information from those it suspected of being enemy agents or dissidents. In those instances where operatives were executed, it is clear that there were some instances of due process being afforded to those accused of offences. In the main, however, due process was given perfunctory observance and these so-called trials cannot be conceived of as remotely

resembling fair trials or hearings. These actions are contraventions of the Geneva Conventions and Protocol I.

74. The information that the Commission received subsequent to the submission of its five-volume Final Report has confirmed that the Commission was correct in making the findings that it did.

GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED BY SELF-DEFENCE UNITS

75. In its Final Report, the Commission made the following finding against the ANC in respect of the commission of gross human rights violations perpetrated by self-defence units (SDUs):

Whilst the Commission accepts that the violent conflict which consumed the country in the post-1990 period was neither initiated by nor in the interests of the ANC, the ANC must nonetheless account for the many hundreds of people killed or injured by its members in the conflict. While the ANC leadership has argued that its members were acting in self-defence, it is the Commission's view that at times the conflict assumed local dynamics in which proactive revenge attacks were carried out by both sides. High levels of political intolerance among all parties, including the ANC, further, exacerbated this situation; the Commission contends that the leadership should have been aware of the consequences of training and arming members of SDUs' in a volatile situation in which they had little control over the actions of such members. The Commission therefore found that in the period 1990 to 1994, the ANC was responsible for:

- *Killings, assaults and attacks on political opponents including members of the IFP, PAC, Azapo and the SAP*
- *Contributing to a spiral of violence in the country through the creation and arming of self-defence units (SDUs).*

While acknowledging that it was not the policy of the ANC to attack and kill political opponents, the Commission finds that in the absence of adequate command structures and in the context of widespread state-sponsored or directed violence and a climate of political intolerance, SDU members often 'took the law in their own hands' and committed gross violations of human rights.

The Commission takes note that the political leadership of the African National Congress and the command structure of Umkhonto WeSizwe accepted political and moral responsibility for all the actions of its members in the period

1990–1994 and therefore finds that the leadership of the ANC and MK must take responsibility and be accountable for all gross violations of human rights perpetrated by its membership and cadres during the mandate period.

76. The finding was based on evidence that the Commission received from victims who testified or made statements to the Commission, evidence at hearings and submissions handed to the Commission.

Response of the ANC

77. In its response to the Section 30 finding, the ANC argued that the finding:

has the deliberate intention, contrary to the truth readily available to the TRC, of shifting the blame for the political violence which occurred in the period since 1990 away for the apartheid regime to the democratic movement and condemning the oppressed for the efforts they took to defend themselves against a very intense campaign of repression and terror.

78. The ANC also restated what it had said in its submission to the Commission in May 1997:

The post-1990 violence was the work of the state, was organised at the highest level, and was aimed at strengthening the hand of the government at the negotiations table by forcing a progressively weakened ANC into a reactive position in which it would be held hostage to the violence and forced to make constitutional concession.... the ANC was not engaging in 'ongoing conflict', nor were the majority of the people on the ground embroiled in 'ongoing conflict': they were being attacked by covert units operating in accordance with the wishes of the apartheid regime.

Amnesty process

79. The Commission received a number of applications from members of ANC-aligned SDUs for violations committed during the 1990s. However, this was the result of a concerted effort made by a few individuals. Regrettably, a large number of SDUs were not reached in time and many did not have access to legal assistance. In certain instances, they did not qualify because of ongoing violence, which culminated in further incidents of violence linked but occurring beyond the mandate period. In this regard, the Commission visited a number of young people in prison.

Environment in the townships during the period in question

80. In the period following the unbanning of the ANC, the townships were in turmoil. The stakes were high for both the state and its surrogate, the IFP, both of whom were opposed to the ANC taking power. Township residents were constantly under attack by surrogate forces of the state, which included members of the IFP, renegade forces and members of the rightwing who were, in many instances, armed by the state.

81. The violence affected particularly Gauteng and KwaZulu/Natal. It was against this backdrop of state-sponsored violence that the activities of the SDUs took place.

Findings in respect of SDUs

82. In assessing whether the findings that were made in respect of the SDUs remain relevant in the light of the evidence emerging from the amnesty process, the Commission needed to confirm the following:
    a Was the ANC responsible for the creation and arming of the self-defence units?
    b Was the Commission's finding that there was not an adequate command structure correct?
    c Whilst acknowledging the state's role in sponsoring the violence, did SDUs take the law into their own hands and perpetrate gross human rights violations?
    d Did all of this contribute to the violence of the 1990s?

The ANC's role in the creation of self-defence units

83. The SDU's were created amidst the spiralling violence of the negotiation period. The former state engaged in a strategy of negotiating with the liberation movements on the one hand and fomenting violence on the other. This meant that supporters of the ANC were left vulnerable to attack by dark surrogate forces, which later became known as the 'Third Force'.[66] After a mass funeral in Soweto in 1990, ANC President Nelson Mandela publicly pledged the ANC's commitment to the formation and training of SDUs. In addition, at its consultative conference in Durban 1990, the ANC resolved to take steps to defend itself with all the means at its disposal and to create people's self-defence units as a matter of urgency as it came under increasing pressure at local level to intervene and respond to the violence.

66 See Appendix to Section Four in this volume.

84. In its attempts to manage and control the process, the ANC released a document called 'For the sake of our lives', which attempted to prescribe and regulate the structures and activities of the SDUs. The thrust of this policy document was that SDUs should operate in terms of a political rather than a military strategy and that the long-term goal should be peace. It was envisaged that SDUs would be well trained and highly disciplined.

85. The document envisaged that, although MK members would play a role in the establishment of SDUs, it was imperative that they be controlled from within communities because of the past history of informally established units. It was also envisaged that the units would receive political instruction of some sort. Local MK members were granted permission to participate in these structures. MK involvement took the form of recruiting and training of SDU members and supplying weapons. In some instances, individual members of MK participated in the clashes and skirmishes that took place.

86. ANC policy required that selected units supplied certain SDU units with weapons. A special unit was set up within the ANC to assist with the arming of SDUs. These included Ronnie Kasrils, Aboobaker Ismail, Riaz Saloojee, Muff Anderson and Robert McBride. All of these applied for amnesty for supplying weapons and assisting SDUs. In the KwaZulu/Natal area, Jeff Radebe, Ian Munro Phillips and Sipho Joel Daniel Sithole were involved in the supply of weapons and assistance to the SDUs.

87. It is important to note that the ANC was not the only supplier of weapons. In most instances, the SDU units had other sources of supply.

88. There is no doubt that the ANC played a major role in establishing SDUs in both the Transvaal and KwaZulu/Natal areas.

Command structures

89. In KwaZulu and Natal, SDUs consisted in the main of loose formations comprising youth and community members in a particular community. There was no formal command structure. However, while ANC branch leadership often assumed the command of these structures, ANC structures themselves were often not well established or formalised and consisted of a handful of supporters who came together for particular events or occasions. Thus ordinary residents living in ANC-aligned areas might find themselves having to participate in an

attack simply because they lived in an area. In many instances, there was no specific commander and the group that came together acted in concert either to defend themselves or to launch an attack.

90. What emerged from the amnesty process was that geographical location played a crucial role. Living in a particular area compelled you to take sides in the conflict. In addition, clan or group loyalty often dictated from whom people received their orders. This meant that ostensible political conflicts were fused with other motives, land disputes and issues of an economic nature. Revenge and reprisal featured strongly in the ongoing conflict.

91. These issues must, however, be viewed against the larger political conflict and violence being sponsored by the former state.

92. In Gauteng, the Tokoza units stayed in close contact with the ANC, and the local branch played a monitoring and disciplinary role. Despite this, these units were also responsible for acts of great violence. In many other townships in Gauteng, links depended largely on whether strong ANC branches existed at a local level. In a number of instances, MK members also played a role in establishing and training SDU members. Vosloorus is an example of this. In most instances, SDUs were established through community structures, often in response to attacks from the IFP.

Role of leadership

93. In their evidence, amnesty applicants in Gauteng stated that, whilst they consulted with leadership on policy and guidelines, they did not inform them of their plans and did not advise them about the nature of their operations. Decision-making took place at community level.

94. Whilst many prominent ANC leaders played a major role in supporting local SDUs, in KwaZulu and Natal they also played a crucial role in peace-building efforts.

95. Evidence emerging from amnesty applications confirms that many SDU members on the ground were cognisant of the fact that the ANC at national level was pursuing a strategy of peace through negotiations. However, at a regional level, the violent conflict between the warring sides reduced the impact of the national strategy. Survival required that you be ready to defend yourself. Testimony from the amnesty hearings reveals that, at a community level, many felt that leadership was not in touch with what was happening on the ground.

96. Another factor that played a major role in the conflict was the fact that ANC-aligned communities could expect little or almost no support from the police or any other state structure. Communities were left to defend themselves against attacks, which often resulted in their taking the law into their own hands.

97. Thus leadership of the SDUs was effectively in the hands of local ANC branches. While ANC policy did not allow for killing other than of a defensive nature, communities in these compelling circumstances tended to take their own decisions. Generally speaking, the ANC national and regional leadership was not involved in these decisions and, indeed, engaged in peace-building efforts in an attempt to restore peace.

98. Furthermore, in the vast majority of instances, no report was made to the national leadership after an attack. In many instances, operatives felt that, because no order or authorisation had been given, there was no necessity to report. The Commission's original finding that there was no adequate command structure is correct and is clearly borne out by the evidence that emerged from the amnesty process. In fact, command was *ad hoc* and dependent on the circumstances of the day in a particular area.

Were the SDUs responsible for the commission of gross human rights violations?

99. The picture that emerges from the amnesty process is that communities found themselves in conflict with the IFP and the state. As they could not rely on protection from the organs of the state, they felt compelled to take the law into their own hands to protect themselves. Evidence reveals that issues of a personal nature – such as loyalty to a particular chief or clan – often became intertwined in the particular conflict. The support that the former state lent to the IFP meant that ANC-aligned communities were at a great disadvantage. They became very vulnerable and an easy target for 'Third Force' activity. Within this context, gross human rights violations were perpetrated.

Nature of violations committed by SDUs

100. The Commission's founding Act determined that killings, abductions, torture, severe ill-treatment and attempts, plots and conspiracies to commit the above constituted gross human rights violations. Amnesty applicants have testified in

their amnesty applications to killings; arson attacks on homes of members of the IFP, police officers and those perceived to be collaborators, and attacks on hostels. In a number of instances, houses were occupied at the time of the attacks. Abduction of suspects was a particular *modus operandi* of the East Rand SDUs. This was followed by interrogation of suspects, and later by summary execution. In this sense, SDUs acted no differently from agencies of the state in using torture as a mechanism to extract confessions from alleged suspects that they were 'IFP members'. In most instances, these confessions were believed and often resulted in the 'suspect' being killed. However, one has to question the validity of an admission made under duress.

101. SDU members were responsible for the targeted killing of those they suspected of being informants, collaborators and members of the IFP. In many instances, identification was made on spurious grounds. Many young members of SDU units were involved in reconnaissance work, the cleaning of weapons and lesser offences such as the collection of money from residents for weapons.

102. In KwaZulu and Natal, members of SDUs targeted many IFP members for assassination. An example of this is the killing of a prominent IFP leader, Mr Mkhize, in Umkomaas in November 1990. Those ANC members suspected of being informers or of having defected to the IFP or the state were also targeted for assassination. Fatal mistakes were made by SDU members, which resulted in the deaths of many who were innocent. In one such incident, a bus containing school children was ambushed in the belief that it was carrying members of the IFP. In this tragic incident, six children were killed and many others were injured. The reason the amnesty applicants advanced for the attack was that the IFP was forcing them to leave the area and that they were being displaced from their homes.

103. Internecine war also took place within the ranks of the SDUs. A number of SDU members were killed in internal clashes. Internal fighting among the ranks of different units as well as with members of the ANC Youth League was a major problem. In Tokoza, an 'eye for an eye' policy was adopted. If an SDU member took the life of a member, his life would be forfeit. A number of amnesty applicants testified about this. The evidence is often chilling, as applicants describe the brutal circumstances under which most of these youth lived. It was often kill or be killed.

104. In one incident involving members of a SDU and members of the ANC Youth League, nine ANC members were killed. Several of the victims were under 17 years of age. In this incident, the victims were first shot and later hacked and stabbed to death.

105. Cognisant of this rising problem, a unit was established in the Cape to deal with the tensions between members of different SDUs. They too became involved in the violence that was taking place.

106. In KwaZulu and Natal, internal disputes between ANC and SACP members led to bitter conflict, so that Mr Harry Gwala was forced to intervene in the matter and broker a peace deal. Mr Blade Nzimande also approached the parties to settle the dispute. Most peace efforts failed and a number of people on both sides of the conflict were killed.

107. A small number of SDUs were involved in armed robberies. Robberies were certainly not considered to be ANC policy, but they took place nevertheless. In one incident in KZN, a number of people were killed and others injured. There is also no doubt that many of the incidents involved the personal agendas of individuals rather than the movement. One such incident involved an attack on the Lembede family at their shop, ostensibly on the grounds that they were IFP members. This family is related to the late Anton Lembede, a former ANC President.

108. Similarly a number of SDUs in Gauteng were involved in armed robberies, ostensibly to obtain funds to purchase weapons.

Conclusion and validity of findings

109. It is clear from the evidence that emerged in the amnesty hearings that the conflict took on a life of its own. Once SDUs were established, attempts by ANC leadership to establish control failed dismally. Youth with little or no proper training made decisions spontaneously, based on the need to deal with unfolding events. Often the attacks that took place were in the nature of reprisal strikes; but many were simply based on revenge or the need to get even. Target selection was often capricious and usually followed by killing. Again, the mere labelling of an opponent as the 'IFP' or an 'informer' legitimated the killing of that particular person. The immature way in which people were identified as belonging to

another group had tragic consequences. Clothes in some instances would be used as an identifying mark, or the speaking of Xhosa instead of Sesotho.

110. The evidence that emerged from the amnesty process confirms the correctness of the original findings that the Commission made in respect of SDUs. The evidence has also revealed much more of the political context within which the conflict took place. The picture that emerges is of structures let loose once they had been established. Had ANC leadership been more pro-active in the control and management of these units, there is no doubt that many of incidents would not have taken place and fewer lives would have been lost. Although the ANC did not train all of the units and was not the major supplier of arms, it was politically responsible for the establishment of these units and should have played a greater role in managing them. This failure led directly to the commission of gross human rights violations by many SDUs. In the circumstances, the findings of the Commission are still valid.

APPENDIX

ANC Statement on Signing Declaration on Behalf of the ANC and Umkhonto we Sizwe. Adhering to the Geneva Conventions of 1949 and Protocol I of 1977. At the Headquarters of International Committee of the Red Cross, Geneva, November 28, 1980

Mr President

Ladies and Gentlemen

The African National Congress of South Africa is deeply honoured to be received today by the International Committee of the Red Cross and by its President, M. Alexandre Hay. Our movement, the oldest national liberation movement in Africa, has had a number of meetings with the delegates of the ICRC in the past and we have come to respect their probity and fairness. The Red Cross has rightly been described as the guarantor of the impartiality and efficacy of the famous Conventions of 1949 whose reaffirmation and development in 1977, largely under the auspices of the ICRC, has led to our presence here in Geneva today.

We recognise that your Committee, associated as it is with the work of the Conventions and the need to provide relief and hope to prisoners of war and civilians caught in the violence of war, must remain non-political if it is to retain the trust of governments. But you will not, I hope, take it amiss if I explain the presence of the delegation of the African National Congress in Geneva today to participate in what is a solemn and historic ceremony for my movement.

Apartheid, the policy of official discrimination enshrined in the law and constitution of South Africa, has now been legally denounced as a crime against humanity and has led to an International Convention for the Suppression and Punishment of the Crime of Apartheid. Protocol I of 1977 itself recognises that 'practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination' constitute grave breaches of the Conventions and must therefore join the list of crimes identified at the Nuremberg War Crimes Tribunal.

The international community has therefore recognised that the war waged by this nefarious system against the vast majority of its population is not merely a matter of domestic concern and that any conflict which arises in South Africa cannot be described as a civil war.

The state of war which exists in South Africa is a war of national liberation, for self-determination on the basis of the Freedom Charter, whose adoption we are celebrating the 25th anniversary this year. It is, as Article 1 of Protocol I of 1977 recognises, an armed conflict in which peoples are fighting against 'colonial domination and alien occupation and against regimes in the exercise of their right to self-determination'.

In the past 12 years, since the Teheran conference on Human Rights, the development of international law under the auspices of the United Nations has led to a recognition that the concept of international armed conflict extends to cover wars of national liberation. The International Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, held in Geneva from 1974 to 1977, gave concrete expression to such a development.

We in the African National Congress of South Africa solemnly undertake to respect the Geneva Conventions and the additional Protocol I in so far as they are applicable to the struggle waged on behalf of the African National Congress by its combatants, Umkhonto we Sizwe.

In consequence, we demand that the South African regime stop treating our combatants as common criminals. The regime has no right to execute them as it did our noble patriot Solomon Mahlangu and as it would have in the case of James Mange if it had not been for the strength of international public opinion. It has no right to impose savage sentences of imprisonment, contrary to the rules and spirit of international law. There is, therefore, a heavy obligation and an imperative duty on States Parties to the Geneva Conventions to ensure that the South African regime observes the basic tenets of civilisation in its treatment of ANC prisoners of war. This is envisaged both in the Geneva Conventions (to which the South African regime is a party) and in Article 1(1) of the 1977 Protocol where States Parties to the Convention undertake 'to respect and to ensure respect for this Protocol in all circumstances'. It is therefore incumbent on South Africa's major trading partners to encourage the South African regime, whether or not the regime ratifies the Protocol, to stop committing war crimes by executing our combatants, torturing them and generally ill-treating them contrary to international law.

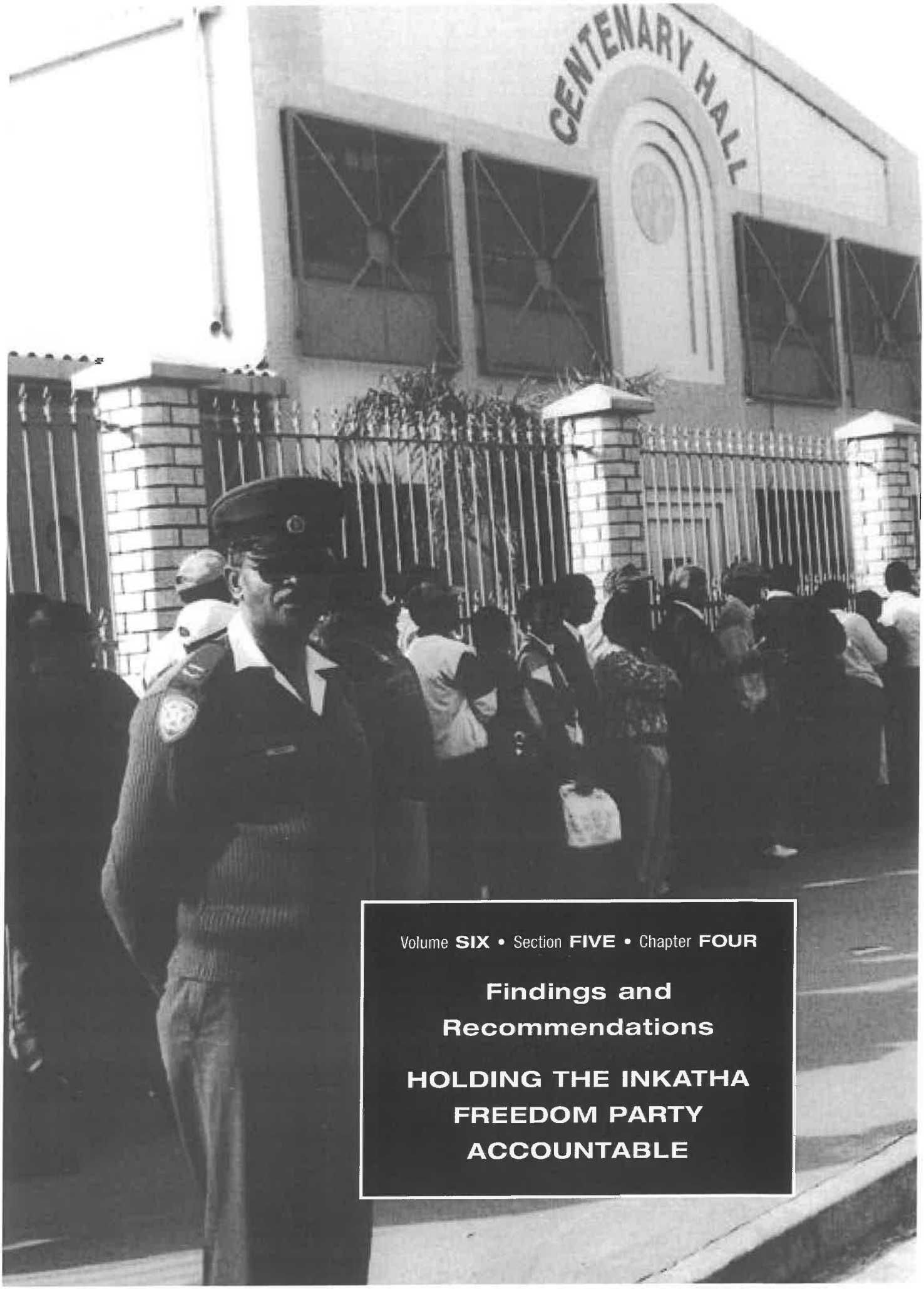
We in the African National Congress have taken the serious step of making a solemn Declaration at the headquarters of the ICRC this afternoon because we have for nearly 70 years respected humanitarian principles in the struggle. We have always defined the enemy in terms of a system of domination and not of a people or a race.

In contrast, the South African regime has displayed a shameless and ruthless disregard for all the norms of humanity.

In signing this Declaration, the African National Congress of South Africa solemnly affirms its adherence to the Geneva Conventions and to Protocol I of 1977. As we have done in the past, so shall we continue, consistently and unreservedly, to support, fight for and abide by the principles of international law. We shall do so in the consciousness of justice, of progress and peace. It is therefore a historic duty that I fulfil on behalf of the African National Congress by signing the following declaration:

> *It is the conviction of the African National Congress of South Africa that international rules protecting the dignity of human beings must be upheld at all times. Therefore, and for humanitarian reasons, the African National Congress of South Africa hereby declares that, in the conduct of the struggle against apartheid and racism and for self-determination in South Africa, it intends to respect and be guided by the general principles of international humanitarian law applicable in armed conflicts.*
>
> *Wherever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts.*

O R Tambo
President
ANC of South Africa



Volume **SIX** • Section **FIVE** • Chapter **FOUR**

Findings and Recommendations

HOLDING THE INKATHA FREEDOM PARTY ACCOUNTABLE

Volume **SIX** Section **FIVE** Chapter **FOUR**

Holding the Inkatha Freedom Party Accountable

1. In its Final Report, the Truth and Reconciliation Commission (the Commission) made findings against the Inkatha Freedom Party (IFP) and associated structures and institutions. In particular, it found against the IFP that:

   The IFP was responsible for the commission of gross violations of human rights in the former Transvaal, Natal and KwaZulu, against persons who were perceived to be leaders, members or supporters of the UDF, the ANC or its alliance partners

   such violations formed part of a systematic pattern of abuse which entailed deliberate planning on the part of the organisation.

2. The Commission based this finding on, *inter alia:*
   a speeches by the IPF president and senior party officials that had the effect of inciting supporters of the IFP to commit acts of violence;
   b the arming of IFP supporters in contravention of existing legislation;
   c mass attacks by IFP supporters on communities and leaders of the United Democratic Front (UDF) and/or the African National Congress (ANC);
   d collusion with the South African government's security forces to commit violations; in particular, a pact with the South African Defence Force (SADF) to create a paramilitary force for the organisation with the intention of causing death and injury to UDF/ANC members;
   e the establishment of a hit squad within the KwaZulu Police and the Special Constable structure of the SAP with the intention of causing death or injury to UDF/ANC supporters;
   f training large numbers of IFP supporters, under the auspices of the Self-Protection Project, with the objective of preventing the holding of elections in April 1994 by violent means;
   g conspiring with right-wing organisations and former members of the government's security forces to commit acts that resulted in loss of life or injury, and
   h creating a climate of impunity by expressly or implicitly condoning gross human rights violations and other unlawful acts committed by members of the IFP.

3. The Commission made further findings against several groups aligned to the IFP:

Caprivi trainees

4. The Commission found that, in 1986, the SADF conspired with Inkatha to provide the latter with a covert, offensive paramilitary unit ('hit squad') to be deployed illegally against persons and organisations perceived to be opposed to or enemies of both the South African government and Inkatha. The SADF provided training, financial and logistical management and behind-the-scenes supervision of the trainees who were trained by the Special Forces unit of the SADF on the Caprivi Strip.

5. The Commission found that this illegal deployment of the Caprivi trainees led to gross violations of human rights, including killing and attempted killing, for which it found former President PW Botha, General Magnus Malan and Dr MG Buthelezi accountable.

KwaZulu Police

6. The Commission found that the KwaZulu Police (KZP), in the period 1986 to 1994, acted in a biased and partial manner and overwhelmingly in furtherance of the interests of Inkatha, and later the IFP, in that:
   a through acts of commission, it worked openly with Inkatha, and through acts of omission, it failed to protect or serve non-IFP supporters;
   b it was responsible for large numbers of politically motivated gross human rights violations (killings, attempted killings, incitement and conspiracy to kill, severe ill-treatment, abduction, torture and arson), the victims of which were almost exclusively non-IFP members;
   c it neglected to observe basic investigative procedures;
   d it deliberately tampered with evidence;
   e it ensured that KZP and IFP suspects in political violence matters were concealed, often for lengthy periods, in KZP and SADF camps;
   f it issued false police certificates and identity documents to members of the IFP who were involved in political violence, in order to prevent their arrest and convictions and to facilitate their continued criminal activities; and

g it took part in killings and purported to investigate the very matters in which its members had been involved as perpetrators.

7. In conclusion, the Commission found that, although there were honourable exceptions in that some members of the KZP did carry out their duties in an unbiased and lawful manner, the KZP generally was characterised by incompetence, brutality and political bias in favour of the IFP, all of which contributed to the widespread commission of gross human rights during the period under review.

Special Constables

8. The Commission found that the Special Constables were deliberately established and trained to assist Inkatha against the latter's political enemies, and that Special Constables, acting alone and in concert with Riot Unit 8 of the SAP, regularly committed serious unlawful acts in order to support and assist Inkatha in the period prior to and during the so-called 'seven-day war'.

Esikhawini hit squad

9. The Commission found that, in 1990, senior members of the IFP conspired with senior members of the KZP to establish a hit squad in Esikhawini Township near Empangeni, Natal, to be deployed illegally against people perceived to be opposed to the IFP. The hit squad consisted of Caprivi trainees and members of the KZP. Its members took instructions from senior members of the IFP and of the KZP to eliminate political activists affiliated to the ANC and the Congress of South African Trade Unions (COSATU), as well as members of the SAP who were seen not to be supportive of the IFP.

Self-protection unit members

10. The Commission found that IFP self-protection unit (SPU) project, although officially placed within the ambit of the Peace Accord and containing an element of self-protection, was also intended to furnish the IFP with the military capacity to prevent by force the central government and the Transitional Executive Council (TEC) from holding elections which did not accommodate the IFP's desires for self-determination. Such armed resistance entailed the risk of unlawful death and injuries to persons.

RESPONSE TO THE COMMISSION'S FINDINGS

11. The IFP criticised the Commission's report and, in the parliamentary debate on the report held on 25 February 1999, Mr MA Mncwango of the IFP said of the Commission that it:

has remained stuck in the mind-set of the total onslaught against the IFP that is the legacy of yesterday's politics. Its final report is a clumsily crafted anecdotal mythology through which it has sought to give credibility to yesterday's liberation propaganda ... The final report of the TRC will be consigned to the dustbin of history .[67]

12. He suggested that the work of the Commission had been negatively affected by its bilateral origins as a political accommodation between the ANC and NP and consequently was 'clueless' in its analysis of 'black-on-black conflict', unlike its work in regard to the white/black conflict.

13. With regard to findings made against Dr MG Buthelezi, he said that the Commission's main source of information came from the 'twisted' confessions of people seeking amnesty who had told the Commission what it wanted to hear. He noted with regard to the Caprivi and Esikhawini hit squad operatives:

This distortion clearly happened in the testimony of discredited witnesses and self-confessed killers such as Daluxolu Mandlanduna Luthuli, Romeo Mbambo and Andries Nosenga, who are changing their versions of the facts of their crimes until they concocted lies to implicate Minister Buthelezi in their activities (interjections). In due course, all these were proved to be lies.

14. In respect of the findings made against Dr Buthelezi as President of the IFP and former leader of the KwaZulu Government, Mncwango said that:

While the TRC found no evidence of wrongdoing, or a specific violation of human rights by Dr Buthelezi, it seeks to hold him accountable for the generic violation of human rights. This is legally obscene and morally repugnant. .... One is politically accountable when certain actions may be the consequence of the policies adopted by a leader. But Minister Buthelezi never adopted any policy other than non-violent passive resistance and the echoing demand for all-inclusive negotiations, which in the final analysis were exactly what caused the demise of apartheid and led to the birth of the new South Africa.

67 Hansard, 25 February 1999, p. 77.

15. Mr Mncwango is not correct in his assertion that 'the TRC found no evidence of wrongdoing, or a specific violation of human rights by Dr Buthelezi ...'. The Commission did in fact make findings against Dr Buthelezi himself. The Commission found that Dr Buthelezi knew that the Caprivi trainees were to be illegally deployed in an offensive manner against people perceived to be anti-Inkatha and was aware that such armed resistance would entail the risk of unlawful death and injury. He was held accountable for killings and attempted killings. The Commission also found that, with regard to the SPUs and the establishment of the Mlaba Camp in the 1993/4 pre-election period, one of the aims of the training was to furnish Inkatha with the military capacity forcibly to prevent the holding of elections, and that Dr Buthelezi was aware that such armed resistance would entail the risk of unlawful death and injury. The Commission found that the SPU project constituted a conspiracy to commit gross human rights violations, for which, *inter alia*, Dr Buthelezi was held accountable.

16. In coming to its findings on Dr Buthelezi's involvement in the Caprivi trainee exercise, the Commission had regard to very substantial quantities of former State Security Council memoranda and documents, which recorded the progress of the training project in significant detail. These documents, the authenticity of which was never challenged, established that senior SADF officers (Lt. Colonel van Niekerk and Colonel van den Berg) met with Dr Buthelezi on 31st October 1989. This was after the SADF had withdrawn from the Caprivi project. Van Tonder summarised this meeting in a report to a superior officer (Vice Admiral Putter) as follows:

The Chief Minister expressed his concern over the situation in Mpumalanga and the fact that he was losing the 'armed struggle'. He referred to the 'cell' idea for offensive action, which did not get off the ground.

17. At the same meeting Dr Buthelezi expressed concern that he was:

losing the armed struggle and in that regard emphasized that 'offensive steps' were still a necessity; meaning the deployment of 'hit squads'.

18. Van Tonder was specifically subpoenaed by the Commission to comment on this report, and he confirmed his recollection of the meeting. He records Mr MZ Khumalo as saying that, at the very least, Dr Buthelezi still required 'cells' capable of taking out undesirable members.

19. Mr Mncwango went so far as to accuse one of the Commissioners, namely the Revd Dr Khoza Mgojo, as having been 'personally involved in supplying arms used in the seven-day war to the fighting units in Richmond'. According to Mr Mncwango, the late Mr Sifiso Nkabinde said in an affidavit that Dr Mgojo had 'used the Federal Theological Seminary (Fedsem) in Imbali as a stock facility for the weapons and he personally handed out these weapons'. To date, no evidence has been tendered to the Commission or to any other structure to support this claim in any way.

REVIEW PROCEEDINGS BROUGHT BY MINISTER BUTHELEZI AND THE IFP

20. Some two years after the publication of the Interim Report presented to the President on 29 October 1998, Minister Mangosuthu Buthelezi and the IFP sought to review and set aside certain findings made by the Commission. They did so essentially on the basis that the findings in question were defamatory of Dr Buthelezi and the IFP. They also complained of certain procedural irregularities.

21. Originally the applicants sought an order recalling the Report and expunging the findings to which they took offence. Although that relief was abandoned, they sought an order compelling the Commission to publish in its final Report a statement setting out certain 'errata' and requiring the Commission to forward the errata to all parties to whom the Report has been distributed where this was practically possible.

22. Dr Buthelezi and the IFP (the Applicants) complained that some thirty-seven findings contained in the Commission's Report – which implicated them in gross human rights violations, criminality and conspiracy – could not have been based on factual and objective information. The Applicants also contended that the Commission had failed to comply with fair procedures and did not afford them a proper and appropriate opportunity to make representations to it in respect of evidence in its possession and the findings it intended to make. The Applicants complained that the findings unjustifiably infringed their entitlement to a good name and reputation and have impaired their right to dignity and political activity free of unwarranted attack. They complained that the findings in question represented a failure by the Commission, its commissioners and employees to apply their minds to the evidence, as there was no rational connection between the factual evidence and the findings made.

23. The Commission contended that the findings were justifiable and that there had been no procedural unfairness. The Commission also contended that there had been an unreasonable delay in launching the application and that no satisfactory explanation for the delay of two years had been furnished. A delay of this magnitude was especially serious in regard to the nature of the mandate of the Commission and its limited lifespan.

24. It was apparent from the Applicants' founding papers that their primary concern was the finding by the Commission that they were implicated in the establishment of a covert offensive para-military unit (also referred to as a 'hit squad') that was deployed against the political enemies of the Applicants. Indeed this was the only finding which was prominently attacked in their legal papers. The Commission contended that the findings in question were proper and, in the light of the oral and authenticated documentary evidence and information on hand, beyond question.

25. The Commission refused to change these critical findings. It was, however, amenable to negotiation on the adjustment of certain lesser findings in order to facilitate settlement and the issue of its Codicil.

26. The case was settled out of court only a few days before the matter was set down for hearing on 29 January 2003. The Commission agreed to the adjustment of certain lesser findings, such as those relating to the activities of certain gangs and the compilation of statistics derived from victim statements. With regard to these findings the Commission replaced findings against the IFP to read as findings against 'members and/or supporters of the IFP'. The Commission has also adjusted similar findings in relation to the ANC and other role players.

27. The bulk of the complaints advanced by the IFP and Minister Buthelezi were rejected by the Commission. Its findings concerning Minister Buthelezi's accountability in his representative capacity as the President of the IFP, the Chief Minister of KwaZulu and the only serving Minister of Police in the KwaZulu Police also remained undisturbed. The Commission was satisfied that there was overwhelming evidence to support these and other key findings concerning the IFP and Minister Buthelezi.

28. As part of the settlement, the Commission agreed to publish an appendix in which the IFP and Minister Buthelezi explained why they disagreed with the core findings of against them.[68]

68 See appendices to this chapter, below.

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APPENDIX 1

"A"

SCHEDULE OF CHANGES AND CORRECTIONS TO THE TRC REPORT

Pursuant to review proceedings instituted by the IFP and Minister Buthelezi, upon reconsideration of its initial findings and upon receipt of extensive representations made by the IFP and Minister Buthelezi, the following changes and corrections to the TRC report are made. The original text is followed by the adjusted text.

1. Volume 2, Chapter 5, paragraph 248

248 The Commission heard evidence of the involvement of Caprivi trainees in the KwaMakhutha massacre on 21 January 1987 in which thirteen people, mostly women and children, were killed and several others injured in the AK-47 attack on the home of UDF activist Bheki Ntuli. A large number of people including former Minister of Defence General Magnus Malan and MZ Khumalo of the IFP, were tried for murder in 1996 in the Durban Supreme Court. Although the accused were acquitted, the Supreme Court found that Inkatha members trained by the SADF in the Caprivi were responsible for the massacre and that the two state witnesses, being members or the SADF Military Intelligence, were directly involved in planning and execution of the operation. The court was not able to find who had provided backing for the attack.

Paragraph 248 is amended as follows:

The Commission heard evidence of the involvement of Caprivi trainees in the KwaMakhutha massacre on 21 January 1987 in which thirteen people, mostly women and children, were killed and several others injured in the AK-47 attack on the home of UDF activist Bheki Ntuli. A large number of people including former Minister of Defence General Magnus Malan and MZ Khumalo of the IFP, were tried for murder in 1996 in the Durban Supreme Court. Although the accused were acquitted, the Supreme Court found that Inkatha members trained by the SADF in the Caprivi were responsible for the massacre and that the two state witnesses, being members of the SADF's Directorate of Special Tasks, were directly involved in planning and execution of the operation. The court was not able to find who had provided backing for the attack. The Commission is mindful of the fact that senior members of the former SA Defence Force and Inkatha were acquitted in this lengthy trial on charges of murder and conspiracy to murder. In its findings, the Commission explains fully, in Volume 3 (Regional Profile) as well as in volume 5 (Findings Volume), the basis upon which it found, on a balance of probabilities, that the SADF and Inkatha are nonetheless accountable for the human rights violations committed by Caprivi trainees.

2. Volume 1, Chapter 12, paragraph 44 (l) , page 444:

Tembisa (26-28 November 1996).
Commissioners heard stories of state repression in the 1980s in this township and in the neighbouring Ivory Park informal settlement. In the 1990s, the IFP-aligned Toaster gang committed many violations in the context of violence between the ANC and the IFP.

This paragraph is amended as follows:

Tembisa (26-28 November 1996).
Commissioners heard stories of state repression in the 1980s in this township and in the neighbouring Ivory Park informal settlement. In the 1990s, the Toaster gang, comprising members who claimed to be IFP supporters, committed many violations in the context of violence between the ANC and the IFP.

3. The statement in volume 2, chapter 5, para 283, p. 476:

283 As such, hit squad members had access to KwaZulu government resources, such as vehicles, arms and ammunition. A measure of protection from prosecution was made possible through the collusion of the KZP as well as instruments of the state security forces. Further, Inkatha officials conspired with senior KZP officials to set up hit squads to eliminate ANC/SDU elements. The activities of the hit squads operating in the Esikhawini area near Richards Bay, the New Hanover area of the Natal Midlands, and the activities of a hit squad known as the Black Cats in Wesselton and Ermelo in the Transvaal are documented in other sections of the Commission's report.

This paragraph is amended as follows:

283 As such, hit squad members had access to KwaZulu government resources, such as vehicles, arms and ammunition. A measure of protection from prosecution was made possible through the collusion of the KZP as well as instruments of the state security forces. Further, certain Inkatha officials conspired with senior KZP officials to set up hit squads to eliminate ANC/SDU elements. The activities of the hit squads operating in the Esikhawini area near Richards Bay, the New Hanover area of the Natal Midlands, and the activities of a hit squad known as the Black Cats in Wesselton and Ermelo in the Transvaal are documented in other sections of the Commission's report.

4. Volume 2, Chapter 5, paragraph 198, page 454:

198 Inkatha dominated the KwaZulu government (both its executive and its bureaucracy) to the extent that the government and Inkatha became interchangeable concepts. The organization effectively ruled the KwaZulu government as a one-party state and used KwaZulu government resources and finances to fund Inkatha party-political activities and in the execution of gross human rights violations against non-Inkatha supporters. The KZP came into existence in 1981 and was disbanded in 1994 following the April 1984 elections. Chief Buthelezi was the only ever serving Minister of Police in KwaZulu. Violations committed by the KZP are dealt with later in this report.

This paragraph is amended as follows:

198 Inkatha dominated the KwaZulu government (both its executive and its bureaucracy) to the extent that the government and Inkatha became interchangeable concepts. The organisation was the only political party that participated in the KwaZulu Government. The Commission heard evidence and made

findings that in certain instances, KwaZulu Government resources and finances were used to fund party-political activities and in the execution of gross human rights violations against non-Inkatha supporters. The KZP came into existence in 1980 and was disbanded and integrated into the SAPS in 1994 following the April 1994 elections. Chief Buthelezi was the only ever serving Minister of Police in KwaZulu. Violations committed by the KZP are dealt with later in this report. The SA Commissioner of Police retained a measure of control over the KZP.

5. Volume 2, Chapter 5, paragraph 279, page 475:

279 The role of the IFP in the political violence in the early nineties is dealt with under the relevant sections of the Commission's report. In brief, the IFP was found to the foremost perpetrator of gross human rights violations in KwaZulu and Natal during this period. Approximately 9 000 gross human rights violations were perpetrated by Inkatha in KwaZulu and Natal form 1990 to May 1994. This constituted almost fifty per cent of all violations reported to the Commission's Durban office for this period and over one-third of the total number of gross human rights violations reported for the thirty-four-year period of the Commission's mandate.

This paragraph is amended as follows:

279 The role of the IFP in the political violence in the early 90s is dealt with under the relevant sections of the Commission's report. In brief, the statistical evidence, based on statements made to the Commission by witnesses, indicates that the foremost perpetrators of gross human rights violations (GHRVs) in KwaZulu and Natal for this period, were persons who were named by witnesses as being supporters of, or aligned to, the IFP. Approximately 9000 GHRVs were perpetrated by such persons in KZN and Natal form 1990 – 1994, which constituted 50% of all violations reported to the Commission's Durban office for this period, and over 33% of the total number of GHRVs reported for the 34 year period of the Commission's mandate. However, in the light of the fact that the vast majority of members and supporters of the IFP stayed away from the Commission, the Commission was denied the opportunity of recording the testimonies of the large numbers of IFP members and supporters who were victims of violence at the hands of supporters of the ANC or its affiliates. Accordingly, any statistical date concerning the respective culpability of the IFP and the ANC during these years, must be seen and understood in the light of the above.

6. Volume 2, Chapter 5, paragraph 280, page 475,:

The following passage is inserted at the beginning of para 280:

The Commission held public hearings into the violence in March 1990, that became known as the Seven Day War, but did not have the benefit of the participation of members and supporters of the IFP, who chose not to participate in the hearings. Thereby the Commission did not have the benefit of hearing the IFP's perspective of the nature and causes to this very intense period of violence and its findings are based on submissions received mainly form those involved in the conflict under the ANC banner.

7. Volume 2, Chapter 5, paragraph 282, page 476:

282 The Commission has made a finding that IFP supporters were conscripted into hit squads and that the activities of these hit squads became widespread in KwaZulu and Natal during the 1990s. From information received by the Commission, it would appear that the hit squad operations flowing from the Caprivi training and other political networks were predominantly supportive of the IFP, drawing in officials of the KwaZulu government and KZP as well as senior politicians and leaders of the party.

This paragraph is amended as follows:

282 A small number of IFP supporters and/or members became involved in hit squad activities, in various parts of KZN and Natal during the 1990s. Some of those involved had received training form the SA Defence Force in the Caprivi Strip and the evidence before the Commission indicated that they liaised with senior officials of the KZ Government and Inkatha Freedom Party.

7. Volume 2, Chapter 5, paragraph 285, page 477:

285 Inkatha supporters were also responsible for the commission of gross human rights violations in the province of KwaZulu/Natal in the run-up to the 1994 elections, when the IFP engaged in a campaign to disrupt the electoral process. During this period, Inkatha received arms and ammunition from right-wing organisations as well as sections of the security forces and embarked upon paramilitary training projects in which IFP supporters were trained in weapons handling and paramilitary tactics. This campaign continued until 29 April, just six days before the elections, when the IFP announced that it would contest the elections. The Commission found that approximately 3 000 gross human rights violations were perpetrated by Inkatha in KwaZulu and Natal form July 1993 to May 1994. This constituted more than 55 per cent of all violations reported to the Commission's Durban office for this period.

This paragraph is amended as follows:

285 Inkatha supporters were also responsible for the commission of gross human rights violations in the province of KwaZulu/Natal in the run-up to the 1994 elections which seriously disrupted the process leading up to the elections. During this period, certain senior IFP members received arms and ammunition from right-wing organisations as well as sections of the security forces and embarked upon paramilitary training projects in which IFP supporters were trained in weapons handling and paramilitary tactics. Just six days before the elections, when the IFP announced that it would contest the elections, political violence in the region came to an abrupt end. The Commission found that approximately 3 000 gross human rights violations were perpetrated by alleged Inkatha supports/ and or members in KwaZulu and Natal from July 1993 to May 1994. This constituted more than 55 per cent of all violations reported to the Commission's Durban office for this period. Allowance must be made for the fact that many IFP supporters declared that they would not report violations perpetrated against the IFP and would not participate in the Commission's process.

9. Volume 3, Chapter 3, first paragraph of the finding at paragraph 182 (page 220):

182 The Commission has made a comprehensive finding concerning Operation Marion. It is contained in a lengthy document which includes the full reasons for the finding and which can be found in the State Archives. The main features of the finding are as follows:

This paragraph is amended as follows:

182 The Commission has made a comprehensive finding concerning Operation Marion. It is contained in a lengthy document which includes the full reasons for the finding and which can be found in the State Archives. The Commission is mindful of the fact that senior members of the former SA Defence Force and Inkatha were acquitted in this lengthy trial on charges of murder and conspiracy to murder. In its findings, the Commission explains fully, in this volume as well as in volume 5 (Findings Volume), the basis upon which it found, on a balance of probabilities, that the SADF and Inkatha are nonetheless accountable for the human rights violations committed by Caprivi trainees. The main features of the finding are as follows:

10. Volume 3, Chapter 3, first sub-paragraph at paragraph 292, pages 267-268:

292 The full findings of the Commission on the event which became known as the Seven day War are recorded elsewhere in the Commission's report. In summary, they are as follows:

This paragraph is amended as follows:

292 The Commission held public hearings relating to the Seven-Day War, but did not have the benefit of the participation of members and supporters of the IFP, who chose not to participate in the hearings. The Commission did not have the benefit of hearing the IFP's perspective of the nature and causes of this intense period of violence and its findings are based on submissions received mainly form those involved in the conflict under the ANC banner. The full findings of the Commission on the event which became known as the Seven day War are recorded elsewhere in the Commission's report. In summary, they are as follows:

11. Volume 3, Chapter 3, the second last indented subparagraph of paragraph 294, page 270:

An informal inquest held in 1991 found that 'persons unknown' were responsible for the deaths. A second inquest was held in May 1995. The inquest magistrate, RA Stewart, found that former special constable Welcome Muzi Hlophe (aka 'BigBoy' Hlophe), SAP Lance Sergeant Peter Smith, KwaZulu government driver Abraham Shoba and a fourth unknown man were prima facie directly responsible for the killings. He also found that the original investigating officer, Major Joseph van Zyl, was an accessory to the killings and recommended that an investigation be opened with a view to a possible conviction of Van Zyl. He further found that the then Secretary of the KwaZulu Legislature, Mr. Robert Mzimela, KwaZulu employee Z Mkhize, and then head of the KLA Protection Unit Major Leonard

Langeni had been implicated in a cover-up operation. (Mzimela and Langeni were both involved in the operations of the Esikhawini hit squad – see below)

This paragraph is amended as follows:

An informal inquest held in 1991 found that 'persons unknown' were responsible for the deaths. A second inquest was held in May 1995. The inquest magistrate, RA Stewart, found that former special constable Welcome Muzi Hlophe (aka 'BigBoy' Hlophe), SAP Lance Sergeant Peter Smith, KwaZulu government driver Abraham Shoba and a fourth unknown man were prima facie directly responsible for the killings. He also found that the original investigating officer, Major Joseph van Zyl, was an accessory to the killings and recommended that an investigation be opened with a view to a possible conviction of Van Zyl. He further recommended an investigation into the roles of senior KwaZulu Government and Police officials who were strongly suspected of being involved in a cover-up operation.

12. Volume 2, Chapter 7, paragraph 186, page 625:

186 Inkatha was found to be the foremost perpetrator of gross human rights violations in KwaZulu and Natal during the 1990s. Approximately 9 000 gross human rights violations were perpetrated by Inkatha in KwaZulu and Natal from 1990 to May 1994. This constituted almost 50 per cent of all violations reported to the Commission's Durban office for this period.

This paragraph is amended as follows:

186 Statistical evidence, based on statements made to the Commission by witnesses, indicates that the foremost perpetrators of gross human rights violations (GHRVs) in KwaZulu and Natal for this period, were persons who were named by witnesses as being supporters and/ or members of the IFP. Approximately 9000 GHRVs were perpetrated by such persons in KZN and Natal form 1990 – 1994, which constituted 50% of all violations reported to the Commission's Durban office for this period, and over 33% of the total number of GHRVs reported for the 34 year period of the Commission's mandate. However, in the light of the fact that the vast majority of members and supporters of the IFP stayed away from the Commission, the Commission was denied the opportunity of recording the testimonies of the large numbers of IFP members and supporters who were victims of violence at the hands of supporters of the ANC or its affiliates. Accordingly, any statistical date concerning the respective culpability of the IFP and the ANC during these years, must be seen and understood in the light of the above.

13. The finding in Volume 2, Chapter 7, paragraph 195, page 626:

THE COMMISSION MADE A COMPREHENSIVE FINDING ONTHE SEVEN DAY WAR AND ON THE ACCOUNTABILITY OF THE PRIMARY ROLE-PLAYERS IN A CONFLICT THAT RESULTED IN THE COMMISSION OF MANY HUNDREDS OF GROSS VIOLATIONS OF HUMAN RIGHTS. THE ROLE-PLAYERS INCLUDE: THE RIOT UNIT OF THE SAP, INCLUDING SPECIAL CONSTABLES, AND THE SOUTH AFRICAN DEFENCE FORCE.

14. Volume 2, Chapter 7, paragraph 551, page 709 will be amended by the addition of the following bullet point:

* The IFP perspective on the root causes, dynamics, political objectives and circumstances of the armed struggle and the so-called black-on- black conflict.

15. Volume 3, Chapter 3, paragraph 106, page 190:

160 By far the majority of reports of severe ill treatment were attributed to Inkatha. The number of acts attributable to Inkatha was double the number attributed to the police and more than three times the number attributed to the ANC. The number of reports of torture in this period rose to five times that of the previous period. The overwhelming majority of these acts were attributed to the SAP. The majority of reports of associated violations that occurred in the province during this period were attributed to the SAP, followed by those attributed to Inkatha. A small number of similar acts were attributed to other parties and organisations, namely, the ANC, the UDF , the KZP and the SADF.

The paragraph is amended as follows:

160 By far the majority of reports of severe ill treatment were attributed to members and/ or supporters of Inkatha. The number of acts attributable to IFP members and/ or supporters was double the number attributed to the police and more than three times the number attributed to members and/ or supporters of the ANC. The fact that the Commission received a greater number of reports implicating Inkatha must be considered within the context of most IFP members having elected not to participate in the Commission's process, and the IFP itself having distanced itself form the Commission's work after its initial submission. The number of reports of torture in this period rose to five times that of the previous period. The overwhelming majority of these acts were attributed to the SAP. The majority of reports of associated violations that occurred in the province during this period were attributed to the SAP, followed by those attributed to members and/ or supporters of Inkatha. A small number of similar acts were attributed to other parties and organisations, namely, the ANC, the UDF , the KZP and the SADF.

16. Volume 2, Chapter 7, the finding at paragraph 251, page 640:

THE COMMISSION FINDS THAT, ALTHOUGH THE SPU PROJECT WAS OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND THAT SELF-PROTECTION FORMED AN ELEMENT THEREOF, INHERENT IN THE PROJECT WAS ALSO AN INTENTION TO FURNISH INKATHA WITH THE MILITARY CAPACITY TO PREVENT BY FORCE THE HOLDING OF ELECTIONS WHICH DID NOT ACCOMMODATE INKATHA'S DESIRES FOR SELF-DETERMINATION. SUCH ARMED RESISTANCE WOULD ENTAIL THE RISK OF UNLAWFUL DEATH AND INJURY TO PERSONS AND, AS SUCH, CONSTITITUTES A CONSPIRACY TO COMMIT MURDER.

The Commission will delete the last sentence of the bolded statement and substitute the statement with the following statement:

THE COMMISSION FINDS THAT, ALTHOUGH THE SPU PROJECT WAS OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND THAT SELF-PROTECTION FORMED AN ELEMENT THEREOF, INHERENT IN THE PROJECT WAS ALSO AN INTENTION TO FURNISH INKATHA WITH THE MILITARY CAPACITY TO

DISRUPT THE HOLDING OF ELECTIONS WHICH DID NOT ACCOMMODATE INKATHA'S DESIRES FOR SELF-DETERMINATION. THIS VERACITY OF THIS CONCLUSION HAS BEEN DISPUTED BY THE IFP.

16. Volume 2, Chapter 7, paragraph 253, page 641:

253 An informal alliance between the right wing and the IFP emerged after the formation of COSAG in 1993. The alliance played itself out in weapons smuggling an paramilitary training, primarily on white farms and KwaZulu nature reserves. There were also a few cases where IFP and right-wing members took part in joint attacks.

Paragraph 253 is substituted by the following paragraph:

253 An informal alliance between the right wing and the IFP emerged after the formation of COSAG in 1993. The alliance played itself out in weapons smuggling and paramilitary training, primarily on white farms and KwaZulu nature reserves. There were also a few isolated cases where certain IFP and right-wing members took part in joint attacks.

18. Volume 3, Chapter 3, last 3 sub-paragraphs of paragraph 208, page 239:

A formal inquest (Howick Inquest 13/88) into the killing of the three MAWU members found nine known Inkatha members responsible for the killings. Despite the inquest finding, no one has been charged for these killings to date. One of those named was Mr Vela Mchunu, a 'Caprivi trainee'. In order to prevent Mchunu from form testifying at the inquest, KZP Captain Leonard Langeni and Chief Minister Buthelezi's personal assistant, Mr MZ Khumalo, arranged for him to be hidden at the Mkhuze camp. IN 1987, Sarmcol signed a recognition agreement with UWUSA, the Inkatha-aligned trade union, set up in opposition to COSATU.

In March 1998 .....to the factory floor.

THE COMMISSION FINDS THE KILLING OF PROMINENT TRADE UNIONISTS IN MPHOPHOMENI TOWNSHIP BY MEMBERS OF INKATHA AND THE KZP SET IN MOTION A LENGTHLY PERIOD OF POLITICAL CONFLICT RESULTING IN WIDESPREAD GROSS HUMAN RIGHTS VIOLATIONS FOR WHICH INKATHA AND THE KZP ARE HELD ACCOUNTABLE.

This paragraph is amended as follows:

A formal inquest (Howick Inquest 13/88) into the killing of the three MAWU members found nine known Inkatha members responsible for the killings. Despite the inquest finding, no one has been charged for these killings to date. One of those named was Mr Vela Mchunu, a 'Caprivi trainee'. In an apparent attempt to prevent Mchunu from testifying at the inquest, KZP Captain Leonard Langeni and Mr MZ Khumalo, a senior Inkatha official, arranged for him to be hidden at the Mkhuze camp. In 1987, Sarmcol signed a recognition agreement with UWUSA, the Inkatha-aligned trade union, set up in opposition to COSATU.

In March 1998 .....to the factory floor.

THE COMMISSION FINDS THE KILLING OF PROMINENT TRADE UNIONISTS IN MPHOPHOMENI TOWNSHIP BY MEMBERS OF INKATHA AND THE KZP SET IN MOTION A LENGTHLY PERIOD OF POLITICAL CONFLICT RESULTING IN WIDE-SPREAD GROSS HUMAN RIGHTS VIOLATIONS FOR WHICH ELEMENTS OF INKATHA AND THE KZP ARE HELD ACCOUNTABLE.

19. Volume 3, Chapter 3, paragraph 259, pages 256 – 7

The Commission has made a comprehensive finding regarding the KZP, in which it is described, inter alia, as a highly politicised force, openly assisting the IFP – by omission and by active participation -in the commission of gross human rights violations, as well as being grossly incompetent.

This paragraph is amended by the insertion of the first sentence below:

In investigating the activity of the KZP, which was disbanded and integrated into the SAPS in 1994, the Commission did not have the benefit of eliciting the view-point of and evidence from the KZP, as most of its senior members did not volunteer evidence to the Commission. The Commission has made a comprehensive finding regarding the KZP, in which it is described, inter alia, as a highly politicised force, openly assisting the IFP – by omission and by active participation - in the commission of gross human rights violations, as well as being grossly incompetent.

20. Volume 3, Chapter 3, first two sub-paragraphs of the finding at paragraph 390, pages 306 –7:

THE COMMISSION FINDS THAT, DURING THE PERIOD 1993 – 1994, THE SELF-PROTECTION UNIT PROJECT (SPU),ALTHOUGH OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND CONTAINING AN ELEMENT OF SELF PROTECTION, WAS ALSO INTENDED TO FURNISH THE INKATHA FREEDOM PARTY WITH THE MILITARY CAPACITY TO, BY FORCE, PREVENT THE CENTRAL GOVERNMENT AND THE TRANSITIONAL EXECUTIVE COUNCIL FORM HOLDING ELECTIONS WHICH DID NOT ACCOMMODATE THE IFP'S DESIRES FOR SELF-DETERMINATION.

IT WAS ADMITTED AT THE TIME BY THE PERSONS NAMED BELOW THAT SUCH ARMED RESISTANCE WOULD ENTAIL THE RISK OF UNLAWFUL DEATH AND INJURY TO PERSONS.

The second bolded paragraph starting with the words "It was admitted" and ending with the words "injury to persons" will be deleted. The first bolded paragraph will be amended as follows:

THE COMMISSION FINDS THAT, DURING THE PERIOD 1993 – 1994, THE SELF-PROTECTION UNIT PROJECT (SPU), ALTHOUGH OFFICIALLY PLACED WITHIN THE AMBIT OF THE PEACE ACCORD AND CONTAINING AN ELEMENT OF SELF PROTECTION, WAS ALSO INTENDED BY SENIOR INKATHA MEMBERS TO FURNISH THE INKATHA FREEDOM PARTY WITH A PARAMILITARY CAPACITY TO, BY FORCE, DISRUPT THE CENTRAL GOVERNMENT AND THE TRANSITIONAL EXECUTIVE COUNCIL FORM HOLDING ELECTIONS WHICH DID NOT ACCOMMODATE THE IFP'S DESIRES FOR SELF-DETERMINATION.

21. Volume 3, Chapter 3, paragraph 296, page 270:

296 In 1991, as a result of these concerns, Daluxolo Luthuli summoned Gcina Brian Mkhize [AM4599/97] to a meeting in Ulundi. Mkhize was a 'Caprivi trianee' who had joined the KZP and was posted to the Esikhawini Riot Unit in 1990. The meeting was held at KZP Captain Leonard Langeni's office in Ulundi early in 1991. At the time, Langeni was the officer commanding the then KLA Protection Unit. Others present at the meeting were Luthuli, Prince Gideon Zulu (then KwaZulu Minister of Pensions), Mr M R Mzimela (then Secretary of the KwaZulu Legislature), and Mr MZ Khumalo (then personal assistant to Chief Buthelezi).

This paragraph is amended as follows:

296 According to Daluxolo Luthuli and Gcina Brian Mkhize [AM4599/97] in 1991, as a result of these concerns, Luthuli summoned Mkhize to a meeting in Ulundi. Mkhize was a 'Caprivi trianee' who had joined the KZP and was posted to the Esikhawini Riot Unit in 1990. The meeting was held at KZP Captain Leonard Langeni's office in Ulundi early in 1991. At the time, Langeni was the officer commanding the then KLA Protection Unit. Others present at the meeting were Luthuli, Prince Gideon Zulu (then KwaZulu Minister of Pensions), Mr M R Mzimela (then Secretary of the KwaZulu Legislature), and Mr MZ Khumalo , a senior Inkatha official.

22 Volume 3, Chapter 3, second bolded sub-paragraph at paragraph 308, pages 276 –9:

INKATHA LEADERS APPROACHED THE INKATHA CENTRAL AUTHORITY IN ULUNDI BECAUSE THEY WERE CONCERNED THAT THEY WERE IN THE PROCESS OF LOSING THE STRUGGLE.

This sub-paragraph is amended as follows:

LOCAL INKATHA LEADERS IN ESIKAWENI APPROACHED CERTAIN SENIOR INKATHA OFFICIALS IN ULUNDI BECAUSE THEY WERE CONCERNED THAT THEY WERE IN THE PROCESS OF LOSING THE STRUGGLE.

The following sub-paragraph is inserted as the final bolded sub-paragraph of the bulleted findings relating to the hit squads on page 278:

THE COMMISSION NOTES THAT THE IFP DISPUTES THE VERSIONS OF DALOXOLO LUTHULI, GCINA BRIAN MKHIZE AND OTHERS. THE COMMISSION NOTES FURTHER THAT THOSE IFP MEMBERS IMPLICATED DID NOT MAKE THEMSELVES AVAILABLE TO THE COMMISSION TO REBUT THE EVIDENCE.

23. Volume 3, Chapter 3, finding at paragraph 318, page 286:

THE COMMISSION FINDS THAT THE KILLING OF SIXTEEN PEOPLE ON 8 NOVEMBER 1990 WAS CAUSED BY UNKNOWN SUPPORTERS OF THE IFP FROM THE BRUNTVILLE HOSTEL, CONSTITUTING GROSS VIOLATIONS OF HUMAN RIGHTS, FOR WHICH UNKNOWN INKATHA-SUPPORTING HOSTEL-DWELLERS ARE HELD ACCOUNTABLE.

This paragraph is amended by an insertion of an additional sentence and will read as follows:

THE COMMISSION FINDS THAT THE KILLING OF SIXTEEN PEOPLE ON 8 NOVEMBER 1990 WAS CAUSED BY UNKNOWN SUPPORTERS OF THE IFP FROM THE BRUNTVILLE HOSTEL, CONSTITUTING GROSS VIOLATIONS OF HUMAN RIGHTS, FOR WHICH UNKNOWN INKATHA-SUPPORTING HOSTEL- DWELLERS ARE HELD ACCOUNTABLE. THE COMMISSION NOTES THAT SINCE THE IFP DECLINED TO PARTICIPATE IN HEARING THAT THERE MAY BE OTHER PER-SPECTIVES WHICH IT DID NOT HAVE THE BENEFIT OF RECEIVING AND ANALYSING.

24. The statement in Volume 5, Chapter 6, finding at the 5th sub-paragraph of paragraph 109, page 229:

IN KWAZULU SPECIFICALLY, THE HOMELAND GOVERNMENT AND POLICE FORCE (KZP) WERE RESPONSIBLE FOR:

The 5th sub-paragraph is amended as follows:

IN KWAZULU SPECIFICALLY, ELEMENTS OF THE HOMELAND GOVERNMENT AND POLICE (KZP) WERE RESPONSIBLE FOR:

25. Volume 5, Chapter 6, sub-paragraphs e, I and j of paragraph 116, pages 231 – 2:

e the establishment in early 1986 of a covert, offensive paramilitary unit trained, armed and paid by Military Intelligence, and their deployment throughout KwaZulu until September 1990, during which the 'Caprivi trainees' killed large numbers of people and permanently altered the political landscape in the areas in which they were deployed (see separate find below);

i the deployment of a joint KZP-IFP hit squad in Esikhawini township in 1990, and the resultant killing of over 100 people (see separate finding below);

j the deployment of the IFP-based 'Black Cats' hit squad in Wesselton and Ermelo in 1990, and the resultant killing of large numbers of people;

Subparagraphs (e), (i) and (j) are amended as follows:

e the establishment in early 1986 of a covert, offensive paramilitary unit trained, armed and paid by Military Intelligence, and their deployment throughout KwaZulu until September 1990, during which the several 'Caprivi trainees' killed large numbers of people and permanently altered the political landscape in the areas in which they were deployed (see separate find below);

I the deployment of a hit squad in Esikhawini township comprising elements of the KZP and certain Inkatha supporters in 1990, which resulted in the killing of over 100 people (see separate finding below);

j the deployment of the 'Black Cats' hit squad in Wesselton and Ermelo comprising Inkatha supporters in 1990, and the resultant killing of large numbers of people;

26. Volume 5, Chapter 6, paragraph 117 – 119, page 232:

117 The above mentioned incidents represent iconic events over the past twelve years in which IFP office-bearers, members and supporters were involved in acts of serious political violence. They do not purport to be a complete list of such incidents. However, the most devastating indictment of the role of the IFP in political violence during the Commission's mandate period is to be found in the statistics compiled by the Commission directly from submissions by victims of gross human rights violations. These established the IFP as the foremost perpetrator of gross human rights violations in KwaZulu and Natal during the 1990-94 period. Indeed, IFP violations constituted almost 50 per cent of all violations reported to the Commission's Durban office for this period, and over one-third of the total number of gross human rights violations committed during the thirty-four-year period of the Commission's mandate. The statistics also indicate that IFP members, supporters and office-bearers in KwaZulu and Natal were responsible for more than 55 per cent of all violations reported to the Commission's Durban office for the period between July 1993 and May 1994.

118 Other statistics derived from the Commission's database show that Inkatha/the IFP was responsible, in the mandate period, for some 3 800 killings in the Natal and KwaZulu area compared with approximately 1 100 attributed to the ANC and some 700 to the SAP. The IFP remains the major perpetrator of killings on a national scale, being allegedly responsible for over 4 500 killings compared to 2 700 attributed to the SAP and 1 300 to the ANC. These statistics suggest that the IFP was responsible for approximately 3.5 killings for on killing attributed to the ANC. A graph included in the Natal regional profile (Volume Three) illustrates that in 1987-88 the IFP exceeded even the SAP in terms of numbers of people killed by a single perpetrator organisation.

119 It must be noted here that, for much of the period in which the Commission was able to accept human rights violations statements, the IFP discouraged its members and supporters from making submissions to the Commission. The result is that only about 10 per cent of all statements taken in KwaZulu-Natal came from people linked to the IFP. The significant point is that the statistics derived from the Commission's database do not diverge from those published by other national and international bodies. All of these are consistent in identifying the IFP as the primary non-state perpetrator of gross human rights abuse in South Africa from the latter 1980s through to 1994.

The last sentence in paragraph 118 has been deleted and the paragraphs are amended as follows:

117 The above incidents represent iconic events over the past twelve years in which IFP office-bearers, members and supporters were involved in acts of serious political violence. They do not purport to be a complete list of such incidents. However, the most devastating indictment of the role of members and/ or supporters of the IFP in political violence during the Commission's mandate period is to be found in the statistics compiled by the Commission directly from submissions by victims of gross human rights violations. These established that members and/ or supporters of the IFP were the foremost perpetrator of gross human rights violations in KwaZulu and Natal during the 1990-94 period. Indeed, such violations constituted almost 50 per cent of all violations reported to the Commission's Durban office for this period, and over one-third of the total number of gross human rights violations committed during the thirty-four-year period of the Commission's mandate. The statistics also indicate that IFP members, supporters and office-bearers in KwaZulu and Natal were responsible for more than 55 per cent of all violations reported to the Commission's Durban office for the period between July 1993 and May 1994.

118 Other statistics derived from the Commission's database show that members and/ or supporters of the IFP were responsible, in the mandate period, for some 3 800 killings in the Natal and KwaZulu area compared with approximately 1 100 attributed to the members and/ or supporters of the ANC and some 700 to the SAP. Members and/ or supporters The IFP remains the major perpetrator of killings on a national scale, being allegedly responsible for over 4 500 killings compared to 2 700 attributed to the SAP and 1 300 to members and/ or supporters of the ANC. These statistics suggest that members and/ or supporters of the IFP was responsible for approximately 3.5 killings for on killing attributed to the members and/ or supporters of the ANC.

119 It must be noted here that, for much of the period in which the Commission was able to accept human rights violations statements, the IFP discouraged its members and supporters from making submissions to the Commission. The result is that only about 10 per cent of all statements taken in KwaZulu-Natal came from people linked to the IFP. The significant point is that the statistics derived from the Commission's database do not diverge from those published by other national and international bodies. All of these are consistent in identifying members and/ or supporters of the IFP as the primary non-state perpetrator of gross human rights abuse in South Africa from the latter 1980s through to 1994. The Commission notes that a complete picture of the IFP-ANC conflict could not be formed due to the failure of by many IFP members and supporters to participate in the Commission and the absence of many countervailing complaints of violations against the IFP.

27. Volume 5, Chapter 6, first paragraph 121 pages 233 – 6:

121 The formal finding of the Commission in regard to the IFP is set out below:

DURING THE PERIOD 1982-94, THE INKATHA FREEDOM PARTY, KNOWN AS INKATHA PRIOR TO JULY 1990 (HEREINAFTER REFERRED TO AS "THE ORGANISATION') WAS RESPONSIBLE FOR GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED IN THE FORMER TRANSVAAL, NATAL AND KWAZULU AGAINST

- PERSONS WHO WERE PERCEIVED TO BE LEADERS, MEMBERS OR SUP PORTERS OF THE UDF, ANC, SOUTH AFRICAN COMMUNIST PARY (SACP) AND COSATU;
- PERSONS WHO WERE IDENTIFIED AS POSING A THREAT TO THE ORGANISATION;
- MEMBERS OR SUPPORTERS OF THE ORGANISATION WHOSE LOYALTY WAS DOUBTED.
- IT IS A FURTHER FINDING OR THE COMMISSION THAT SUCH VIOLATIONS FORMED PART OF A SYSTEMATIC PATTERN OF ABUSE WHICH ENTAILED DELIBERATE PLANNING ON THE PART OF THE ORGANISATION.
- THE COMMISSION BASED THIS FINDING ON THE FOLLOWING ACTIONS OF THE IFP:
- SPEECHES BY THE IFP PRESIDENT, SENIOR PARTY OFFICIALS AND PERSONS ALIGNED TO THE ORGANISATION'S IDEALOGY, WHICH HAD THE EFFECT OF INCITING SUPPORTERS OF THE ORGANISATION TO COMMIT ACTS OF VIOLENCE;

- ARMING THE ORGANISATIONS'S SUPPORTERS WITH WEAPONS IN CONTRAVENTION OF THE ARMS AND AMMUNITION, AND EXPLOSIVES AND DANGEROUS WEAPONS ACTS;
- MASS ATTACKS BY SUPPORTERS OF THE ORGANISATION ON COMMUNITIES INHABITED BY PERSONS REFERRED TO ABOVE, RESULTING IN DEATH AND INJURY AND THE DESTRUCTION AND THEFT OF PROPERTY;
- KILLING OF LEADERS OF THE POLITICAL ORGANISATIONS AND PERSONS REFERRED TO ABOVE;
- COLLUSION WITH THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT THE VIOLATIONS REFERRED TO ABOVE;
- ENTERING INTO A PACT WITH THE SADF TO CREATE A PARAMILITARY FORCE FOR THE ORGANISATION, WHICH WAS INTENDED TO AND DID CAUSE DEATH AND INJURY TO THE PERSONS REFERRED TO ABOVE;
- ESTABLISHING HIT SQUADS WITHIN THE KZP AND THE SPECIAL CONSTABLES STRUCTURE OF THE SAP TO KILL OR CAUSE INJURY TO THE PERSONS REFERRED TO ABOVE;
- UNDER THE AUSPICES OF THE SELF-PROTECTION UNIT PROJECT, TRIANING LARGE NUMBERS OF THE ORGANISATIONS'S SUPPORTERS WITH THE SPECIFIC OBJECTIVE OF PREVENTING, BYMEANS OF VIOLENCE, THE HOLDING OF ELECTIONS IN KWAZULU-NATAL IN APRIL 1994, UNDER A CONSTITUTION WHICH DID NOT RECOGNISE THE ORGANISATIONS'S DEMANDS FOR SOVEREIGNTY. IN ORDER TO ACHIEVE THIS OBJECTIVE, THE KWAZULU GOVERNMENT AND ITS KWAZULU POLICE STRUCTURES WERE SUBVERTED;
- CONSPIRING WITH RIGHT-WING ORGANISATIONS AND FORMER MEMBERS OF THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT ACTS WHICH RESULTED IN LOSS OF LIFE OR INJURY IN ORDER TO ACHIEVE THE OBJECTIVE REFERRED TO ABOVE;
- CREATING A CLIMATE OF IMPUNITY BY EXPRESSLY OR IMPLICITLY CONDONING GROSS HUMAN RIGHTS VIOLATIONS AND OTHER UNLAWFUL ACTS COMMITTED BY MEMBERS OR SUPPORTERS OF THE ORGANISATION.
- CHIEF MG BUTHELEZI SERVED SIMULTANEOUSLY AS PRESIDENT OF THE IFP AND AS THE CHIEF MINISTER OF THE KWAZULU GOVERNMENT AND WAS THE ONLY SERVING MINISTER OF POLICE IN THE KWAZULU GOVERNMENT DURING THE ENTIRE THIRTEEN-YEAR EXISTENCE OF THE KWAZULU POLICE. WHERE THESE THREE AGENCIES ARE FOUND TO HAVE BEEN RESPONSIBLE FOR THE COMMISSION OF GROSS HUMAN RIGHTS, CHIEF MANGOSUTHU BUTHELEZI IS HELD BY THIS COMMISSION TO BE ACCOUNTABLE IN HIS REPRESENTATIVE CAPACITY AS THE LEADER, HEAD OR RESPONSIBLE MINISTER OF THE PARTIES CONCERNED.

This paragraph is amended as follows:

121 The formal finding of the Commission on the actions by members, supporters or officials of the organisation, is set out below:
DURING THE PERIOD 1982-94 MEMBERS, SUPPORTERS AND/ OR OFFICIALS OF THE INKATHA FREEDOM PARTY, KNOWN AS INKATHA PRIOR TO JULY 1990 (HEREINAFTER REFERRED TO AS "THE ORGANISATION') WERE RESPONSIBLE FOR GROSS VIOLATIONS OF HUMAN RIGHTS COMMITTED IN THE FORMER TRANSVAAL, NATAL AND KWAZULU AGAINST:

- PERSONS WHO WERE PERCEIVED TO BE LEADERS, MEMBERS OR SUP PORTERS OF THE UDF, ANC, SOUTH AFRICAN COMMUNIST PARY (SACP) AND COSATU;
- PERSONS WHO WERE IDENTIFIED AS POSING A THREAT TO THE ORGANISATION;
- MEMBERS OR SUPPORTERS OF THE ORGANISATION WHOSE LOYALTY WAS DOUBTED.
- IT IS A FURTHER FINDING OF THE COMMISSION THAT SUCH VIOLATIONS FORMED PART OF A SYSTEMATIC PATTERN OF ABUSE WHICH ENTAILED DELIBERATE PLANNING ON THE PART OF THE MEMBERS, SUPPORTERS OR OFFICIALS OF THE ORGANISATION.

THE COMMISSION BASED THIS FINDING ON THE FOLLOWING ACTIONS OF THE IFP:

- SPEECHES BY SENIOR PARTY OFFICIALS AND PERSONS ALIGNED TO THE ORGANISATION'S IDEALOGY, WHICH HAD THE EFFECT OF INCITING SUP PORTERS OF THE ORGANISATION TO COMMIT ACTS OF VIOLENCE;
- ARMING THE ORGANISATIONS'S SUPPORTERS WITH WEAPONS IN CONTRAVENTION OF THE ARMS AND AMMUNITION, AND EXPLOSIVES AND DANGEROUS WEAPONS ACTS;
- MASS ATTACKS BY SUPPORTERS OF THE ORGANISATION ON COMMUNITIES INHABITED BY PERSONS REFERRED TO ABOVE, RESULTING IN DEATH AND INJURY AND THE DESTRUCTION AND THEFT OF PROPERTY;
- KILLING OF LEADERS OF THE POLITICAL ORGANISATIONS AND PERSONS REFERRED TO ABOVE;
- OCCASIONAL COLLUSION WITH THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT THE VIOLATIONS REFERRED TO ABOVE;
- ENTERING INTO A PACT WITH THE SADF TO CREATE A PARAMILITARY FORCE FOR THE ORGANISATION, WHICH WAS INTENDED TO AND DID CAUSE DEATH AND INJURY TO THE PERSONS REFERRED TO ABOVE;
- ESTABLISHING HIT SQUADS WITHIN THE KZP AND THE SPECIAL

CONSTABLES STRUCTURE OF THE SAP TO KILL OR CAUSE INJURY TO THE PERSONS REFERRED TO ABOVE;

- UNDER THE AUSPICES OF THE SELF-PROTECTION UNIT PROJECT, TRIANING LARGE NUMBERS OF THE ORGANISATIONS'S SUPPORTERS WITH THE SPECIFIC OBJECTIVE OF PREVENTING, BYMEANS OF VIOLENCE, THE HOLDING OF ELECTIONS IN KWAZULU-NATAL IN APRIL 1994, UNDER A CONSTITUTION WHICH DID NOT RECOGNISE THE ORGANISATIONS'S DEMANDS FOR SOVEREIGNTY. IN ORDER TO ACHIEVE THIS OBJECTIVE, THE KWAZULU GOVERNMENT AND ITS KWAZULU POLICE STRUCTURES WERE SUBVERTED;
- CONSPIRING WITH RIGHT-WING ORGANISATIONS AND FORMER MEMBERS OF THE SOUTH AFRICAN GOVERNMENT'S SECURITY FORCES TO COMMIT ACTS WHICH RESULTED IN LOSS OF LIFE OR INJURY IN ORDER TO ACHIEVE THE OBJECTIVE REFERRED TO ABOVE;
- CREATING A CLIMATE OF IMPUNITY BY EXPRESSLY OR IMPLICITLY CONDONING GROSS HUMAN RIGHTS VIOLATIONS AND OTHER UNLAWFUL ACTS COMMITTED BY MEMBERS OR SUPPORTERS OF THE ORGANISATION.

CHIEF MG BUTHELEZI SERVED SIMULTANEOUSLY AS PRESIDENT OF THE IFP AND AS THE CHIEF MINISTER OF THE KWAZULU GOVERNMENT AND WAS THE ONLY SERVING MINISTER OF POLICE IN THE KWAZULU GOVERNMENT DURING THE ENTIRE THIRTEEN-YEAR EXISTENCE OF THE KWAZULU POLICE. WHERE THESE THREE AGENCIES ARE FOUND TO HAVE BEEN RESPONSIBLE FOR THE COMMISSION OF GROSS HUMAN RIGHTS, CHIEF MANGOSUTHU BUTHELEZI IS HELD BY THIS COMMISSION TO BE ACCOUNTABLE IN HIS REPRESENTATIVE CAPACITY AS THE LEADER, HEAD OR RESPONSIBLE MINISTER OF THE PARTIES CONCERNED.

28. Volume 5, Chapter 6, paragraph 122, page 234;

122 The Commission also made comprehensive findings with regard to a number of key incidents involving members of the IFP in KwaZulu-Natal, all of which are dealt with in more detail in the Natal regional study in Volume Three of this report. The commission has also made a finding on the KZP, which has been dealt with in the chapter on Homelands in Volume Two.

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APPENDIX 2

In its interim report the TRC made a number of adverse findings concerning the IFP and its President, Minister Mangosuthu Buthelezi. Both the IFP and Minister Buthelezi have taken issue with these findings. To that end, they instituted legal proceedings with a view to reviewing and setting aside those findings and requiring the TRC to publish appropriate corrections in its final report. The TRC accepts the validity of certain of these criticisms and has accordingly made appropriate corrections in its final report. In order to settle the dispute in respect of the remaining complaints and to enable the TRC to complete its mandate, the parties have agreed that the TRC will publish this appendix to the final report reflecting the viewpoint of the IFP and Minister Buthelezi concerning those findings with which they disagree.

APPENDIX TO THE FINAL TRC REPORT REFLECTING THE VIEWS OF THE INKATHA FREEDOM PARTY AND MINISTER BUTHELEZI CONCERNING THE FINDINGS MADE IN THE INTERIM TRC REPORT

In the review proceedings the IFP and Prince Buthelezi challenged some 37 findings made by the TRC in its interim report. In relation to some of the findings the TRC has made appropriate corrections in its final report. In respect of other findings which are in issue the views of the IFP and Prince Buthelezi are reflected below.

The findings of the TRC in question are, contrary to the statutory obligation imposed on it by section 4(e) of the Promotion of National Unity and Reconciliation Act 34 of 1995 ('the Act'), not based on factual and objective information and evidence received by the TRC. There is no rational connection between the evidence and material before the TRC and the conclusions reached by it in this regard.

The IFP and Prince Buthelezi wish to record in this regard that:

- The findings implicating the IFP and Prince Buthelezi in gross human rights violations, criminality and conspiracy are without any factual basis.

- The IFP and prince Buthelezi at no stage endorsed policies based on violence, criminal conduct or an armed struggle and they only advocated non-violence, passive resistance and self-defence where legally justified.

- The IFP and Prince Buthelezi have serious reservations regarding the

establishment and functioning of the TRC and its ability to make objective and factually correct findings. The TRC was the product of a mutual political accommodation reached between the ANC and the NP to the exclusion of the other participants in the conflicts of the past. The TRC was thus inclined to approach its mandate by focusing on black-on-white and white-on-black conflicts. It was ill-equipped to deal with black-on-black conflict and explore the genesis, dynamics, purposes and strategies of this conflict. The TRC process was conducted at a time very close to the animosity and tensions of the conflicts of the past and without the benefit of a historical perspective. In this context evidence was taken without any effective means of independent or adversarial verification.

- Notwithstanding the reservations which the IFP and Prince Buthelezi had regarding the TRC, they made written and oral representations to the TRC at the appropriate stages. The TRC has no taken account of these representations in arriving at its findings.

- In many instances the TRC's findings are based on unreliable, uncorroborated or hearsay evidence provided by persons who acknowledged that their conduct constituted an offence or delict. These persons sought amnesty in respect of such conduct which could only be granted if a link between their conduct and a political objective was established. This resulted in untruthful, unreliable or generally vague evidence which in some cases reflected adversely on the IFP or Prince Buthelezi. Such evidence should not have been accepted at face value by the TRC.

- The TRC acted contrary to the provisions of section 30 of the Act which required it to act in a procedurally fair manner and give notice of its contemplated findings to persons who might be implicated. The requirement of procedural fairness was aimed not only at protecting those persons who might be adversely affected but also at enabling the TRC to assess the other side of any given story or allegation. Firstly, the TRC failed to give the IFP and Prince Buthelezi notice of most of its contemplated findings. This meant that they were not afforded the opportunity of rebutting such findings and did not allow the TRC to consider their response to any particular allegation. Secondly, in respect of certain contemplated findings the TRC gave notice of such findings but failed to identify the evidence supporting such findings to enable the IFP and Prince Buthelezi to adduce countervailing evidence. Thirdly, in those cases where adequate notice of the contemplated

findings was given enabling the IFP and Prince Buthelezi to respond thereto the TRC failed properly to apply its mind to the response submitted. Despite the rep resentations that were made rebutting these findings, the actual findings published in the interim report were in all material respects identical to the contemplated findings.

The TRC made a number of finding relating to black-on-black conflict. In this regard the figures of casualties suggested by the TRC are unsubstantiated and have been extrapolated through statistics based on an undisclosed and obviously erroneous methodology. Contrary to what is stated in the TRC's report, almost 400 Inkatha leaders were killed in a systematic plan of targeted mass assassination. More than 10,000 Inkatha members and supporters were killed and hundreds of thousands of them were dispossessed or suffered untold misery and gross human rights violations because of the armed struggle waged against Inkatha.

The TRC made certain findings relating to the KZP which suggested that on occasions they co-operated with the SAP in perpetrating gross human rights violations. These findings ignored certain relevant facts and are wrong. As the ruling part of KwaZulu, Inkatha had the responsibility of maintaining law and order. The TRC ignored the reality that Prince Buthelezi had no operational control over the KZP which, in terms of law, was under the control of the South African Government in respect of all matters relating to its deployment, training, promotion and operational control. Nothing in the TRC Report or in any credible evidence before the TRC detracts from the fact that Prince Buthelezi never ordered, authorized, approved, condoned or ratified any gross human rights violations.

Certain of the findings in the TRC report endeavour to connect crimes committed by individuals or groups operating at community level with the IFP or Prince Buthelezi. In particular the TRC has in its report reconstructed events relating to the training of 206 young people by the SADF in the Caprivi Strip. The findings in this regard are erroneous and in conflict with the approach taken by the Durban Supreme court to similar evidence before it in extensive criminal proceedings. These people were chosen on the basis of criteria determined by the SADF and trained by it in accordance with its chosen requirements. The training was requested by the KwaZulu Government solely to protect the lives of government officials and the integrity of government structures and assets which were being targeted by terrorism and insurrection related to the armed struggle. Prince Buthelezi was at the time reliably informed of ANC plans to assassinate him, which information was confirmed before

the TRC in the testimony of President Mbeki. The KwaZulu Government never had operational control of these trainees. No basis exists for suggesting Prince Buthelezi could have believed that 206 barely trained security guards could be deployed against hundreds of thousands of ANC cadres who were well equipped and well trained by Soviet and Cuban military personnel.

In fact, Inkatha and the KZG were the only major participants in the conflicts of the past which had no control over a private army to be deployed for political purposes. Private armies were available both to the exiled political forces, such as the ANC and the PAC through the military training camps abroad, as well as to the leaders of the TBVC states and, obviously, to the SAG. Prince Buthelezi's refusal to accept nominal independence was, as admitted by former State President FW de Klerk, the major cause of the demise of the great scheme of apartheid, as it prevented the SAG from consolidating its claim that the white minority was no longer ruling over the majority of disenfranchised black South Africans. The fact that the Zulu people remained South Africans and did not have an independent state, forced the chief Minister of the KZG to provide for their security.

This as the background leading to the training of the Caprivi trainees which was fully scrutinized during the 8 month Malan trial referred to in the TRC report. The trial court found nothing illegal in such training. In arriving at its conclusions the TRC failed to pay proper regard to the evidence before the Court and its judgment.

The TRC in making certain findings in relation to self protection units misconceived their true nature. The training of SPUs was legal and was intended to achieve legal purposes relating to community policing and defense supervised by the National Peace Accord. Factually, SPUs never became involved in the conflict of the past. The only contrary evidence available to the TRC was that of someone whose political allegiance changed from the IFP and its Leader. He was involved in the setting up of a military camp for self-protection training, which he did without any knowledge of the IFP Leader. The TRC never offered the opportunity to the IFP to produce evidence to counter the false testimony placed before it, during in camera hearings at which the IFP was not represented no afforded an opportunity to test such evidence.

The TRC wrongly concluded that the IFP and its Leader could have made plans to disrupt the April 1994 elections by deploying a thousand people trained for a few weeks, against the combined might of the SAP, the SADF and MK, the ANC's private army. In fact, the IFP and its Leader never considered any plan to disrupt the April

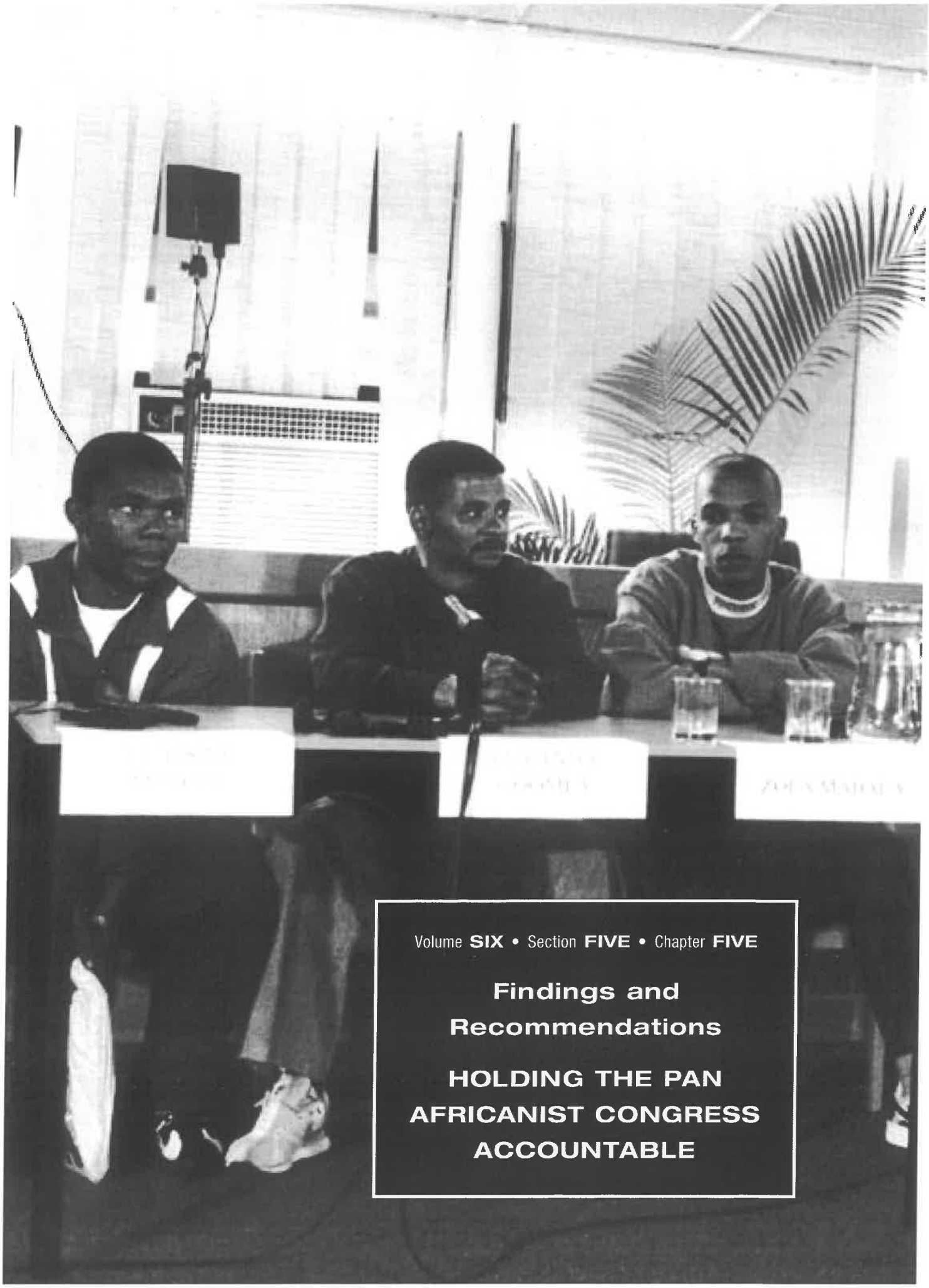
1994 elections, the Central Committee (the decision making body of the IFP) never passed a resolution to that effect and the IFP's structures were never involved in any illegal activity. When the IFP expressed its opposition to the 1994 elections, it did so in a principled fashion, relying on its usual methodology of passive resistance and nonviolence, by exercising its democratic option of not participating in such elections.

In various findings made by the TRC against the IFP it sought to create links between a variety of violent activities taking place within community dynamics and individual crimes on the one hand and Inkatha on the other hand. At no stage did Inkatha advocate a policy of violence. In fact, the public and private pronouncements of Inkatha's leader, Prince Buthelezi, indicate that he constantly urged members and supporters to refrain from violence. The TRC has ignored this body of evidence and has sought to rely on a statement by Prince Buthelezi reiterating the recognised principle that people are entitled to self defence and a statement in the KwaZulu Legislative Assembly in which he reaffirmed his legal responsibility to protect public officials and government assets against acts of violence.

The TRC has tried to make the findings against the IFP mirror the findings made against the South African Government and the ANC. Through the chain of command within the armed struggle the ANC had control of and was responsible for the violence and gross human rights violations committed by its members and supporters, who were acting in accordance with ANC stated policies. The same applies in respect of the covert operations of the South African Government and the illegal activities of the SAP and the SADF, which were conducted within the parameters of an existing structure accountable to certain leaders. In the IFP there was no chain of command or integrated structure which can in any way link community and individual violence to Inkatha or its Leader. In making its findings the TRC had ignored the absence of any causal link and has incorrectly adopted an extended notion of accountability.

Prince Buthelezi served simultaneously as President of the IFP and the Chief minister of the KwaZulu government and during the period 1982-1994 was the Minister of Police in the KwaZulu Government. The TRC sought to hold Prince Buthelezi politically accountable for the commission of gross human rights violations allegedly perpetrated by the entities by virtue of the positions which he held. As appears from this appendix prince Buthelezi does not accept that he can be held accountable, politically or otherwise, in his representative capacity for the commission of any gross human rights violations.

The TRC sought even to connect the IFP to the activities of the groups known as the 'Black Cats' and the 'Toaster Gang' as well as the activities of other groups which perpetrated violence within community level conflicts. Within this context the TRC adopted the expression 'hit squads' to refer to any group of people involved in community violence, suggesting that such people were structurally organized for such nefarious purposes and constantly involved in their pursuance. The reality is that the overwhelming majority of violence by Inkatha's members and supporters was the produce of occasional activities of unstructured groups without any underlying plan. On the contrary, the evidence submitted to the Goldstone Commission demonstrates that the violence targeted against Inkatha followed systematic and well strategized patterns and was the product of an underlying political campaign.



Volume **SIX** • Section **FIVE** • Chapter **FIVE**

Findings and Recommendations

HOLDING THE PAN AFRICANIST CONGRESS ACCOUNTABLE

Volume **SIX** Section **FIVE** Chapter **FIVE**

Holding the Pan Africanist Congress Accountable

FINDINGS

1. In its Final Report, the Truth and Reconciliation Commission (the Commission) made findings of accountability against the Pan Africanist Congress (PAC) in respect of the commission of gross human rights violations.

2. The Commission stated in its report that it recognised the PAC as a legitimate liberation movement which had waged a just struggle against the apartheid government. However, in the course and conduct of that struggle, it had committed gross violations of human rights.

3. While the PAC did not formally commit itself to upholding the provisions of the Geneva Conventions or the Additional Protocols, it was nevertheless bound by international customary law and, in particular, by international humanitarian law.

4. The Commission made three major findings against the PAC. It made a finding against the PAC's armed grouping of the 1960s, Poqo; a finding against the PAC for violations committed in exile, and a finding against its armed wing APLA in the later period.

FINDING ON POQO

5. The Commission stated in its Final Report that:

While the Commission takes note of the explanation tendered by the PAC that its activities in the early 1990's need to be understood in the context of the 'land wars of the time', it nevertheless finds that the PAC and ***Poqo*** *were responsible for the commission of gross violations of human rights through* ***Poqo's*** *campaign to liberate the country. This unleashed a reign of terror, particularly in the Western Cape Townships. In the course of this campaign, the following groups suffered gross violations of their human rights:*

- Members of the police, particularly those living in Black townships;
- The so-called 'Kataganese', dissident members of the PAC who opposed

the campaign and were subjected to physical attacks and assassinations by other Poqo members;
- Representatives of traditional authority in the homelands, that is Chiefs and headmen;
- White civilians in non-combat situations.[69]

6. In making these findings, the Commission relied on evidence received from victims and witnesses who made statements and submissions to the Human Rights Violations Committee. In terms of the evidence received, the commission of human rights violations by PAC members began with the activities of its 1960s armed grouping, Poqo. These included forcible conscription drives and attacks on the South African Police, white civilians, and alleged 'collaborators' and 'dissidents' within the movement.

7. Poqo's activities in the early 1960s unleashed a reign of terror, particularly in the Western Cape townships, where it adopted aggressive conscription methods. These allowed no room for dissent and at times resulted in violent intolerance towards members and outsiders who criticised or failed to support its methods.

8. The Commission found that Poqo militants targeted civilians indiscriminately, particularly in the November 1962 Paarl attacks, which resulted in the killing of two white civilians. It found that these attacks (on the prison, the police station and the private homes of white residents) were locally planned and executed in response to serious local grievances arising from the strong enforcement of influx control and the corruption of Bantu Administration Board officers. Although not officially sanctioned by the regional or national PAC leadership, the Paarl attacks fell in line with a mass uprising planned for 8 March 1963, which specifically targeted whites and government agents.

9. The February 1963 attack on a group of whites sleeping at the roadside near Bashee (Mbashe) River Bridge in Transkei, in which five whites were killed, was also found to be an indiscriminate targeting of civilians. A massive police crack-down on the PAC followed. Fifty-five people were subsequently charged with murder, of whom twenty-three were convicted and sentenced to death.

10. The PAC told the Commission that the incident needed to be understood in the context of the land wars of the time. Families were being forcibly moved from

69 Volume Five, p. 244.

their plots and homes without compensation to make way for the construction of a new road between Umtata and Queenstown. In the light of this, the PAC considered their attack to be purely defensive.

11. The Commission took note of the explanation but nonetheless found the PAC and Poqo to have been responsible for the commission of gross violations of human rights in its indiscriminate targeting of civilians.

12. In 1962 and 1963, Poqo members engaged in attacks on representatives of traditional authorities in the homelands, killing two headmen in the St Marks district of Cofimvaba in the Transkei. The attacks were described by the PAC as 'aimed at those headmen and chiefs assisting the dispossession of African people through the rural rehabilitation scheme'. On 12 December 1962, armed Poqo members were intercepted by police while on their way to assassinate Chief Kaiser Matanzima. An armed clash took place at Ntlonze Hill in the Transkei. Seven Poqo members were killed in this encounter and three policemen were seriously injured. The Commission considered this incident to be in the nature of a military encounter in which both sides were armed. It concluded, therefore, that the injuries to the policemen and the deaths of the Poqo members did not constitute gross human rights violations.

13. In the early 1960s, a group of disaffected PAC supporters, dubbed the 'Katangese', began operating outside the PAC's policy framework. They soon became the targets of physical attacks, attempted assassinations and attacks by Poqo gangs.

14. The PAC considered police officers to be an extension of the apartheid machinery and hence legitimate military targets. Spies and informers fell into this category as well. Dissidents in the movement were treated as the 'enemy'. It needs to be remembered that there were continual fears that the liberation movement would be infiltrated by those in the employ of the state. Not unnaturally, vigilance tended to spill over into paranoia.

15. The PAC deliberately targeted 'white farmers' as they were considered to be 'settlers' and thus 'acceptable' targets for killing.

16. The activities of Poqo belong to the 1960s and it is not surprising that the Commission received no amnesty applications from members of Poqo for violations committed during this period. Nor did the PAC furnish the Commission

with any further information related to these matters, providing no reason for the Commission to change its findings in respect of Poqo.

17. The finding with respect to Poqo thus remains unchanged.

FINDING ON PAC 'INTERNAL' VIOLATIONS

18. Like the African National Congress (ANC), the PAC executed a number of persons in custody in their camps without due process. This was usually on the instructions of its high command. In terms of the Protocols, such killings are considered to be grave breaches of the conventions.

19. In its Final Report, the Commission made the following finding:

The Commission finds that a number of members of the PAC were extra-judicially killed in exile, particularly in camps in Tanzania, by APLA cadres acting on the instructions of its high command, and that members inside the country branded as informers or agents, and those who opposed PAC policies were also killed. All such actions constituted instances of gross violations of human rights for which the PAC and APLA are held to be responsible and accountable.[70]

20. In assessing this finding, it is important to note that the violations that occurred in the ranks of the PAC in exile were largely the result of divisions within the PAC leadership, military command structures and APLA members. Evidence received by the Commission revealed that many such violations took place. Whilst the Commission received a number of statements from victims regarding their treatment in exile, it received only one amnesty application in connection with these violations. Unlike the ANC leadership, the PAC leadership made no submissions on this issue to the Commission.

21. The Commission also received statements from families of individuals who went 'missing in exile', and heard evidence of the killing and attempted killing of PAC cadres in exile for which the PAC was allegedly responsible. It also received evidence in respect of a number of cases of assault and torture in PAC camps in Tanzania. Assault and torture were used as mechanisms to deal with suspected dissidents or infiltrators. The PAC did not have a security division responsible for handling such matters. Nevertheless, sections 1.4 and 1.5 of its Disciplinary Code provided constitutional justification for the use of 'firm iron discipline' and

70 Volume Five, 'Findings'.

for 'chopping off without ceremony' factional elements in the movement, 'no matter how important'.

22. The Commission found the PAC responsible for the extrajudicial killing and attempted killing of a number of PAC members in exile, particularly in the camps in Tanzania.

23. In reviewing these findings, the Commission records that it received no further information affecting the substance of this finding subsequent to the publication of its Final Report. Moreover, it reiterates that the Geneva Protocols applied to the PAC, even though the latter may not have considered itself bound by its provisions. The Convention on Torture makes it clear that torture is not permitted in any circumstances. Hence, cases of torture clearly constitute contraventions and gross human rights violations. Moreover, the execution of persons in custody without due process is considered to be a grave breach of the Protocols.

24. There is thus no reason, compelling or otherwise, for the Commission to change its findings in respect of these incidents.

VIOLATIONS AGAINST PAC MEMBERS AT HOME

25. The PAC was also responsible for violations against its own members inside South Africa after 1990, for which five applications for amnesty were received. In the main, they involved the killings of suspected informers. The Commission found the PAC responsible for the killing and attempted killing of members branded as informers and agents, as well as of those who opposed PAC policies.

26. The Amnesty Committee received four amnesty applications for the killing of three individuals suspected of collaborating with the security police. In one instance, a fellow PAC and APLA member was seen in the company of a police officer and was allegedly overheard talking to him and promising to report on a PAC meeting. He was killed. The amnesty committee accepted the amnesty applicant's explanation.[71]

27. In another application, an amnesty applicant took a decision to kill a comrade whom he regarded as an informer. Although he failed to do so, he himself was injured and captured in the course of his last attempt. He applied for amnesty for

71 See Section Three, Chapter Four of this volume.

the attempted killing. The Amnesty Committee accepted his version and his proposition that the attempted killing of this police informer was politically justified.[72]

FINDINGS ON GROSS HUMAN RIGHTS VIOLATIONS COMMITTED BY PAC/ APLA DURING ITS ARMED STRUGGLE

28. The Commission's major finding on the Azanian People's Liberation Army (APLA) was in respect of the commission of gross violations of human rights committed in the course of the armed struggle inside the country during the 1980s and 1990s.

29. The Commission stated that:

[w]hile the PAC proclaimed a military strategy of a protracted people's war, which involved the infiltration of guerrillas into the country to conduct rural guerrilla warfare and attacks in the township, in actuality, the primary target of its operations were civilians. This was especially so after 1990 when, in terms of its 'Year of the Great Storm' campaign, the PAC/Apla targeted whites at random and white farmers in particular.

30. The Commission noted but rejected the PAC's explanation that the killing of white farmers constituted acts of war. To the contrary, the Commission found PAC actions against civilians and whites to have constituted gross violations of human rights for which the PAC and APLA leadership was held morally and politically responsible and accountable.

31. The Commission found that:

[t]he targeting of civilians for killing not only constitutes a gross violations of human rights of those affected but a violation of international humanitarian law. The Commission notes but rejects the PAC's explanation that its killing white farmers constituted acts of war for which it has no regrets and apologies. To the contrary, the Commission finds PAC action directed towards both civilians and whites to have been a gross violation of human rights for which the PAC and Apla leadership are held to be morally and politically responsible and accountable.

32. In dealing with this issue, an important factor to bear in mind is the PAC's political platform, captured in a statement made by Brigadier Mofokeng at the armed forces hearing:
The enemy of the liberation movement of South Africa and of its people was

72 Ibid.

always the settler colonial regime of South Africa. Reduced to its simplest form, the apartheid regime meant white domination, not leadership, but control and supremacy. The pillars of apartheid protecting white South Africa from the black danger, were the military and the process of arming of the entire white South African society. This militarization, therefore, of necessity made every white citizen a member of the security establishment.

33. The vast majority of amnesty applications fall into this category and will be considered in greater detail below.

SUBMISSION MADE BY THE PAC IN RESPONSE TO THE FINDINGS MADE BY THE COMMISSION

34. In terms of section 30 of its founding Act, the Commission sent the PAC a notice setting out its proposed findings on 27 August 1998. The PAC responded on 21 October 1998 through its secretary-general, Mr Ngila Muendane. The response reached the Commission's offices after the cut-off date and was not considered or taken into account at the time of the publication of the Commission's Final Report. In reviewing its findings, however, the Commission returned to the submission made by the PAC.

35. The first objection that the PAC raises in the submission is that the Commission labelled it a gross violator of human rights. The PAC argues that, if the Commission determined that its struggle was just, it was contradictory to find it a violator of gross human rights. The PAC made this point again after the Commission had handed over its Final Report to President Mandela in October 1998.

36. The second issue raised by the PAC was that of 'legal equivalence'. This echoed objections raised by the ANC that violations committed by members of the liberation movements were given legal equivalence to those perpetrated by members of the security forces.

37. Beyond this, the PAC did not respond in any detail to the Commission's findings; nor did it make reference to the problems and reservations it had raised with the Commission while the process was underway. Instead, it affirmed the work of the Commission, despite some general reservations on the Commission's findings on the liberation movements in general.

PAC COMMENTS DURING PARLIAMENTARY DEBATE

38. In the parliamentary debate on the Commission's Report, held on 25 February 1999, PAC President Dr Stanley Mogoba noted that the Commission had revealed the painful truth of past apartheid atrocities but had not succeeded in bringing about reconciliation:

The TRC unavoidably opened the wounds of many families who were hurting in silence. The skeletons of this country came tumbling out of the cupboards. Some of us who had experienced the terrible side of the apartheid repression knew some of the truth, but only a fraction of the truth.

39. However, while Dr Mogoba praised the Commission for 'the positive contribution' it had made in 'the manner in which it revealed the painful truth of past atrocities and shocking barbarity during apartheid', he criticised it for condemning the liberation movements for atrocities perpetrated during the liberation struggle:

Although the context of hostilities, war and the struggle for survival is grudgingly admitted, the condemnation is nevertheless made. How we may ask, can people who were fighting and killing to uphold an oppressive and inhuman apartheid system, which was roundly condemned as a crime against humanity, be placed on the same scales of justice with the victims of that system?[73]

40. This, indeed, was the criticism levelled at the Commission by all the liberation movements, despite the fact that they themselves had played a leading role in drafting the legislation that required the Commission to adopt an 'even handed' approach to the commission of gross human rights violations. The legislation did not make a distinction between the state and any other party. It required the Commission to investigate *all* gross human rights violations. Moreover, in making its findings, the Commission found the former apartheid state to be the major perpetrator responsible for state-sponsored violence.

41. The Commission considered that the war waged by the liberation movements was a just war and upheld the finding of the United Nations that apartheid was a crime against humanity. Thus the fight against the apartheid government was considered to be just and legitimate. Reference should be made to Additional Protocol I to the Geneva Conventions of 1949 covering armed conflicts in which

73 *The Sowetan*, 30 October 1998.

74 Provisions relating to Geneva Convention of 1949 relating to the protection of victims in armed conflicts, (Protocol 1) 1125 53 U.N.T.S.

people are fighting against racist or colonial regimes,[74] which was specially created to deal with the struggles being conducted in South Africa and Israel. The conflict was therefore regarded as an international armed conflict.[75]

42. The PAC sought disingenuously to blur the lines between a 'just cause' and 'just means', striving to make the point that, if the struggle it waged was just, it could not possibly be a violator. Their point of departure was that, if the cause is just, it follows that the actions performed in support of that cause must also be just. In terms of the Geneva Convention and the Protocols, the means used also have to be just.

43. Taken one step further, the PAC insisted on the view that anybody they considered to be the enemy in terms of their own policy constituted a 'legitimate' target. This view is contrary to the provisions of international humanitarian law, which considers the only acceptable or legitimate target to be a 'combatant'. In addition, civilian casualties are perceived to be grave breaches of the Geneva Conventions and the party responsible for the killing is considered to have committed a gross violation of human rights.

44. The PAC also makes the point that the majority of people who die in war are innocent and that that is the very nature of war. This assertion, of course, evades the fundamental purpose of international humanitarian law which is to ensure that innocent people such as civilians are not killed, maimed and tortured and that they, particularly, are protected from the impact and ravages of war.

Application of the Geneva Conventions

45. The Geneva Conventions and the Additional Protocols set out comprehensively the situations in which grave breaches are said to be committed.[76] The Geneva Conventions stipulate that, even if one of the parties in a conflict is not a party to the Conventions, the other party will remain bound. Article 1(2) of Protocol I specifically states that, in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience. Reference was made in the chapter dealing with the ANC[77] to the fact that this Protocol was intended to deal with those situations where 'peoples are fighting

75 See this section, Chapter Three, 'Holding the ANC Accountable'.

76 See Appendix 2 to Chapter One of this section.

77 Chapter Three of this section

against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration of Principles of International law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. These Conventions are designed to limit the brutality of war and the loss of civilian life and, in particular, to hold accountable those who wage war in an unacceptable fashion.

46. Common Article 3 defines what kinds of acts constitute violations. There are a total of four acts that, if committed in respect of 'persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause' constitute grave breaches. They include the following:
    a violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
    b taking of hostages;
    c outrages upon personal dignity, in particular humiliating and degrading treatment, and
    d the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.

47. Given the provision of Common Article 3, it can be seen that this argument of the PAC is disingenuous and cannot be taken seriously. Whilst it is true that innocent people lose their lives, it is by no means acceptable that they should do so.

FINDINGS

Police officers as 'legitimate' targets

48. The PAC makes the assertion that they considered all police officers to be legitimate targets because they were the agents of apartheid and thus criminals. Their involvement with the apartheid government made them a legitimate target of the liberation movement.

49. An anomalous factor is that the vast majority of attacks against police officers took place at times when they were technically off duty. In most of these

instances, their houses were attacked and often their families were included in the attack.

50. In this regard, the PAC makes the point that one cannot draw a distinction between the period when police officers are at work and the period when they are off duty. It asserts further that, even when they were off duty, they were reporting to the state.

51. The main thrust of the PAC's argument is that police officers were considered by the vast majority of township residents to be agents of the state, and that in the eyes of the liberation movements they were regarded as collaborators and therefore constituted legitimate targets. The question of being on or off duty or in plain clothes or uniform was not at issue.

52. There is no doubt that police officers were perceived by ordinary people to be an extension of the state and thus legitimate targets of the liberation movements. In most of the townships, police were perceived to be the enemy and in many instances played the role of maintaining the apartheid government's power. This is not true of all police officers, but it is certainly true of the vast majority who became police officers during the apartheid era. One of the most painful experiences for most members of the community was the fact that police officers were an extension of apartheid authority and were responsible for carrying out many brutal acts against members of the community. In a number of instances, they were responsible for the arrest and detention of loved ones. In a vast number of cases, black policemen were responsible for the torture of activists in the townships.

53. In its submission, the PAC makes the point in vivid language:

When is a criminal not a criminal? Is he a criminal only when he commits a crime and stops being such when he retires to his bedroom at night? Would we say that the police must stop pursuing him simply because his now with his family and enjoying a Sunday meal.

54. It goes on to make the point that the apartheid government did not make that distinction.

55. The PAC points out that, in terms of their own definitions, 'all police were the enemies of oppressed people because under that system they were obliged to work even when they were off duty'.

56. However, even if one accepts the argument that police officers were an extension of the apartheid system and thus legitimate targets, this does not remove from the PAC responsibility for attacks on police officers when they were *hors de combat* or when, unacceptably, innocent family members were killed or injured in these attacks.

57. Furthermore, it is not correct to assume that all police officers collaborated with the former state. In many instances, they joined the force because there was little opportunity for them to do anything else. Are they to be considered any more complicit in the apartheid system than magistrates or other persons who accepted jobs in the apartheid system?

58. If one accepts the argument that police officers were an extension of the apartheid apparatus, does this make a police station a legitimate target? In one case, applicants sought amnesty for an attack on a police vehicle in Diepkloof during which one policeman was killed and another injured.

59. In another incident, amnesty was sought for an attempted attack on the Yeoville police station. In this particular incident, the applicants were intercepted before they got to the police station. However, one SAP member was injured in the crossfire that ensued.

60. A question that must be considered is: Are all policemen who served in the apartheid force to be considered combatants and thus legitimate targets?

61. If one accepts the PAC's argument with regard to police officers, then neither the PAC nor ANC can be held responsible for the commission of gross human rights violations for these attacks. However, if one applies a strict interpretation of the Conventions, they would nevertheless be held accountable.

Traditional leaders as 'legitimate' targets

62. The PAC treated traditional leaders who co-operated with the state as an extension of the apartheid system and thus as legitimate targets.

63. In 1962, members of Poqo attacked representatives of traditional authority in the homelands, killing two headmen in the St Marks district of Cofimvaba, Transkei. These attacks were described by the PAC as being 'aimed at those headmen and chiefs assisting the dispossession of African people through the rural dispossession scheme'.

64. On 12 December 1962, armed Poqo members were intercepted by police while on their way to assassinate Chief Kaiser Matanzima. An armed clash took place. In this encounter, seven Poqo members were killed and three policemen seriously injured. In its original report, the Commission considered this to be a combat situation.

65. The question these incidents raise is whether those who became part of the apartheid system became legitimate targets as identified by the PAC. The above situation relates to but one example of the iniquity of the apartheid system, which dispossessed people of their land, often violently, and frequently replaced hereditary leadership with chiefs of their own. Yet the targeting of traditional leaders and chiefs cannot be condoned and must constitute a gross human violation. Thus the motivation for the attacks can be understood but not condoned.

Civilians and farmers as 'legitimate' targets

66. In its second submission to the Commission, the PAC confirmed its earlier stance that whites under apartheid were beneficiaries of the system, that every white person was part of the defence lines of apartheid, and that the Commission had to accept that every white home during the apartheid era was some kind of garrison.

67. While the Commission did not deal conclusively with the notion of 'beneficiaries', there is no doubt that white people were the beneficiaries of apartheid and its largesse. White people cannot escape the fact that being white in South Africa enabled them to benefit from the system at the expense of the black majority. Having said that, the Commission cannot accept the argument that every white person must be considered part of the apartheid defence system

and that every white home must be considered to be a garrison. This is absurd and must be rejected. There were a large number of white people who not only opposed apartheid but who also fought against it in a variety of different ways, including the taking up of arms.

68. An analysis of the amnesty applications received from the PAC reveals that a total of thirty-two applications were received for attacks on civilians. In these incidents, twenty-four people were killed and 122 seriously injured.

69. These attacks formed part of the PAC's 'Operation Great Storm'.

70. A number of applicants claimed that the attacks were not motivated by racism. Rather, as whites were seen to be complicit in the government's policy of apartheid, they constituted a legitimate target.

71. Mr Letlapa Mphahlele, APLA director of operations, stated at a media briefing in Bloemfontein on 28 October 1997 that APLA offered no regret or apology for the lives lost during 'Operation Great Storm' in 1993. He said that his 'proudest moment was seeing whites dying in the killing fields'. He also accused the Amnesty Committee of being 'a farce and a sham' which sought to 'perpetuate white supremacy'.

72. Despite such spurious attacks on the Amnesty Committee, there is no doubt that the Committee considered the arguments of applicants very seriously – with the result that APLA members received amnesty for the most heinous of crimes on the basis that they complied with the requirements of the amnesty process. The Amnesty Committee has itself sustained serious criticism for some of these decisions, which many felt represented too generous an interpretation of 'proportionality'.

Attacks on civilians

73. Attacks on civilians included those made on the King William's Town Golf Club; Steaks restaurant in Claremont, Cape Town; Yellowwoods Hotel, Fort Beaufort; St James Church in Kenilworth, Cape Town; the Heidelberg Tavern in Observatory, Cape Town, and Amy Biehl in Guguletu, Cape Town.[78]

78 Amnesty applications for targeting white civilians are detailed in this volume, Section Three, Chapter Four.

74. A common feature of these attacks is the fact that they involved indiscriminate attacks on civilians. Whilst applicants have stated in their amnesty applications that the intended targets were military or security force personnel, no proper investigation was carried out to determine whether their perceptions were correct. In fact, in most of the incidents, their information or intelligence was incorrect and suspect.

75. In terms of the Geneva Conventions, civilians are protected by principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. There can be no justification for the choice of civilians as targets.

76. The amnesty decisions have supported the stance the Commission took with regard to attacks on civilians. No compelling evidence has been provided to the Commission to persuade it to change its findings in respect of the attacks on civilians. Indeed, the evidence that emerged from amnesty hearings supports the original findings. While the motive for the attacks are understood and, in most instances, the Commission can understand the rage that motivated them, motive cannot change the fact that the victims in most cases were innocent civilians who were unarmed.

77. The findings that the Commission made in respect of the PAC and APLA in regard to attacks on civilians must stand.

Farmers as 'legitimate' targets

78. The Commission made findings against the PAC and APLA for their indiscriminate attacks on farmers. The second submission made by the PAC is curious in this respect, suggesting that, in making this finding, the Commission is biased in favour of white people. The rest of the PAC's argument is fairly spurious.

79. The Commission received a total of twenty-seven applications from the PAC and APLA for attacks on farms, committed between the period 1990 and 1993. In these attacks, twelve people were killed and thirteen injured. The majority of these applications were granted.

80. APLA and PAC operatives testified that it was part of their strategy and policy in terms of 'Operation Great Storm' that farmers would be attacked in order to drive white farmers from their farms in order to get their land back.

81. These operations involved the deliberate targeting of white farmers and are quite unlike the ANC's landmine operations in farming areas. Whilst it is true that farmers in many of the border areas were trained and issued with weapons so that they could take part in commandos patrolling the area, not all of the farmers so targeted were an extension of the apartheid system.

Specific amnesty applications dealing with attacks on white farmers

82. One of the incidents for which amnesty was applied involved an attack on Mr RJ Fourie on the farm 'Stormberg'. Mr Fourie was attacked from behind, ambush style, and killed. A witness made a submission to the amnesty committee to the effect that the deceased was not interested in politics and was known to be a progressive farmer in the area. He had assisted his workers to improve their stock, housed them in brick houses with running hot and cold water and built a school for their children on the farm, as well as a soccer club.

83. In another incident, the amnesty application involved the killing of Mr John Bernard Smith, also a farmer. Mr Oliphant, one of the applicants, testified that it was the objective of the PAC to wage the struggle for the return of land to the African people, which was why he had become involved in that operation. Another applicant testified that it was part of PAC policy to intensify the armed struggle in order to strengthen the hands of the PAC in the negotiating process. He described the attacks on the farmers as one of the phases of the campaign. The PAC believed that the farming community had participated in the dispossession of the African people and that they were beneficiaries of the land taken away from the Africans.

84. None of the reasons advanced in any of the amnesty applications can condone the fact that, in most of the attacks, the farmers targeted and killed were ordinary civilians, in no way linked to different commando groups. They cannot therefore be seen as an extension of the security forces. In terms of the Conventions, they do not, therefore, constitute a legitimate target. Nor are they considered combatants.

85. The finding made in respect of findings of accountability for gross human rights violations committed against farmers by the PAC and APLA must therefore stand. They were responsible for the commission of gross human rights violations. In most instances the nature of the attack was almost that of an ambush.

PAC/ANC conflict

86. The Commission received four applications for offences committed in the course of the conflict between the PAC and the ANC. While the applicants received amnesty, the evidence led at the hearings cast doubt on whether they were dealing with each other in a combat situation. The evidence that was led spoke of the ongoing violence in the area, but the targeting of opponents often resulted in innocent people being killed. Nevertheless, the PAC must accept responsibility for these killings, which constitute gross human rights violations.

Applications refused

87. The Committee received a number of amnesty applications from persons in custody, which it refused either on the grounds that the incidents were not politically motivated or on grounds of lack of full disclosure. In most of these incidents, the applicants remain in custody serving sentences.

88. The leaders of the PAC maintain that a number of their cadres are languishing in apartheid jails and that special arrangements should be made to pardon them. At a parliamentary briefing after the debate on the Commission's report, Dr Stanley Mogoba, the President of the PAC, made a call to the State President to pardon 'the many freedom fighters who are still languishing in our prisons'.

Now that the TRC work is finished – or is about to be finished – it is time, perhaps, to call on our President, perhaps as a farewell gift or gesture, to give Presidential pardon to these prisoners from the liberation struggle. Many grieving families would be eternally grateful to our President for that. I also want to say that this argument and this discussion must be separated from the discussion on general amnesty. I am not talking about general amnesty.

DIFFICULTIES EXPERIENCED BY PAC APPLICANTS

89. It is important for the Commission to acknowledge the great difficulty that the PAC/APLA cadres experienced in filing proper amnesty applications. They were hampered by the fact that, at the time, the Legal Aid Board appointed inadequate Counsel to assist them. In many instances, counsel did not bother to read the Commission's founding Act or endeavour to understand it. It was only after legal practitioners such as Mr Bandazaya were appointed that these applicants began to be properly represented.

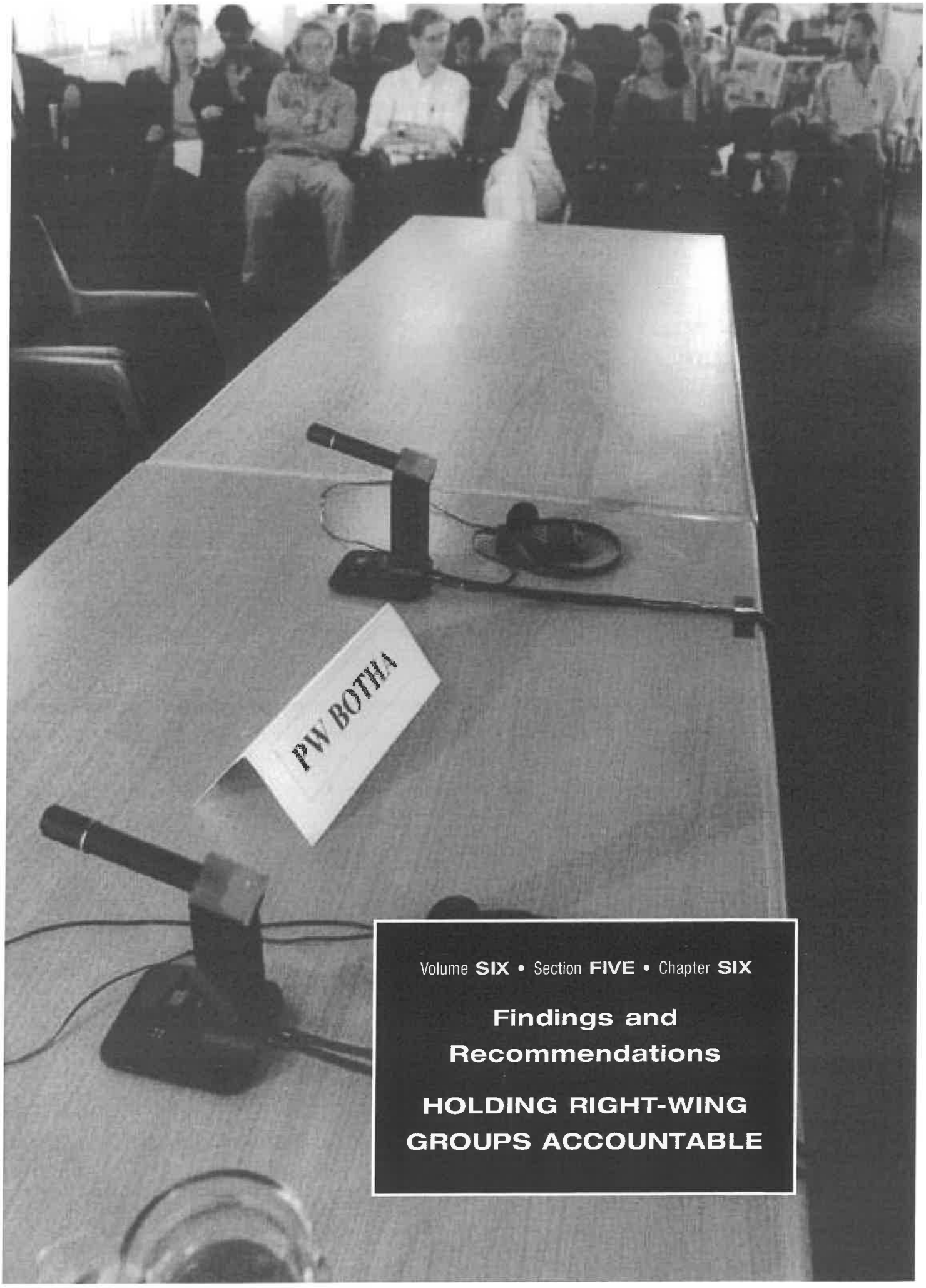
90. There is no doubt that a number of people still in custody did not apply for amnesty for a variety of reasons, including the fact that they were not properly advised. The government will need to consider this issue from a humanitarian point of view. It is commendable that the President of the PAC does not consider that another amnesty deal should follow.

Pardons

91. Recently the President pardoned a number of PAC amnesty applicants who had been denied amnesty by the Committee. This decision was widely criticised by civil society and victims, as the pardons were perceived to be a ploy to grant amnesty using the 'presidential pardon' process. There has been a demand from civil society that the President explain why he took this decision, as the use of the presidential pardon to grant amnesty is seen as undermining the work of the Commission whose mandate it was to grant amnesty on an accountable basis.

CONCLUSION

92. The evidence that emerged from the hearings of the Amnesty Committee did not lead to any alteration in the findings of the Commission as recorded in the Final Report.



Volume **SIX** • Section **FIVE** • Chapter **SIX**

Findings and Recommendations

HOLDING RIGHT-WING GROUPS ACCOUNTABLE

Holding the Right-Wing Groups Accountable

INTRODUCTION

1. The Truth and Reconciliation Commission (the Commission) made findings against right-wing opposition groups in its Final Report.[79] These findings were based on the evidence and testimony it received. This included speeches that had been made by senior leaders inciting followers to commit acts of violence against those labelled 'the enemy', the arming of supporters in contravention of the law, and random racist attacks on black civilians.

2. The Commission noted that an important aspect of the insurrection was the clandestine collusion between right-wing forces, members of the security forces and the Inkatha Freedom Party (IFP). This led to the commission of gross human rights violations and the training of IFP paramilitary forces in the hope of preventing the ANC from coming to power.

3. In addition, particularly in the period leading to the holding of the first democratic elections, right-wing supporters embarked on a campaign to destabilise the country and to prevent the holding of elections. The storming of the World Trade Centre and the assistance rendered to the Bophuthatswana homeland by the right wing are examples of this. In terms of the leadership of the right wing, the Commission specifically held Generals Constand Viljoen and Peter Groenewald and Mr Eugene Terre'Blanche accountable for the reign of terror carried out by the various groups and their individual supporters.

4. At the time when the Commission made its findings on the right wing, a number of right-wing amnesty applications had already been heard. However, the Commission decided that findings would be revisited once all decisions of the Amnesty Committee became available.

79 Volume Five.

SUMMARY OF FINDINGS

5. The Commission stated in its Final Report:

In the late 1980's and early 1990's, a number of Afrikaner right-wing groups became active in the political arena. They operated in a loose coalition intent on securing the political interests of conservative Afrikaners through a range of activities seemingly intent on disrupting the negotiations process then underway. Operating both within and outside the negotiations process, members of these groups undertook actions which constituted gross violations of human rights.

6. Specifically:

The Commission finds that the Afrikaner Volksfront and structures operating under its broad umbrella were responsible, between April 1993 and May 1994, for gross violations of human rights of persons perceived to be supporters and leaders of the ANC, SACP, UDF, PAC, National party and other groups perceived not to support the concept of Afrikaner self-determination or the establishment of a volkstaat, to that end, the movement's political leaders and military generals advocated the use of violence in pursuit of the movement's aims and/or in an attempt to mobilise for an insurrection.

REVIEW OF FINDINGS

7. It is important to review the findings in the light of evidence that has emerged from the amnesty process.

Membership of right-wing groups

8. The amnesty applications reveal that many amnesty applicants claimed membership of one or more right-wing groups. In total, 107 applications were received for amnesty, with 71 per cent of the applicants claiming membership of the Afrikaner Weerstandsbeweging (AWB), 10 per cent of the Conservative party and the remaining 19 per cent claiming membership of a variety of right-wing organisations. The most prominent group was the AWB, under the leadership of Eugene Terre'Blanche. More than forty of his supporters applied for amnesty. Of these, 68 per cent of applications were granted.

Nature of violations

9. Most amnesty applications pertaining to the period prior to 1990 relate to attacks that were intensely individualist, uncoordinated and extremely racist in nature. Amnesty applications for the period after February 1990 reveal a more co-ordinated plan, with better organised and more orchestrated attacks. Two of the best-known incidents were the occupation of the World Trade Centre in 1993 and the support by members of the AWB of the Bantustan administration in Bophuthatswana in 1994.

10. The Commission agreed to the request by President Mandela that it extend the period available for amnesty applications in the interests of reconciliation in order to accommodate the right wing and the Pan Africanist Congress (PAC), the majority of whose violations took place after the original date and during the run-up to elections. This decision proved fruitless as the Commission received no further applications, particularly for the two incidents described above. Thus the argument forwarded by General Viljoen that extending the date would promote reconciliation did not impact on the process.

CONFIRMATION OF FINDINGS

Collusion between the right wing and the security forces

11. Amnesty applications confirm that in a number of incidents, covert units within the security structures assisted in arming right-wing groups. The amnesty application of Mr Leonard Veenendal[80], a member of the Civil Co-operation Bureau (CCB), confirms this.

Collusion with the IFP

12. Right-wing amnesty applicants confirmed that they formalised their ties with the IFP. They were responsible for supplying the IFP with weapons and also worked very closely with IFP groups on the north and south coasts of KwaZulu-Natal. In at least two instances, joint attacks were planned and carried out – at the Flagstaff police station and on the Seychelles restaurant. Mr Walter Felgate, formerly a member of the IFP, testified at a section 29 hearing that the right wing had offered to procure weapons to the IFP. The amnesty applications of Messrs Gerrit Phillipus Anderson and Allan Nolte confirm this.

80 See Veenendal case in Section Three, Chapter Six; [AM3675/96].

Links with international right-wing groups

13. Amnesty applications also confirm that right-wing groups had links with other international right-wing groups. However, deeply held suspicions regarding an international right-wing conspiracy in respect of the murder of Mr Chris Hani were not confirmed in the amnesty process, due to a number of factors.

Attacks on individuals

14. In their evidence, amnesty applicants confirmed that they had targeted and attacked those they regarded as the enemy. The attack by Mr Eugene Terre'Blanche and his supporters on Professor Floors van Jaarsveld[81] is an example of such an attack. His children testified in the amnesty hearing that this attack had contributed to the humiliation of their father and his loss of standing in his community. While the expressed motive for the attack was that that they regarded the new direction that Van Jaarsveld had given to Afrikaner history as contrary to the then South African Constitution, which recognised God as the highest authority, it became quite clear during the hearing that the real motivation for the attack was his willingness to accommodate change.

Attacks on black people

15. The right wing carried out a number of racist attacks[82]. One of the worst of these was carried out by Mr Barend Strydom, a member of the Wit Wolwe ('White Wolves'). The attack was carried out indiscriminately against black people, eight of whom were killed. Strydom filed an amnesty application for this attack but later withdrew the application.

16. Members of the Orde Boerevolk attacked a bus full of black commuters in Durban in which seven people were killed. The motivation they expressed for the attack was an earlier Azanian People's Liberation Army (APLA) incident. In another incident, Mr George Mkomane was killed because he was in a so-called 'white' area at night without permission.[83] What is sickening is the random indiscriminate nature of the attacks on people simply because they were black. Despite attempts by amnesty applicants to justify the political nature of these attacks, their testimony reveal that, in most instances, their motives had been

81 See Section Three, Chapter Six in this volume.
82 Ibid.
83 Ibid.

purely racist. One of the worst attacks was carried out by the AWB on innocent civilians outside Ventersdorp, which led to the killing of four people, including two children.

Possession of arms, explosives and ammunition.

17. The Commission received thirty-one amnesty applications for the illegal possession of arms, explosives and ammunition – stolen, in a number of instances, from military bases.

Sabotage of the transitional process

18. The Commission received thirty-five applications for a range of violations involving attempts to sabotage the negotiations process. These consisted of attacks on individuals and included assassinations. A number of innocent individuals were killed for no apparent reason. The killing of Mr Chris Hani by Messrs Clive Derby Lewis and Janusz Walus threatened the stability of the country in the period leading up to the elections. The constraint shown in the ranks of Umkhonto we Sizwe (MK), the African National Congress (ANC) and the vast majority of the country in dealing with the killing is testament to how deeply people were committed to making peace work.

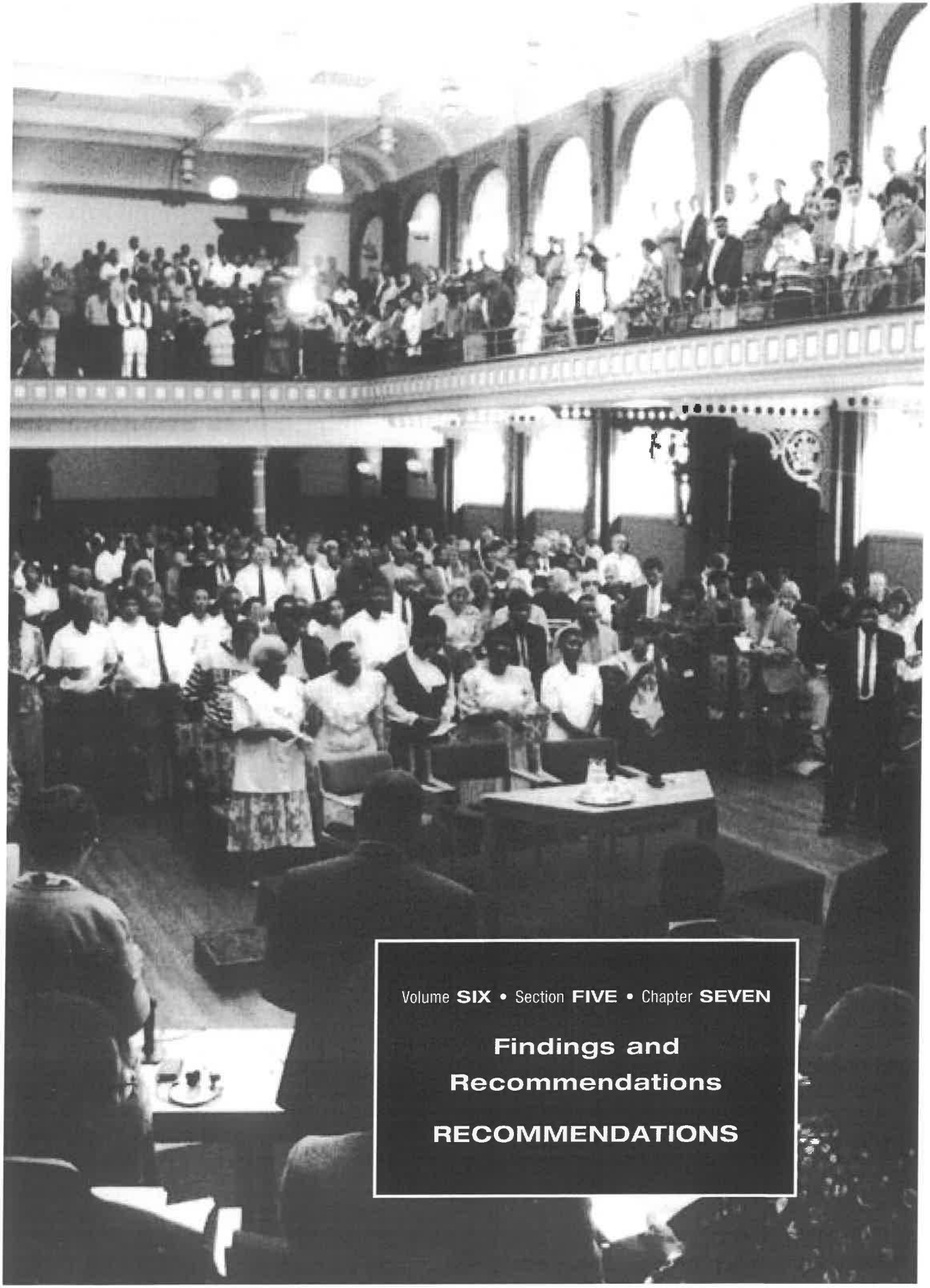
Bombings

19. The AWB, the Boereweerstandsbeweging (BWB) and the Afrikaner Volksfront (AVF) all engaged in bombing activities during the pre-election period. Much of the bombing was designed to sow terror and to destabilise the country in the period leading up to the elections. A number of offices belonging to the ANC, schools that admitted children of different race groups, and magistrates' courts were attacked. Businesses belonging to Indians were also targeted. The offices of the Independent Electoral Commission in a number of areas, as well as other institutions and offices associated with the election, were targeted and bombed, as were railway lines and power installations.

CONCLUSION

20. The evidence that emerged from the amnesty applications and hearings confirms the original findings made by the Commission in respect of right-wing groups. The testimonies of the applicants were tantamount to confessions that the right wing embarked on a campaign of terror and violence designed to destabilise the country at an extremely sensitive time. Right-wing groups were responsible for committing gross human rights violations as defined by international human rights law. In most instances, the victims were innocent civilians whose only 'sin' was the fact that they were black. The motive for these violations was that members of the various right-wing groups were opposed to majority rule and to a change in their way of life. There was no nobility or morality to their cause, despite their attempts to justify their actions.

21. Having considered the amnesty applications and hearings on the right-wing, the Commission has no reason to change the findings it made in its Final Report.



Volume **SIX** • Section **FIVE** • Chapter **SEVEN**

Findings and Recommendations

RECOMMENDATIONS

Volume **SIX** Section **FIVE** Chapter **SEVEN**

Recommendations

RECONFIRMATION OF REPARATION AND REHABILITATION RECOMMENDATIONS IN FINAL REPORT

1. The Truth and Reconciliation Commission (the Commission) reconfirms the Reparation and Rehabilitation Committee's recommendations drawn up in terms of sections 25 and 26 of its founding Act[84] and set out in its Final Report.[85]

RECONFIRMATION OF RECOMMENDATION FOR A SECRETARIAT TO OVERSEE IMPLEMENTATION

2. The Commission confirms and supports the recommendation in its Final Report that a Secretariat be established in the Presidency to oversee the implementation of the recommendations of the Commission. It is recommended that the Secretariat:

    a be responsible for reporting on and publishing an annual report on the status of victims for a period of six years following the publication of this Codicil to the Commission's Final Report;
    b establish a particular presence and visibility in rural areas;
    c establish a Presidential Award for innovative and inclusive projects aimed at 'keeping the memory of the past alive' in schools, research centres and institutions of higher learning;
    d focus on reparations and democracy-related capacity-building through the specialised training of development workers.

REPARATION TRUST FUND

3. The Commission recommends and urges that a Reparation Trust be set up and trustees appointed.

4. The Reparation Fund should be managed by government, organised local and international business and civil society.

84 The Promotion of National Unity and Reconciliation Act No. 34 of 1995.
85 Chapter Five of Volume Five.

5. The purpose of the trust will be to raise funds, to audit the budget for victim support and to be responsible for financial controls and accounting.

ONCE-OFF WEALTH TAX

6. The Commission recommends and urges that government impose a once-off wealth tax on South African business and industry.

BENEFICIARY CONTRIBUTION TO REPARATION FUND

7. The Commission recommends and urges that all beneficiaries of apartheid make a contribution to the Reparation Fund.

NATIONAL PROGRAMME OF ACTION

8. The Commission recommends and urges that government and civil society adopt the national programme of action proposed by the South African Human Rights Commission, and work towards a society free of racism, xenophobia and related intolerance.

9. It proposes further that government move urgently to implement related programmes, particularly amongst young people.

ANNUAL REPORTING DURING BUDGET VOTE

10. The Commission recommends and urges that all ministers with portfolios relating to issues affecting victims report annually on the status and circumstances of surviving victims during the budget vote in parliament for a period of six years following the publication of this Codicil to the Commission's Final Report.

SPECIAL ARRANGEMENTS FOR EDUCATION

11. The Commission recommends and urges that the Department of Education, the South African Qualifications Authority and institutions of higher learning make special arrangements for entry into tertiary educational institutions of those whose secondary and tertiary education was interrupted by the struggle, as was done for those whose studies were interrupted by World War II.

KEEPING THE PAST ALIVE

12. The Commission recommends and urges that the curriculum of the South African Human Rights Commission National Education Centre include projects that aim to encourage children to keep the past alive.

TASK TEAM TO DEAL WITH DISAPPEARANCES AND EXHUMATIONS

13. The Commission recommends and urges government to act on the recommendation of the Commission in regard to dealing with disappearances and exhumations and to establish a task team to deal with these matters.

'HEALING THE MEMORY' CONFERENCE

14. The Commission recommends and urges that government convene an urgent conference aimed at healing the memory in respect of those who did not return.

CONFERENCE DEDICATED TO THE FALLEN

15. The Commission recommends and urges that government convene a conference dedicated to the memories of those who were executed or killed in such circumstances that their honour and reputation and their loyalty to their organisations were deliberately slandered by others, often causing their families and friends great distress and sometimes leading to the death and torture of family members.

APOLOGY BY HEAD OF STATE ON BEHALF OF PERPETRATORS OF GROSS VIOLATIONS OF HUMAN RIGHTS

16. The Commission recommends and urges that, as head of state, the President of the Republic of South Africa apologises to all victims on behalf of those members of the security forces of the former state and those armed forces of the liberation movements who committed gross violations of human rights.

THE COMMISSION'S DATABASE

Preamble

17. The Commission created and maintained a database to manage the data requirements of the three Committees. The database was used to register human rights violations statements and amnesty applications as they were lodged with the Commission, after which teams of data processors stored the names of the victims, the violations they suffered and details of the alleged perpetrators. During the life of the Commission, the database was upgraded to assist with the management of the work of the Reparations and Rehabilitation Committee. It is still being used by the staff of the President's Fund today to record disbursements made.

18. By the time the Commission closed, the database had become a rich repository of information about the nature, scale, location, dates, types and consequences of violations of human rights suffered by South Africans. As such, it is an essential primary source of valuable historical material, which must be made accessible to future generations.

Data provision

19. The Commission recommends that the database be owned, managed and maintained by the National Archives and Records Service of South Africa, who must take responsibility for ensuring that the database:

    a forms the cornerstone of an electronic repository of historical materials concerning the work of the Commission;
    b is enriched by electronic multi-media facilities to support audio-visual and other graphic materials;
    c is in a format that allows for distribution to schools, other educational institutions and the general public by means of CD-ROM or other portable electronic format, and
    d uses language that is accessible to the majority of South Africans.

Data reconciliation

20. The work of the Amnesty Committee continued after that of the Human Rights Violations (HRV) Committee had been completed, so a process of data reconciliation is necessary to compare and contrast the victims and violations described in

Amnesty applications with those gathered by the HRV Committee. The Commission recommends that:

a the database be updated with the victim and violation details from the tran scripts of amnesty hearings which, for security reasons, were not always recorded on the database prior to the hearing, and
b the details of the victims and violations mentioned in each amnesty application be reconciled with those recorded by the HRV Committee, to ensure that every victim in need of reparation and rehabilitation is identified and noted.

Database conversion

21. The Commission's database is a custom-built system whose functionality was designed primarily to record victims and violations to support the work of the three Committees. Its current format does not lend itself easily to use by researchers or the general public.

22. The Commission therefore recommends that the database:

a be converted to run on technology best suited for Internet-based, read-only access, using open-source software wherever possible;
b be web-enabled in a user-friendly, searchable format, and
c have facilities for extracting the data for further research and analysis.

WEBSITE

23. The Commission established a website, which became popular amongst researchers and scholars of transitional justice. The contents of that website currently appear in a section on the Department of Justice website.

24. The Commission recommends that custody of the website should be held by the National State Archives, who should manage it in a way that ensures maximum accessibility. The Commission recommends that the Archives, in consultation with the various stakeholders, should decide on the physical location of the site.

WITCHCRAFT

25. The Commission received statements from many victims as well as a number of amnesty applications regarding the use of witchcraft in the commission of gross

human rights violations. 'Witchcraft' and 'tradition and culture' were major factors cited in a number of cases as being the motivation for the commission of gross human rights violations.

26. The Commission, and in particular the Amnesty Committee, accepted 'witchcraft' as a political motive sufficient within the context of the founding Act to grant amnesty to those applicants who had satisfied the provisions of the amnesty legislation. The political context of the time warranted this approach.

27. However, the Commission notes that this problem is endemic particularly in many parts of Limpopo province. The Commission received hundreds of statements regarding this issue after the cut-off date.

28. The Commission recommends therefore that the authorities note this problem as a matter of urgency, and embark on an education program and take action to stop practices related to witchcraft that lead to the commission of gross human rights violations.

EXERCISE OF THE PRESIDENTIAL PARDON

29. The following comments and recommendation are made in the full knowledge that the Commission operated under enormous political and legal constraints and that it was not a holy cow that was not itself open to criticism:

30. With this in mind, the Commission notes:

    a the recent pardons extended by the President and
    b the President's constitutional discretion to pardon those who have committed crimes, and further,
    c that it in no way wishes to impugn or intervene in this discretion.

31. The Commission is, however, of the view that this presidential discretion should not be used to subvert the rights of victims by framing blanket amnesties through a pardon process.

32. The Commission therefore recommends that in the event that the President is considering a further amnesty provision, the following should be taken into account:

    a that the rationale for establishing the Commission should not be undermined and that the value of its work should not be compromised through such a process;

b that real reconciliation comes from facing the demons of the past honestly and demanding truth and accountability, and

c that victims should not be 'revictimised' and that any amnesty should take into account their needs and their right to the truth and full disclosure and ultimately reparation.

33. The Commission is thus of the view that any amnesty and pardon must make provision for the rights of victims and maintain the constitutionality of our new state based on disclosure and a respect for the human rights of all.

POPULAR VERSION

34. The Commission will hand the Minister of Justice the completed popular version of the Truth and Reconciliation Commission's report.

35. The Commission recommends that the Minister has this printed, published and distributed to schools and tertiary institutions in conjunction with the Ministry of Education.

'CLOSED LIST' POLICY

36. The Commission, anxious not to impose a huge burden on the government, adopted a 'closed list' policy. Effectively this limited the payment of reparation only to those victims who made statements to the Commission before 15 December 1997. In the period between December 1997 and January 2002, victims' groups confirmed to the Commission that they had collected more than 8000 statements from victims who, for a variety of reasons, were unable to access the Commission. The consequence of ignoring this group of people has potentially dangerous implications for South Africa, as communities may become divided if some receive reparation that is not accessible to others who have had similar experiences.

37. The Commission is of the view that the 'closed list' policy should be reviewed by government, in order to ensure justice and equity. It needs to be noted that, in many other countries which have gone through similar processes, victims have been able to access reparation many years after the truth commission process has been completed.

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. It is recorded that:

   (a) Not all persons who committed crimes before 11 May 1994 and which emanate from conflicts of the past applied for or were granted amnesty during the TRC process ("the designated cases").

   (b) It is necessary to set out procedures in terms of which the designated cases can be dealt with by the prosecution authorities.

   (c) 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.

   (d) 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 wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and which are accommodated in our legislation.

2. In view of the above, prosecuting policy, directives and guidelines are required in respect of the designated cases that 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 recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

(e) 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.).*

(f) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(g) 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.

(h) 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.

3. The existing legislation and normal processes referred to in A1(d) above include the following:

(a) The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established. The factors to be considered include the following:

(i) The fact that the victim does not desire prosecution.

(ii) The severity of the crime in question.

(iii) The strength of the case.

(iv) The cost of the prosecution weighed against the sentence likely to be imposed.

(v) 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 or civil liability.

(b) 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. No indemnity from private prosecution or civil liability is obtained.

(c) 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. No indemnity from private prosecution or civil liability is obtained.

(d) Section 179(5) of the Constitution, in terms of which the NDPP may review a decision to prosecute or not to prosecute.

4. Therefore, in light of the equality provisions in our Constitution and the equality legislation, it is important to deal with the designated cases on a rational, uniform and effective 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 the designated cases:

1. A person who faces possible prosecution in a designated case and who wishes to enter into arrangements with the NPA as contemplated in paragraph A3(a)-(c) 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. Subject to B6 and B7 below, the Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all designated cases.

4. The regional Directors of Public Prosecutions must refer all prosecutions in designated cases with which they are or may be seized, immediately to the Office of the NDPP.

5. The PCLU shall be assisted in the execution of its duties by a senior designated official from the Detective Division of the South African Police Service and the NPA's Directorate of Special Operations.

6. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute in designated cases.

7. The NDPP must also be consulted in respect of and approve any offer to an Applicant in designated cases relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

8. 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 in terms of B6 and B7 above.

9. The NDPP must take all reasonable steps to make contact with victims and to ensure that they are legally assisted when making their representations.

10. A decision of the NDPP not to prosecute any designated case 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 designated cases.

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 AND TO OFFER THE STATUS OF A SECTION 204 WITNESS IN CASES RELATING TO CONFLICTS OF THE PAST

The general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, must, **in a balanced** way, be applied by the NDPP before reaching a decision contemplated in section A3(a) and A3(b) above in a designated case.

D. CRITERIA GOVERNING THE DECISION TO OFFER A S105A PLEA AND SENTENCE AGREEMENT TO PERPETRATORS OF CRIMES 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 must, **in a balanced** way, be applied by the NDPP before reaching a decision whether to enter into a plea and sentence agreement in respect of a designated case:

(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, ommission 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) the credibility of the alleged offender;

(ii) the alleged offender's sensitivity to the need for restitution;

(iii) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;

(iv) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and

(v) 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 plea and sentence agreement may contribute to, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.

(g) Whether entering into a plea and sentence agreement may avoid 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, it being obligatory in so far as it is reasonably possible, to obtain the views of

the victims of the offence in relation to the proposed plea and sentence agreement.

(j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

IN CAMERA FOUNDING AFFIDAVIT

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I, the undersigned

THEMBISILE PHUMELELE NKADIMENG

state under oath as follows:

INTRODUCTION

1. I am the applicant herein. In my founding affidavit I attach certain correspondence which should remain confidential at this stage. These include annexes **TN13** to **TN14** which are letters from the investigating officer to various officials. Under the heading "Attempts to seek justice" I set out a timeline which provided an overview of the steps taken so far, including some of the interactions between myself, my representatives and the authorities.

2. Since several of the documents referred to in the timeline include correspondence between my attorneys and the NPA and SAPS, as well as extracts from the police docket, I have not attached these annexes to my open court affidavit. They are attached to this affidavit. The investigative timeline is reproduced below. The documents which are attached to this affidavit are numbered **TN21.1** to **TN21.23**. They appear in the rows in the table below shaded grey.

3. This affidavit will only be served on the first respondent as it is already in possession of the documents attached to this affidavit. The registrar will be requested to hold this affidavit and its annexes as part of an *in camera* record, which is not to be released to the public, unless authorised by this Honourable Court.

Investigative Timeline

Date	Action	Reference
11 September 1983	Nokuthula Simelane is kidnapped by member of the Security Branch of the South African Police.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane. (Annex **TN10**)

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11 Sept. to about mid-October 1983	Nokuthula Simelane is secretly kept captive in a store room on a farm at Northam where she is persistently tortured by members of the Security Branch.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
About mid- October 1983	Nokuthula Simelane is secretly taken from the farm at Northam by members of the Security Branch and has not been seen again.	TRC Amnesty Committee Finding AC/2001/185 Abduction and Torture of Nokuthula Simelane.
27 January 1996	Sowetan newspaper published a story about Nokuthula's disappearance and made an appeal for information.	Sowetan newspaper dated 27 January 1996 (Annex **TN11**)
January/ February 1996	Former Security Branch policeman Sergeant M M Veyi provided evidence to the TRC Amnesty Committee about the abduction, torture and disappearance of Ms. Simelane	1. TRC Amnesty Hearing AC/2001/185 – 2. Evidence of former Sergeant Veyi. (Annex **TN22**) 3. Sowetan news report.
February 1996	In consequence to the disclosures by former Sergeant Veyi CAS1469/02/1996 Murder case docket was opened and investigated by "Priority Crimes Unit" based at John Vorster Square (now Johannesburg Central Police Station). The case was assigned to Captain Leask. Initial investigation made progress but before its conclusion the case was transferred to the D'Oliviera Team towards the end of 1996. Little or no further investigation is undertaken by the D'Oliviera Team until matter is taken over by the TRC.	1. Extracts from docket. (Annex **TN21.1**) 2. Letter from PCLU, 5 December 2013 (Para 5.1.6) (Annex **TN21.2**)
1996 - 1997	Police (D'Oliviera Team) investigation put on hold pending the TRC process.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 3. (Annex **TN21.3**)
3 June 1997	Commencement of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane. Following persons make applications for amnesty for abduction, torture and other related crimes. None of the applicants applied for amnesty in	TRC Amnesty Hearing AC/2001/185

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	respect of the murder of Ms Simelane. W H Coetzee (TRC ref. AM4122/96) A Pretorius (TRC ref. AM4389/96) J F Williams (TRC ref. AM4375/96) J E Ross (TRC ref. AM4377/96) F B Mong (TRC ref. AM4154/96) N L Mkhonza (TRC ref. AM5420/97) M M Veyi (TRC ref. AM5421/97) M L Selamolela (TRC ref. AM5419/97)	
1998	NDPP Ngcuka establishes TRC component within NPA Head Office to attend to prosecution matters arising from TRC.	Letter from PCLU, 5 December 2013. Para 5.1.6 (Annex **TN21.2**)
February 1999	Meeting between TRC and NPA to discuss a process of establishing mechanisms for identifying potential cases.	"Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex **TN23**)
11 March 1999	TRC commences referrals for potential prosecution to NPA – alerting them to sources of evidence to crimes. Correspondence does not specify any particular cases.	"Report for the Office of the National Director of Public Prosecutions dated 7 March 1999. (Annex **TN23**)
30 June 2000	Final session of Amnesty Hearing of TRC into the disappearance of Nokuthula Simelane	TRC Amnesty Hearing AC/2001/185
23 May 2001	TRC Decision issued in this Simelane matter. All applicants are granted amnesty for the abduction of Ms Simelane; applicants W.H Coetzee, A Pretorius and F B Mong are refused amnesty for torture; applicants M M Veyi and M L Selamolela are granted amnesty for the torture of Ms Simelane.	TRC Amnesty Hearing Decision AC/2001/185 (Annex **TN10**)
29 August 2001	The TRC Amnesty Committee decision in the Simelane matter is gazetted.	Proc 31. Justice 29/08/2001
12 March 2003	Volumes 6 and 7 of the TRC Report are published.	TRC Report

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12 March 2003	Specific mention is made in the TRC Report on Nokuthula Simelane's abduction, torture and disappearance. Volume 2, Chapter 3 para 278 - 280; 287 – 292 Volume 6, Chapter 1 para 194 – 206 Volume 6, Chapter 2 para 50 – 71 Volume 7, Victims list	TRC report . (Extracts annexed as **TN24 - 27**)
23 March 2003	PCLU is created by Presidential Proclamation. Officials assume duty July/ August.	1. Presidential Proclamation (Annex **TN28**) 2. Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
2003	The South African President directed the NDPP to give attention to the cases of 500 persons who had been reported missing by the TRC. NPA established a Task Team to evaluate the TRC report and to identify cases for investigation. 150 cases were identified for immediate investigation.	About PCLU (Annex **TN29**)
2003	NPA TRC Unit is converted into Priority Crimes Litigation Unit (PCLU)	Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
2003	The NDPP give attention to the cases of some 500 persons who had been reported missing by the TRC. A Task Team evaluates the TRC Report to identify cases for investigation. Approximately 150 cases were identified for immediate investigation. The disappearance of Nokuthula Simelane is one of these cases.	About PCLU (Annex **TN29**)
2003	The PCLU requests all outstanding cases to be referred to it.	Letter from PCLU, 5 December 2013 (Annex **TN21.2**)
2003	NPA and PCLU place TRC cases "on hold" awaiting formation of policy on the TRC cases.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 6. ((Annex **TN21.3**)
November 2004	Foundation for Human Rights make submission on behalf of family re prosecutions of persons refused amnesty.	Letter from PCLU, 5 December 2013, para 5.1.4. (Annex **TN21.2**)

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2004 and 2005	Several discussions between FHR and PCLU (Advocate Anton Ackerman) about charges arising from the alleged torture of Ms Simelane (in terms of International Law); the prosecution of Sergeant Radebe on kidnapping charges and the possibility of holding an Inquest into this matter.	Letter from PCLU, 5 December 2013, para 5.1.5. (Annex **TN21.2**)
1 December 2005	NPA issues Guidelines for TRC cases in terms of National Prosecution Policy sec.179(5) of the Constitution	Appendix A, National Prosecution Policy dated 1 December 2005. (Annex **TN30**)
23rd September 2007	Establishment of Ginwala Enquiry into the fitness of Advocate Pikoli to hold the office of NDPP	Ginwala Enquiry Report dated 4 November 2008 (Available on request)
2007/8	Decision by the SAPS not to investigate TRC cases pending conclusion of Ginwala Commission.	Letter from Dr. Ramaite, Acting NDPP, 31 January 2013, para 8. (Annex **TN21.3**)
4 November 2008	Ginwala Enquiry into NDPP finalised and issues report.	Ginwala Enquiry Report dated 4 November 2008 (Available on request)
2 December 2008	Amendments to Prosecution Policy struck down	Judgment, Nkadimeng & Others v The National Director of Public Prosecutions & Others, T.P.D. Case no. 32709/07. (Available on request)
Early 2010	Advocate Macadam appointed by Acting NDPP to take over TRC matters and to liaise with the General Dramat Commander of DPCI.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 10. (Annex **TN21.3**)
March 2010	Duplicate Docket and TRC material requested from State Archives and made available to PCLU.	Letter from Acting NDPP, Adv Jiba, 13 August 2013, p3 (Annex **TN21.4**)
25 March 2010	1. Duplicate Case Docket forwarded to Superintendent Bester of DPCI by PCLU requesting investigation to determine availability of witnesses; confirmation of statements; and to determine the position of Timothy Radebe	1. Letter from Advocate Macadam of NPA, Deputy Director of Public Prosecutions and Deputy Head of PCLU to Senior Superintendent Louis Bester, dated 25 March 2010

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	(whether he is a witness or a suspect) 2. Police Captain Masegela of DPCI was appointed to investigate matter	(Annex **TN21.5**) 2. Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex **TN21.3**)
October 2010	Captain Masegela of DPCI returns duplicate docket and other files and material to Advocate Macadam	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 12. (Annex **TN21.3**)
27 October 2010	Letter from Advocate Macadam to Captain Masegela (together with duplicate case docket; other files and material) with a directive for extensive further investigations. These are inter alia: • Various administrative tasks related to case files. • Checking the alibi of Sergeant Radebe and circumstances of his original statement. • Investigation concerning an undercover operation involving a tape recording. • Statements from identified witnesses. • Establish circumstances of deaths of certain witnesses. • Draw crime scene maps and plot points of relevance. • Establish the circumstances of the arrests of the 18 MK Operatives. • Establish the circumstances and facts of the "false flag" operations. • Trace and interview Brigadier Schoon. • Identify members of Eastern Transvaal Security Branch at relevant time. • Interview Siphiwe Nyanda – MK Commander in Swaziland. • Establish whether there is any relevant information from the Swaziland authorities.	Letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of PCLU dated 27 October 2010 (Annex **TN21.6**)

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	• Investigations concerning Motsoanyame Commission and its findings. • Explore the possibility of an exhumation at Northam farm. • Investigations concerning safe houses and other properties with a view to conducting exhumations. • Witnesses who have already made statements to confirm these and be re-interviewed.	
October 2010 (date not specified)	Missing Persons Task Team (MPTT) requested to explore the farm at Northam for possible exhumation and to check mortuary records for possible leads in respect of remains of Ms Simelane.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.3 (Annex **TN21.3**)
Late 2010 (date not specified)	Original docket located	Letter from NPA, Acting NDPP, Advocate Jiba dated13 August 2013 page 3 sub paragraph vii. (Annex **TN21.4**)
July 2011	The investigating officer, Captain Masehela, submitted his report to Adv Macadam recommending an inquest.	Thembi Nkadimeng discussion with Captain Masegela
October 2012 (date not specified)	Exploration by MPTT of farm at Northam completed and they conclude there is no possibility of an exhumation in the absence of specific evidence of a burial site. MPTT report issued on 25 January 2013.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 paragraph 17.5 (Annex **TN21.3**)
22 January 2013	1. Captain Masegela returns docket and provides report in terms of Sec. 4 of the Inquest Act to Adv. Macadam 2. NPA denies that the docket was returned with the required certificate for an Inquest and claims that docket was returned with a substantial amount of the original investigations incomplete, and no evidence establishing that Ms. Simelane had been murdered.	1. Information supplied by Captain Masegela to Thembi at a meeting 2. Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, para 16 (Annex **TN21.3**).

25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex **TN21.3**)
25 January 2013	Letter from NPA claiming matter has been diligently attended to and investigations are continuing. MPTT report made available to PCLU on exploration of Northam farm and finding that exhumation is not possible unless there is specific evidence of the precise burial place.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013, paragraph 17.5 (Annex **TN21.3**)
29 January 2013	The holding of an inquest is requested by family as authorities are not making progress in their investigation into determining circumstances of death.	Inquest Request – letter from T.P. Nkadimeng to NPA dated 29 January 2013 (Annex **TN20**)
31 January 2013	NDPP says that Macadam is perusing docket and resubmit to investigating officer.	Letter from Dr. Ramaite Acting NDPP dated 31 January 2013 (Annex **TN21.3**)
11 February 2013	Letter from the applicant pointing out that this matter has not been diligently attended to and calling for a prosecution or an inquest. To this end a meeting has been arranged between family representatives and Adv. Macadam to discuss and determine how the investigation can be completed and to set a reasonable deadline for this work to be completed.	Inquest Request – copy of letter from T.P. Nkadimeng to NPA dated 11 February 2013 (Annex **TN21.7**)
12 February 2013	NDPP reasserts that a decision can only be taken once investigation has been completed and refers to the upcoming meeting on 18 February 2013 between members of his staff and families representatives to discuss the investigative steps that are being taken.	Letter from Dr. Ramaite Acting NDPP dated 12 February 2013 (Annex **TN21.8**)
13 February 2013	Macadam of PCLU instructs Col Xaba of DPCI to undertake following investigations: • Trace and interview Nompumelelo Zakade who was a SB informant. • Locate "safe houses" to determine if exhumations are feasible.	Letter from Adv. Macadam to Colonel Xaba of DPCI dated 13 February 2013 (Annex **TN21.9**)

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	• Locate safe house that was used by Strongman Bambo to determine if exhumations are feasible. • Interview Siphiwe Nyanda	
18 February 2013	Meeting between Adv. Macadam (PCLU) Susanne Bukau (PCLU) Colonel Xaba (Hawks) Captain Masagela (DPCI) and Adv. Palmer, Alan Wallis (SALC) (the last two mentioned representing family). Agreement that investigative tasks as set out in PCLU letter to DPCI dated 27 October 2010 is incomplete but there will be an endeavour to conclude investigation by end of May 2013.	1. Letter from NPA, 13 August 2013 (Annex **TN21.4**) 2. Minutes of Meeting (Annex **TN21.10**)
6 March 2013	Again pointing out the considerable delays that have occurred in this matter by providing a timeline; raising concerns about some of the investigative tasks mentioned at the meeting of 18 February 2013 and in the letter to Colonel Xaba – also that not all tasks agreed to at the meeting have been included in the letter. Emphasizing those outstanding investigations are concluded as agreed by 30 May 2013.	Letter from Thembi Nkadimeng to NPA dated 6 March 2013 (Annex **TN21.11**)
13 March 2013	Adv. Macadam notes concerns about serious inaccuracies and unreasonable demands made in the letter of 6 March 2013 from Thembi Nkadimeng. He undertakes to do his best to finalise investigation by 30 May 2013.	Email from Adv. Macadam to Adv. Robin Palmer dated 13 March 2013. (Annex **TN21.12**)
27 March 2013	Captain Masegela informs Thembi Nkadimeng telephonically that the skeletal remain of a young woman has recently been found by construction workers at the site of new mall in Brits.	
6 April 2013	Response by Adv. Palmer to Adv. Macadam concerning the issues he raised in his email of 13 March 2013.	Email from Adv. Robin Palmer to Adv. Macadam dated 6 April 2013. (Annex **TN21.13**)

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15 April 2013	Raising concern that the contents of some communications between the family's legal representatives and NPA have been disclosed to the Sunday Times. Investigation into Sergeant Radebe's alibi is continuing. Checks are also being conducted on the mortuaries in areas relevant to the investigation for any records which might correspond with the missing person.	Email from Adv. Macadam to Adv. Robin Palmer dated 15 April 2013. (Annex **TN21.14**)
2 May 2013	Adv. Palmer asked for an update on the current status of the investigation to which Adv. Macadam replied that there were no new developments.	Email from Adv. Macadam to Adv. Palmer dated 2 May 2013. (Annex **TN21.15**)
17 May 2013	Adv. Macadam informs Adv. Palmer that investigation will not be concluded by end of May 2013 and reports: • The safe houses in use by the Soweto Security Branch have all been identified and been eliminated as having exhumation potential, except for the smallholding at Westonaria where consideration is being given to the feasibility of a probe • Radebe's alibi investigation concluded and it has been determined that he was a member of the SB at relevant time and not at Vehicle staff as he had claimed. • Mortuary checks are on-going; • The tracing of 18 MK members which is central to the defence of the white SB members is on-going. The case file relating to the arrest of Justice Ngidi has been found.	Emails between Adv. Macadam and Adv. Palmer 17 May 2013 (Annex **TN21.16**)

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26 June 2013	Canvasses the following issues: • Whereas it was indicated that a decision would be made by the end of May 2013 on this matter -this date has now passed and there is still no indication on what further investigative steps are envisaged before the NPA will be in a position to either make a decision to prosecute, or to refer the matter for a formal inquest. • The emotional toll the delays are having on the family and friends of Nokuthula Simelane • Request specific indications of remaining investigative steps together with target dates.	Letter attached to email from Adv. Robin Palmer to Adv. Macadam dated 26 June 2013. (Annex **TN21.17**)
13 August 2013	Skeletal remains have been found and DNA testing is being conducted. • Mortuaries records have been checked and four records have been found that could be relevant. These records are illegible and efforts are being made to obtain photos of the deceased. • MPTT have identified several "safe houses" that were in use by Security Branch and all of these except for a plot at Westonaria having been excluded as possible burial sites. An exploration to see whether an exclamation is feasible at the Westonaria plot is to be undertaken. • The key aspect of the 18 MK Operatives is on-going.	Letter from NPA, Acting NDPP, Advocate Jiba dated13 August 2013 page 3 sub paragraph vii. (Annex **TN21.4**)
31 July 2013	This letter expresses frustration at the lengthy delay in completing the investigation and demands that this matter be urgently resolved by means of a prosecution or an inquest.	Letter from Legal Resource Centre (LRC) (representing family) to NPA dated 31 July 2013 (Annex **TN31**)

5 August 2013	Letter from LRC to Acting NDPP disputing further reasons for delay	Letter dated 5 August 2013 responding to Adv Macadam email dated 31 July (Annex **TN32**)
5 December 2013	• DNA sample from Brits skeletal remains did not contain sufficient material for DNA extraction. A second sample to be obtained and sent to a specialist DNA Laboratory in Bosnia. • Facial reconstruction is being done in an effort to identify the remains. • The plot at Westonaria to be inspected by an anthropologist to determine feasibility of exhumations. • Four mortuary entries fit the criteria set these entries are however illegible. SAP Recovery Unit has been directed to find these graves and obtain a DNA sample from each for comparison purposes. • Plan and map to be submitted. • Additional TRC statements found and these need to be investigated. • 18 MK Operatives to be traced and interviewed.	Letter from PCLU, 5 December 2013. (Annex **TN21.2**)
16 January 2014	The family feels no closer to resolution despite the elapse of yet another year. The protracted delays with no action prior to 2010 are again pointed out. Family not satisfied with investigation progress since 2010 either. DNA and Exhumations – queries link between skeletal and other remains with Ms. Simelane and requests specifically what the links are to exclude "shots in the dark" as delaying tactics. Westonaria Plot- a possible exhumation of this plot should not cause delays in finalisation - unless there is specific evidence of a burial	Letter from Legal Resources Centre (representing family) to NPA dated 16 January 2014 (Annex **TN21.18**)

	site. Requests a meeting with the acting NDPP to discuss these issues	
16 January 2014	Acknowledges letter dated 25 September 2013 and will provide a comprehensive report on investigations into DNA of skeletal remains found at Brits by end of January 2014.	Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex **TN21.19**)
10 February 2014	In respect of DNA comparisons of skeletal remain found at Brits the testing has to be done at a specialist laboratory abroad which is expensive – procurement policies have to be followed for the authorisation of the expense. Such authorisation is awaited before proceeding with further sampling and testing. An expert in craniofacial superimposition was unable to make an identification. The Forensic Science Laboratory will follow up on the four remains identified in mortuary records and with a determination of possible exhumations at the Westonaria plot. Pending forensic results the investigator will continue the investigations identified by Adv. Macadam.	Letter from General Dramat, National Head of DPCI dated 16 January 2014 (Annex **TN21.19**)
26 February 2014	Family is concerned to note that DPCI do not accept responsibility of investigation delays over the past four years. It is also noted that investigation has not been prioritised by DPCI and the end of investigation is not yet in sight. The nexus between the skeletal remains and mortuary remains are queried and do not provide a reason to delay finalisation of case. Two questions are posed: 1. Have investigation been conducted diligently? 2. Did the discovery of the skeletal remains halt or delay investigations?	Letter from Legal Resources Centre (representing family) to General Dramat of DPCI dated 26 February 2014 (Annex **TN21.20**)
February to July 2014	No responses received to LRC letters to NPA dated 16 January 2014 and to the DPCI dated 26 February 2014. No other reports received.	

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10 July 2014	Letter from LRC to the NDPP (copied to Adv. Abrahams and Macadam) noting that: • No response had been received to LRC's letter of 14 January 2014 and assuming that the NDPP did not wish to meet with the applicant and her legal representatives; • No monthly progress reports had been supplied by the PCLU as previously promised; • Applicant had not been advised of the DNA test results. The letter assumed that there was no real intention to make a decision to prosecute or not; and moreover that there is no intention to refer this case to an inquest. It accordingly reserved the rights of the applicant. No response was received from the NDPP.	Letter from LRC to the NDPP dated 10 July 2014 (Annex **TN33**)
10 July 2014	Letter from LRC to Lt-Gen. A Dramat, National Head: Directorate for Priority Crimes Investigation (DPCI), SAPS noting that: • No response had been received to LRC's letter of 24 February 2014 and assuming that the DPCI has no response and that no progress has been made in this investigation; • Applicant had been promised notification of the DNA test results but heard nothing; • There was no intention to finalize this matter expeditiously or at all and reserving rights of the applicant.	Letter from LRC to National Head: DPCI dated 10 July 2014 (Annex **TN34**)

17 July 2014	Letter from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 and: • alleging contact between applicant and investigating officer (IO); • notifying that the laboratory in Bosnia had completed the DNA tests and that the IO had been advised on 14 July 2014 that the results were negative; • alleging that extensive investigations had been conducted and the docket had been submitted to the NDPP for consideration and further instructions, if necessary; • Suggesting a meeting with the investigating officer's commanding officer Col Xaba to resolve any outstanding issues.	Letter of 17 July 2014 from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014 (Annex **TN21.21**)
31 July 2014	Meeting attended by Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS), Captain Masegela (Investigating Officer), Thembi Nkadimeng, Frank Dutton (the family's private investigator); Carien Van Der Linde (instructing attorney, LRC) and Angela Mudukuti (Southern African Litigation Centre). The meeting followed mostly a question and answer format with Frank Dutton asking for details about the investigation. The docket was handed to the PCLU of the NPA on 14 July 2014 and Captain Masegela and Colonel Xaba are of the opinion that investigations are complete.	Minutes of meeting dated 31 July 2014 (Annex **TN21.22**)
11 August 2014	Letter from Colonel Xaba , Commander, Crimes Against the State, DPCI to LRC seeking an affidavit from the family's private investigator affidavit setting out what investigation he had conducted.	Letter from Colonel Xaba , Commander, Crimes Against the State, DPCI to LRC dated 11 August 2014. (Annex **TN35**)

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9 September 2014	In a letter dated 9 September 2014 the LRC advised Col Xaba that Frank Dutton took no statements.	Letter from the LRC to Col Xaba dated 9 September 2014 (Annex **TN36**)
10 September 2014	Col Xaba indicated that the National Prosecuting Authority (NPA) claimed it could not make a decision without the requested affidavit from Frank Dutton.	Letter from Col Xaba to the LRC dated 10 September 2014 (Annex **TN37**)
16 September 2014	Frank Dutton supplied the requested affidavit to Col Xaba	Email with attachment from LRC (on behalf of Frank Dutton) to Col Xaba (Annex **TN21.23**)
25 September 2014	Col Xaba requests information on Thembi's family members who were studying in Swaziland	Letter from Col Xaba to the LRC dated 25 September 2014 (Annex **TN38**)
22 October 2014	Col Xaba requested further information and an affidavit from the applicant	Email from Col Xaba to the LRC (Annex **TN39**)
20 January 2015	The applicant hands her affidavit to Captain Masegela	Email from the applicant
26 February 2015	Col Xaba indicated that investigations are ongoing.	Email sent from Col Xaba to the LRC and SALC (Annex **TN40**)

THEMBISILE PHUMELELE NKADIMENG

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at JOHANNESBURG on this the 18TH day of MAY 2015 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

TREVOR BAILEY ATTORNEY
82 KILKENNY ROAD
PARKVIEW 2193
JOHANNESBURG
RSA.

ANNEXURES to IN CAMERA AFFIDAVIT

TN #	Description of Annexure	Paragraph(s) Cited
21.1	Extracts from of Police docket	Investigative Timeline
21.2	Letter from PCLU, dated 5 December 2013	Investigative Timeline
21.3	Letter from Dr. Ramaite, Acting NDPP, dated 31 January 2013	Investigative Timeline
21.4	Letter from NPA, Acting NDPP, Advocate Jiba re: PCLU's request for Duplicate Docket and TRC material, dated 13 August 2013	Investigative Timeline
21.5	Letter from Advocate Macadam of NPA, Deputy Director of Public Prosecutions and Deputy Head of PCLU to Senior Superintendent Louis Bester, dated 25 March 2010	Investigative Timeline
21.6	Letter from Advocate Macadam of NPA, Deputy Director of Prosecutions and Deputy Head of PCLU, to Captain Masegela, dated 27 October 2010	Investigative Timeline
21.7	Inquest Request – letter from T.P. Nkadimeng to NPA dated 11 February 2013	Investigative Timeline
21.8	Letter from Dr. Ramaite, Acting NDPP to T.P. Nkadimeng , dated 12 February 2013	Investigative Timeline
21.9	Letter from Adv. Macadam to Colonel Xaba of DPCI, dated 13 February 2013	Investigative Timeline
21.10	Minutes of meeting between Adv. Macadam (PCLU) Susanne Bukau (PCLU) Colonel Xaba (Hawks) Captain Masagela (DPCI) and Adv. Palmer, Alan Wallis (SALC), dated 18 February 2013	Investigative Timeline
21.11	Letter from Thembi Nkadimeng to NPA, dated 6 March 2013	Investigative Timeline
21.12	Email from Adv. Macadam to Adv. Robin Palmer, dated 13 March 2013	Investigative Timeline
21.13	Email from Adv. Robin Palmer to Adv. Macadam, dated 6 April	Investigative Timeline
21.14	Email from Adv. Macadam to Adv. Robin Palmer, dated 15 April 2013	Investigative Timeline
21.15	Email between Adv. Macadam and Adv. Palmer, dated 2 May 2013	Investigative Timeline
21.16	Emails between Adv. Macadam and Adv. Palmer, dated 17 May 2013	Investigative Timeline
21.17	Email from Adv. Robin Palmer to Adv. Macadam, dated 26 June	Investigative Timeline
21.18	Letter from Legal Resources Centre (representing family) to General Dramat of DPCI, dated 16 January 2014	Investigative Timeline
21.19	Fax from General Dramat of DPCI to LRC dated 16 January 2014	Investigative Timeline
21.20	Letter from Legal Resources Centre (representing family) to General Dramat of DPCI, dated 26 February 2014	Investigative Timeline

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TN #	Description of Annexure	Paragraph(s) Cited
21.21	Letter from National Head: DPCI to LRC disputing contents of LRC letter dated 10 July 2014, dated 17 July 2014	Investigative Timeline
21.22	Minutes of meeting attended by Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS), Captain Masegela (Investigating Officer), Thembi Nkadimeng, Frank Dutton (the family's private investigator); Carien Van Der Linde (instructing attorney, LRC) and Angela Mudukuti (Southern African Litigation Centre)	Investigative Timeline
21.23	Email dated 16 September 2014 with attachment – Frank Dutton affidavit from LRC to Col Xaba	Investigative Timeline

John Vorster Square CAS 1469/02/96 20 TN 13 191

South African Police Service Suid-Afrikaanse Polisiediens

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HEAD NATIONAL CRIME INVESTIGATION SERVICE
HOOF NASIONALE MISDAADONDERSOEKDIENS

GAUTENG

JOHANNESBURG

2000

1996-02-19

A. The Secretariat for
Safety and Security
Mr A Cachalia
Private Bag X463
PRETORIA

B. The National Head
Priority Crime
PRETORIA

INVESTIGATION INTO THE ALLEGED KIDNAPPING AND MURDER OF NOKUTHULA SIMELANE DURING SEPTEMBER 1983 - MEMBERS OF THE SECURITY POLICE PROTEA, SOWETO - HEAD OFFICE REFERENCE 54/1/2(668) REFERS

1. The investigation into this matter has received priority attention and the necessary statements obtained where possible.

2. The following persons have given sworn statements:

2.1 Mrs Simelane - Mother of missing person Nokuthula Simelane.

2.2 Sgt Mzimkulu Nimrod Veyi - Members of the South African Police Service and source of revelations made to Sowetan and published on 1995-02-06.

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2.3 Constable Malosela Patrick Kobe - Member of the South African Police Service and ex member of the Security Police.

2.4 Constable Mokone Matsebetse Edward Sefuthi - ex member of Security Police, now retired.

2.5 Mr Petrus Cornelius Welthagen - owner of farm at Northarn where part of alledged crimes were to have taken place.

2.6 Sgt Moleke Peter Lengene - member of the South African Police Service and presently still working under the direct command of Superintendent Anton Pretorius.

2.7 Mr Norman Lungile Mkhonza, alias "Scotch" - ex covert agent for security Police, Protea, Soweto.

2.8 Inspector Mokapi Lazarus Selamolela - member of the South African Police Service and ex-member of the Security Police, Protea Soweto.

3. Very briefly, the persons interviewed scretch the facts leading to the disappearance of Nokuthula Simelane as follows:

3.1 She was an MK agent for the ANC and conducted courier services from Swaziland to South Africa and visa versa.

3.2 She worked under the command of a "Mpho" who during September 1983 sent her to South Africa where she was to meet agent "Scotch".

3.3 Before meeting "Scotch" she stopped over at an ANC Safehouse where Mr Duma Nkosi assisted her with directions to get to the Carlton Centre.

3.4 Nokuthula Simelane met with Scotch (covert agent) who had already informed the then Warrant Officer W H J Coetzee and Sgt A Pretorius who organised the arrest of Nokuthula Simelane in a basement at the Carlton Centre.

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3.5 After her arrest she was taken to a room in the married quarters of the SAPS Norwood where she was detained and tortured for about one to two weeks. Hereafter she was taken to a farm at Northarn in the Northen Transvaal, where she was further detained, tortured and interrogated. This lasted up and until the festive season, December 1983. It was at this stage that she was last seen by the witnesses interviewed.

4. The actual interrogators are alleged to be

W H J Coetzee now Superintendent
A Pretorius do
F B Mong now Inspector
P Lengene now Sergeant
Radebe now retired

5. Witnesses/suspect that are alleged to be deceased are Sgt Mathuba and ex covert agent Frank Langa "Big Boy"!

6. On 1996-02-15 an interview was held with Mr D Nkosi in Cape Town.

6.1 He knew about the meeting which was to take place, also that he had provided safety for Nokuthula in Soweto and after giving directions to her to reach the Carlton Centre, Nokuthula was never seen again.

6.2 Upon his return from Cape Town Mr Nkosi will assist and facilitate a meeting where "Mpho" will also then be interviewed and their full statements obtained.

7. On 1996-02-17 on the request of Sgt Lengene I re-interviewed him in which he passed on the following information:

7.1 He had not told the truth on the day he gave me his statement for the following reasons:

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7.1.1 He is presently serving under the command of Superintendent A Pretorius who also brought him for the interview on the day of him giving his statement.

7.1.2 He had been told that it was up to him and Norman "Scotch" to save their skins.

7.1.3 That Director Thoms would reveal all that he had said to them after taking his statement.

7.1.4 The Captain Leask would not be able to prove any charges as he had no proof of a body,

7.2 After the interview the following took place:

7.2.1 He was taken to Superintendent Coetzee's office where he was asked what had been said during the interview.

7.2.2 He was led into an argument because he had mentioned Scotch's name.

7.2.3 He was told to rewrite a statement which Superintendent Pretorius then first read and after okaying it, told him to keep it in a safe place so that it could later be handed to their attorney as they were busy arranging this through the Police.

8. On 1996-02-07 Superintendent Coetzee promised Captain Leask, the investigating officer to make available the witness/suspect "scotch" which up and until now has not been honoured.

8.1 The investigating officer however on 1996-02-09 found Scotch, on own accord and obtained his statement.

8.2 On 1995-02-10 Superintendent Pretorius and Coetzee secretly met with Scotch and coached him into what his version and manner should be if Captain Leask was to approach him. This discussion was secretly taped by the investigation team.

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9. It has become further very clear from the meeting with Sgt Lengene on 1996-02-17 that the incident regarding Nokuthala was not a once off incident but part of an extensive conduct which has lead directly to the planting of bombs, kidnapping of and murdering of numerous other persons.

9.1 Lengene confesses his own part in the murder of a person whom he had shot with an AK 47 rifle given to him by Superintendent Pretorius/Coetzee after the person had been told to plant a limpet bomb in Soweto.

10. A detailed statement will be obtained from Sgt Lengene on 1996-02-19 at a secret rendevouz upon which he has firmly stated he wishes to reveal all the "dirty tricks" which had taken place during his career in the Security Police as of 1982 up and until now.

11. It is of great concern to this office that both Superintendent Coetzee and Pretorius are presently employed in positions where they can easily continue with intimidation, defeating the ends of justice because of their contacts with the CIS and its members. This could also lead to the elimination of witnesses.

12. The investigating team has to go to great lenghts to keep the investigation, witnesses and information from the very persons attached to the priority crimes division of Gauteng. It is suggested that they be re-transferred to a post in the Uniform Pro-active division.

13. All further information will be brought to your attention.

14. An offical murder and kidnapping investigation has been launched under registered case docket John Vorster Square CAS 1469/02/96.

DIRECTOR
HEAD : PRIORITY CRIME : GAUTENG
N W THOMS

/MH/LIB/1/108

TP

John Vorster Square CAS 1469/02/96 196

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HEAD NATIONAL CRIME INVESTIGATION SERVICE
HOOF NASIONALE MISDAADONDERSOEKDIENS

GAUTENG

JOHANNESBURG

2000

1996-02-26

A. The Divisional Chief
National Crime Investigation Services
PRETORIA

B. The Head
National Priority Crime Investigation Services
PRETORIA

INVESTIGATION INTO THE ALLEGED KIDNAPPING AND MURDER OF NOKUTHULA SIMELANE DURING SEPTEMBER 1983 - MEMBERS OF THE SECURITY POLICE PROTEA, SOWETO - HEAD OFFICE REFERENCE 54/1/2(668) REFERS

1. The investigation into this matter has received priority attention and the necessary statements obtained where possible.

2. The following persons have given sworn statements:

2.1 Mrs Simelane - Mother of missing person Nokuthula Simelane.

2.1.1 She states that Nokulhula was last seen in June 1983 - she was always travelling between S.A. and Swaziland as she was working for the ANC. Her disappearance was strange as she was to have graduated during October 1983 - Her personal belongings were found at Duma's place in Soweto as he was the last person of the ANC to see her.

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2.2 Sgt Mzimkulu Nimrod Veyi - Member of the South African Police Service and source of revelations made to Sowetan and published on 1995-02-06.

2.2.1 He states that he guarded Nokuthula as he worked under the command of Nokuthula's captors Superintendent Coetzee en Pretorius - His guard duties took place at the farm in Northam - he witnessed torture of Nokuthula - last saw her alive in the boot of Superintendent Coetzee's state vehicle on Potch/Johannesburg road near Fochville.

2.3 Constable Malosela Patrick Kobe - Member of the South African Police Service and ex member of the Security Police.

2.3.1 He states entirely hearsay evidence - he never knew or saw Nokuthula - he worked covertly on the AZAPO line - only heard numours that Superintendent Pretorius, Coetzee and Inspector Mong were responsible for the alleged murder of Nokuthula.

2.4 Constable Mokone Matsebetse Edward Sefuthi - ex member of Security Police, now retired.

2.4.1 He states that he was a guard who on instructions of Superintendent Coetzee and Pretorius assisted in arresting Nokuthula at the Carlton Centre, taking her then to Norwood SAPS flats where she was detained for ± one to two weeks, then taken to Northam where she was kept for ± 2 months - he also witnessed torturing and last saw her at the farm.

2.5 Mr Petrus Cornelius Welthagen - owner of the farm at Northam where part of alledged crimes were to have taken place.

2.5.1 He states that Superintendent Coetzee a family member had requested the use of the outbuilding for training of police recruits - he cannot identify Nokuthula but states that two women were brought to the farm over a period of two months.

2.6 Sgt Moleke Peter Lengene - member of the South African Police Service and presently still working under the direct command of Superintendent Anton Pretorius.

TP

John Vorster Square CAS 1469/02/96 27 By

2.6.1 He in his first statement corroborates Sefuthi but denies ever having seen any torture taking place - he further states that Superintendent Coetzee and Pretorius gave Nokuthula clothing and money during December and released her to return to Swaziland.

2.6.2 In his second statement he alleges his first statement was made under duress from Superintendent Pretorius and Coetzee - he was told to rewrite a statement which he did and Superintendent Pretorius first checked it (Now as exhibit with Investigating officer) - he further states and corroborates the other witnesses that Nokuthula was trapped, tortured and adds that she was taken to Westonaria where she was further detained by Superintendent Coetzee and Pretorius at the private dwelling of Coetzee's brother - he then also states that he was part of a force under Coetzee and Pretorius in which he and other security Policemen and/or Askaris murdered ANC recruits after letting them place limpet bombs at railway points in Soweto - further that they also blew up and threw handgranades at councillers houses and municipal buildings in Soweto - he also has exposed the names of the other members involved.

2.7 Mr Norman Lungile Mkhonza, alias "Scotch" - ex covert agent for security Police, Protea, Soweto.

2.7.1 He states that he was a covert agent and set up the trap for Superintendnet Coetzee and Pretorius to capture Nokuthula - he was taken to a clinic after her arrest where he was placed in plaster of paris and a false message was sent to Swaziland by covert agent Frank Langa, that he had never met Nokuthula because he was involved in a car accident.

2.8 Inspector Mokapi Lazarus Selamolela - member of the South African Police Service and ex-member of the Security Police, Protea Soweto.

2.8.1 He corroborates all the other witnesses with regards to the trap, detaining and torture of Nokuthula - he however does not corroborate Veyi in that they were together when Veyi alleges he last saw Nokuthula alive in the boot of Coetzee's vehicle.

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2.9 Gilbert Thwala alias "Mpho" - Nokuthula's Commander in Swaziland.

2.9.1 He states she was sent to meet Scotch and Frank at the Carlton Centre - she was last seen or heard of after this meeting - she was expected back because she had to graduate - complete denial that the ANC had killed her as she was very valuable to them.

2.10 Duma Nkosi - owner of ANC Safehouse in Senoane Soweto.

2.10.1 He states that she stayed at his place whilst in Johannesburg 1983 - he gave her directions to get to the Carlton Centre on her request - she never returned - her personal belongings were removed from his place by her parents.

3. The actual interrogators are alleged to be

W H J Coetzee now Superintendent
A Pretorius do
F B Mong now Inspector
P Lengene now Sergeant
Radebe now retired

4. Witnesses/suspect that are alleged to be deceased are Sgt Mathuba and ex covert agent Frank Langa "Big Boy"!

5. On 1996-02-07 Superintendent Coetzee promised Captain Leask, the investigating officer to make available the witness/suspect "scotch" which up and until now has not been honoured.

5.1 The investigating officer however on 1996-02-09 found Scotch, on own accord and obtained his statement.

5.2 On 1995-02-10 Superintendent Pretorius and Coetzee secreatly met with Scotch and coached him into what his version and manner should be if Captain Leask was to approach him. This discussion was secretly taped by the investigation team.

TP

John Vorster Square CAS 1469/02/96.

6. It has become further very clear from the meeting with Sgt Lengene on 1996-02-17 that the incident regarding Nokuthula was not a once off incident but part of an extensive conduct which has lead directly to the planting of bombs, kidnapping of and murdering of numerous other persons.

6.1 Lengene confesses his own part in the murder of a person whom he had shot with an AK 47 rifle given to him by Superintendent Pretorius/Coetzee after the person had been told to plant a limpet bomb in Soweto.

7. It is of great concern to this office that both Superintendent Coetzee and Pretorius are presently employed in positions where they can easily continue with intimidation, defeating the ends of justice because of their contacts with the CIS and its members. This could also lead to the ellumination of witnesses.

8. The investigating team has to go to great lenghts to keep the investigation, witnesses and information from the very persons attached to the priority crimes division of Gauteng. It is suggested that they be re-transferred to a post in the Uniform Pro-active division.

9. An offical murder and kidnapping investigation has been launched under registered case docket John Vorster Square CAS 1469/02/96.

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B.1. For your information

DIRECTOR
HEAD : PRIORITY CRIME : GAUTENG
N W THOMS

/MH/LB11/118

TP 17

POLICE DOCKET:

PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996

Complainant: Sizakele Ernestinah Simelane

Offences: Murder: Method: unknown: Injuries: unknown
Kidnapping: falsely arrested during September 1983 at Carlton Centre.

Record of documentary and other exhibits: JVR(A)197/96: Cassette tape

STATEMENTS

SIZAKELE ERNESTINAH SIMELANE: Krugersdorp CAS 1263/01/96 – A3

A2 – Photograph of Nokhuthula

Press Clippings: Sowetan articles by Sharon Chetty – 27/1/95 and 6/2/95

MZIMKULU NIMROD VEYI: Krugersdorp CAS 1263\01\96 – A3
Sergeant in SAPS, Vehicle Theft Unit, Soweto

Wishes to make statement even though it may incriminate me. In 1981 joined SB at Protea in Soweto. Served in SB until 1985. On 27/1/95 read an article in the Sowetan in relation to Nokuthula Simelane who was reported missing as of 8/9/83. Approached Sharon Chetty and gave her story which was published on 6/2/95.

Duties: act as conveyer of information between handler and informer. Also had to recruit informers.

Scotch: Norman Mkhonza, covert policeman of security branch at Protea. Joined the ANC undercover and worked in Swaziland where he infiltrated the ANC. He reported to his handler: Warrant Officer WHJ Coetzee (now a Colonel with SAPS in Braamfontein). He advised Coetzee of the rendezvous at the Carlton. Arranged for her to be arrested. Both arrested so that cover of Scotch would not be blown. Policemen who went to Carlton included:

W/O Coetzee, Sgt Anton Pretorius (Col in Midrand), Sgt Radebe (discharged), Constable Lazarus Selamolela (Sgt at Sanab, Sandton), Late Sgt Mathiba.

Taken to a farm at Northam. The day after arrest he was posted to the farm to guard her. Persons who guarded her were:

TP 17

Constable Lazarus Selamolela, Const Edmond Sefuthi, Sgt Radebe, Sgt Mathiba, Adriaan Bambo (a recruit from Mozambique who is deceased), Manual from Mozambique, Const Patrick Kobe (taxi unit, Heidelberg).

Assault
She was kept in an outbuilding. She was interrogated by Coetzee, Pretorius and Mong. (Mong is in Soweto). Kept there for more than a month. Hands and feet were cuffed. Sleep was kept to a minimum. She was kicked and slapped. Bag was pulled over her head. At times she could no longer stand. "I was present and did what was expected of me".

Disappearance
One day myself and Lazarus were instructed to go to the SB at Potchefstroom and meet with Coetzee. We drove 1982 beige Honda Ballade. Close to 4 way stop of Fochville and Carltonville with the Joburg/ Potch road we saw a XR6 flashing lights. It was WO Coetzee. Coetzee who was on his own opened the boot and I saw Nokhuthula lying there with her hands (behind her back) and feet cuffed. She was alive. Coetzee told us to return to Soweto.

A few days later I asked Sgt Pretorius where she was as all the guards had been withdrawn. His response: "Moenie baie vrae vrag nie". Spoke to Mathibe who said that Coetzee and Pretorius had shot, killed and buried her at Rustenburg.

Signed at Jhb on 96/02/02 at 14:30
Before Capt Leask, Krugersdorp

MALOSELA PATRIC KOBE: Krugersdorp CAS 1263/01/96 – A7

Detective Constable with National Crime Investigation Unit, Priority crimes, Taxi Conflict – Heidelberg.

During 1982 I joined the SAP I was deployed by Internal Security covertly against Azapo.

Knows nothing of the Simelane woman. Did not see her at the farm and denies meeting her. In 95 Const Veyi telephoned me about this woman. Said I did not know her but heard that she had been arrested **and she had been seriously assaulted.** Got the info from Sgt Mathibe. He is however dead.

Everything I know is hearsay. I heard that Sgt Anton Pretorius, WO Coetzee, and Sgt Mong killed her Although I was handled by these people I did not see anything.

Signed at Jhb on 96.02.05 at 13.30 before N W Thomas.

TP 9

MOKONE MATSEBETSEBE EDWARD SEFUTHI: Krugersdorp CAS 1263/01/96 – A8

Was a SA Policeman. Presently medically unfit. Handed a copy of his **life history** to the investigation team. Started duties with SB, Protea, Soweto in 1982. First gave driving lessons then did covert work which included transport of members to border posts. Recognized photo of deceased. Aware that SP under handling by WO Coetzee made use of Scotch to lure her to the Carlton. Scotch is Norman Mthanza, a covert policman.

Persons present at time of arrest included: Coetzee, Sgt Pretorius, Sgt Mong, Lazerus Selapomela, Scotch. He himself was not present. Got the information through Scotch. After the arrest I know that she was taken to the Block B Flats at Norwood Police Station.

I had to guard her in the room on the roof of the building. She was kept there for about 3 weeks. One of the residents in the flats, a child, "discovered us detaining her there **after she had been screaming from assaults**".

We then took her to a farm in Northam in a cream white E20 Panelvan. The farm belonged to "Oom Piet". His house was very close to the building in which she was kept. She was held here for about 2 months. During this time she was interrogated by Coetzee, Pretorius and Mong. **She was hand and foot cuffed, severely beaten and tortured. At one stage she was unrecognizable.** At the farm she was guarded by myself, Peter Lengene and Veyi.

I was at the farm for at least one month. At a stage I asked Pretorius what happened to her and he said to me that "**I would never see her again**". Coetzee and Mong were present when this was said.

At one stage during the detention of the woman at the farm I had wanted to release her. **"She was however too badly injured and could not walk".**

"I strongly suspect that Nokhuthula has been murdered by Coetzee, Pretorius and Mong. They continuously threatened her with death during the interrogation. I had told Nokuthula never to give the information as they would then kill her".

96/02/06 Before Leask

MOKONE MATSEBETSEBE EDWARD SEFUTHI: Life History – A8

…I was transferred to SA Intelligence in Soweto Protea that is where I was completely exploited. ….i saw injustice ….ANC members were captured, tortured brutally both men and women ..

See para 44: Attempted murder of black policeman, Sefuthi: Sefuthi says summonded by AG in Jhb who says strong case but cannot allow it to proceed attackers were state members acting under cover and he cannot hamper the image of the state

TP

PETRUS CORNELIUS WELTHAGEN: Krugersdorp CAS 1263/01/96 – A9

Lives on farm in east Northam. In early 95 his farm was visited by Sowetan reporters who took photos. A family member, Willem Coetzee, who was in the SAP asked if he could use the outside building for training of persons in the underground. I agreed.

They stayed on the farm for about 3 months. While they were there I did not go to the building. I was aware that 2 black women received training. One followed the other. They were young about 18 years. I will not recognise them.

There was no noise or screaming. The building is about 300 m from my house.

Have not seen Willem Coetzee in 3 years.

96-02-08 - Leask

MOLEKE PETER LENGENE: Made under duress. Krugersdorp CAS 1263/01/96 - A10

Sergeant in SAPS attached to Crime Intelligence Unit, Jhb. He was a "returned exile" and in 1983 was stationed with the Security Police at Protea in Soweto. His task was to train new recruits. His commanders were Capt Coetzee and Lt Pretorius.

In relation to Nokuthula his task was to explain to her "how we worked". This was when she was detained in "a room at the back of the farm". He does not know how she got there.

One morning, Capt Coetzee, Lt Pretorius and Sgt Mony arrived at the farm with new clothing for her. She was told that she was being taken back to Swaziland. They took her away in Ford XR6. I never saw her again. Other policemen involved "with this lady" were Sgt Sefuthi and Norman Mkhonza.

"When I last saw her she was in good health". Denies assaulting her. When he saw her for the first time she was in "good health", **"however she did have some bruises on her face"** There were also bruises on her hands. She explained to him that this was because of the handcuffs.

96/02/09 at 10.03 at Jhb before Leask

NORMAN LUNGILE MKHONZA – A11 (also known as Scotch) - Krugersdorp CAS 1263/01/96 – A11

Employed by Old Mutual. Claims he is bound by the Secrecy Act and cannot give information to anyone.

TP

During 83 was stationed at Protea Security Branch. Task was to work as an undercover agent in Swaziland. He had infiltrated the ANC. Commander was "Willem Coetzee 'Mkhize'".

He passed on information to Coetzee that an MK agent female was to meet with him at the Carlton Centre. The instruction from Swaziland was to wear a yellow shirt and brown trousers. She found me sting at a table at the "Fun Foods Restaurant".

Coetzee, Pretorius and Mony were present. One was taking photographs. On the way to car we were both arrested. We were taken in separate cars and I did not see her again. I was released the same day.

My code name was Dan. I was taken to East Rand where I had plaster of paris applied to my leg and arm. This was my cover why I did not meet her. "Big boy" Frank Langa took this message back to Swaziland. He worked at the security police. Protea.

About 2 weeks later I asked Coetzee where the lady was and he replied: "Moenie baire vrae vra nie". A few months later I asked the same question and he gave the same answer.

Coetzee gave me money to entertain her so that she could be photographed. It was about R100. I has signed for the money at Norwood where Coetzee was staying.

PETRUS MOKEBE MADIBO: Krugersdorp CAS 1263/01/96 – A12

Sergeant in SAP and attached to the West Rand Murder and Robbery Unit, Krugersdorp. On 96/02/10 upon the request of Capt Leask I proceeded to Vereneeging where I handed over to "Scotch" a tape recording device with a clean tape in it.

This device was hidden on the body of Scotch and we monitored Scotch in the presence of 2 white men at the Wimpy in Vereeniging. After the meeting I recovered the device from Scotch which I then gave to Capt Leask. I do not know what was said during this discussion. The white men drove in a white Opel Kadet CA 553 781.

MOHAPI LAZARUS SELHMOLELA: Krugersdorp CAS 1263/01/96 – A13

Inspector in the SAPS and attached to the Organised Crime Investigation Unit, Gauteng. In 1983 Coetzee was my commander. He instructed me to accompany him to the Carlton Centre. Those present included Coetzee, Pretorius, Sgt Mathuba, Sgt Radebe. It is possible that Sefuthi and Mong were also there.

Scotch was followed by our team to the Juicy Luicy in the Carlton Centre. We followed them to the basement where they were arrested and split up. Radebe was in the back of

TP

Coetzee's car with the lady. We followed them to the Norwood married quarters of the SAP. At the top of the building was a room used by the security police. She was interrogated there by Coetzee and Pretorius. The team was all present.

She was kept there for about a week. She was guarded 24 hours by the team. Sgt Vezi also joined us during this period. Whilst in my presence at the married quarters nobody assaulted her. **It was however clear to me that she had been assaulted. Her face was badly swollen.**

When she was originally arrested she was wearing jeans. During her detention she wore overalls. I did not see her other injuries.

After a while we were instructed by Coetzee to follow them to a farm in Northam. I was driving with Vezi. She was put in a small outbuilding at the back of the farm. We erected a tent behind the room where we slept. She was kept on the farm for more than a month. She was interrogated here which was done by Coetzee, Pretorius and Mong. Mathiba was also present.

She was assaulted by use of a bag over her head, use of electrical shocks. She became very weak and could no longer walk. Us black members always tried our best to nurse her but had to be careful not to be caught by our superiors.

During her detention, the assaults were the cause of her changing her physical appearance. She was treated very badly for a woman.

One night this same lady was taken to the zinc dam where Radebe threw her in. She was thrown into the dam after interrogation bouts.

At the farm, Peter Lengene was also present.

She at this stage could no longer walk and we had to even take her to the toilet.

One day we were all withdrawn from the farm. That is the last time I saw her. I do remember Pretorius saying he was just going to lock her up. I thought they were going to take her to a police station.

I do not know who took her away from the farm as I was one of the first to leave. Coetzee, Pretorius and Radebe were still with her when we left.

I never asked questions after last seeing the body.

96.02.11 at 12.08 before Leask

TP

Interview of Sgt PETER LENGENE at Grasmere 1 Stop N1 at 19:24 – 21:45 on 96/02/19 by Leask, Madibo and Badirwang: John Vorster Square CAS 1469/02/96 – A14

In 1982 I was in exile in Gaberone, Botswana where I was kidnapped by Coetzee and Pretorius. I was beaten and tied during the kidnap. I was taken to a house in Rustenberg. This house belonged to Coetzee's in-laws.

Under duress I worked for the security police. My work was to train their recruits about politics and life in exile. I would go to Durban and elsewhere to assist in recruiting people. I was made a policeman but I never went to college.

First I wish to state that my original statement was not the whole truth. The reasons are:

1. I was taken to the interview by Supt Pretorius. We first met with Supt Coetzee.
2. Pretorius told that I should not worry as Director Thoms was going to help us in this matter.
3. That Director Thoms would later show them the files. I was therefore feeling uncomfortable to make a statement as I knew they would be reading it later.

After making the original statement the following took place:

1. I was told to report to Coetzee's office.
2. I was asked to tell them what I had said in my statement. I told them and they questioned me .. for talking to Scotch. They insisted he was not there. The same about Sgt Sefuthi. They said Mathiba was present.
3. Pretorius told me that I must rethink my statement and bring it to him so that he can file it and later show it to our lawyers. I did this.
4. Pretorius was given my statement which he read and gave it back to me. He told me to keep it safe because if he it they could say he was interfering with witnesses. He said that him and Coetzee were the accused.
5. Pretorius asked me if I was shown the photo in the file. He asked me if it was the same woman and I said yes.

Before I made my original statement, Pretorius had told me that the case could not be proved because there is no proof. They suspected Veyi of giving the information to the press.

I fear Supt Coetzee and Pretorius very much and at no cost must they become aware of my statement to you.

Gives an account of abduction and removal to Norwood. The first time I saw her when I went to guard her. **She was already beaten up.**

She had bruises on her face, hands and feet. She was wearing a brown overall. Her hands and legs were cuffed. I was never present when she was interrogated at the flats.

TP 7

She was transferred one or 2 weeks later to Northam Farm near Thabazimbi. I went to the farm in December 1983 with Sgt Sefuthi. **He was in possession of the keys for the cuffs. This was so he could untie her if she wished to relieve herself.**

During my stay Coetzee and Pretorius never came. **On my arrival at the farm this lady was in a bad condition. She told me that she was very afraid of Coetzee as he was very hard on her during interrogation.** She told me she had been promised to be taken to back to Swaziland.

On New Year's eve, Pretorius came with Coetzee and Mong. They had brought new clothes with them for her. Coetzee told her to wash and put the new clothes on. They said they were taking her to Swaziland. The lady was put into the back of our panel van and we followed Coetzee and the others to Westonaria. Here we took her to a certain house where she was placed in the servant's quarters.

Here she was left in the company of Sefuthi, Pretorius and Coetzee. Mong was instructed to take me back to Jhb, which he did. This was the last time I saw this woman. One day after this Sefuthi, Mong and myself were in a vehicle. Sefuthi asked what had happened to her and he said that if we wished to survive in this department you should not ask questions.

I wish to give details on other activities I had taken part in on instruction from Pretorius and Coetzee starting with a murder I was directly involved in.

Not sure of exact year, I think it was 1988. We had a source who had infiltrated the ANC youth in Soweto. This was Max Maukhanzane. He is now a policeman at Jabulani SAP. Then proceeds to explain his role in booby trapping limpet mines and his shooting of a recruit at the behest of Pretorius; and the burning of the bodies, Also gives accounts of involvement of attacks on house of a councilor, and the rector of Vista College, and the bombing of municipal offices in White City and Mzimhlophe Hostel.

96/02/17 before Leask

GILBERT ZAKHELE THWALA: John Vorster Square CAS 1469/02/96 – A15

Inspector General, SA Airforce, HQ Pretoria.

During 1983 I was a commander in the ANC armed wing based in Mbabane. I knew Nokhuthla from 1977. During 1983 she was under my direct command. She was a courier for the units serving in SA. During August or September I instructed her to go to Jhb to meet members of another unit. She was to stay at Duma's place in Soweto. The persons she was to meet were known to me as Frank and Scotch.

TP

She reported her safe arrival. After her meeting she was supposed to return to Duma's place with the communications then proceed to her parents in Bethal and then return to Swaziland.

She never reported back to me. Duma said she never returned. Her parents had no information. The very same weekend of her disappearance either Frank or Scotch was in Swaziland. This was against strict instructions of the ANC that they were never to come to Swaziland. He claimed he had come to Swaziland cos he was scared.

Scotch and Frank had instructions to attack a substation in Randburg. I had confirmation of such an attack in the news.

After this incident neither Frank nor Scotch ever came back to us. I received a visit from the parents of Nokhuthula and I explained to them.

The persons under my command who had specifically spoken to Scotch or Frank in Swaziland would have been Mafa Ngidi Hlonuka (Mayor of Alex/ Sandton) or John June, staying in Phefeni, Soweto. My codename in 83 was Mpho.

She was not kidnapped or murdered by my men. She was of great value to my unit.

96/02/24 before Leask.

DUMA NKHOSI: John Vorster Square CAS 1469/02/96 – A16

In August and September 1983 was attached to a MK unit operating from Swaziland and working in Soweto. Mr Mpho, based in Swaziland, was his commander and would send him instructions.

Was advised that a courier, the late Simelane, would visit and to give her assistance and residence. She stayed with me and I directed her to the Carlton. She left and never returned. Reported this to Mpho who said she never arrived back in Swaziland. Her parents came to investigate.

96/02/24 at Braamfontein before Thoms

THEMBI VILAKATI: John Vorster Square CAS 1469/02/96 –A17

Aunt of the deceased. During 1983 Nokhuthula stayed with deponent. She had just completed her degree and was about to graduate in October 1983. In September she said she was going home to get clothes for her graduation. She never returned. Nokhuthula normally kept in close contact with me and her family. She never made contact.

06/02/29 at Manzini before Leask

TP

JAN STEFANUS FOURIE : John Vorster Square MAS 1469/02/96 - A18

Forensic analyst in the SAPS. Leask gave him "mikrokassetband" to examine. "Daar is n poging aangewend om die spraak verstaanbaarheid op die heropname te verbeter. Ek het geen byvoegings gemaak tot, of geen deel verwyder vanaf die oorsponklike opname nie."

1996 -03 -05 at Silverton

J VAN ZYL – A19

During 1982 -83 he was a member of the SAP stationed at Norwood and served as caretaker (opstigter) of the Police Flats in Norwood.

One Coetzee, a member of the old security branch, together with his staff members, used a storeroom on the 10th floor of the building as an office for interrogation. I cannot remember who gave permission for this use.

96/03/28 before Leask

JOHAN HENDRIK PRETORIUS: Krugersdorp CAS 1263/01/96: PR NO: 107/96 – A20

Inspector in official photography service of the SAPS stationed at the Criminal Record Centre in Rustenberg. On 96-02-08 at 12:15 I photographed points at the farm Uitsig as pointed out by Sgt Weyi. Photos attached.

JUSTICE MAFA HLOMUKA NGIDI: John Vorster Square CAS 1469/02/96 - A21

Mayor of Sandton City. In response to claim by Gilbert (A15) that I spoke to Scotch or Frank I deny this. Instructions were clear that after training Mpho would give instructions to Scotch and Frank so I did not have communications with them.

96/7/03

MSEBENZI TIMOTHY RADEBE –A22 (untruthful statement)

Detective Inspector with the Kwa Mhlanga Motor Vehicle Theft Unit, Mpumalanga.

In 1982 I was transferred from Murder and Robbery to Soweto Internal Security Services. I worked under Superintendent Willem Coetzee, who was a warrant officer and Senior Superintendent Pretorius who was a sergeant at the time.

TP

One Saturday, Coetzee told me there was work to do at the Carlton Centre. He asked me to meet him at the Norwood barracks and told me to proceed to a certain restaurant to meet an informer by the name of Scotch who was on observation.

While in the restaurant I noticed a certain lady come to the informer and sat with him for about 20 minutes. She was in a chicken licken uniform. They left the restaurant and Scotch signaled us by taking out a white handkerchief.

Outside the restaurant I introduced myself and I told her that I was arresting her. She was very co-operative and we went to the basement where our car was parked. I proceeded with Coetzee and Lazrus.

She was kept at Norwood barracks for about a week. Myself, Lazrus and N.... and a certain female guarded her.

I last saw her the day I guarded her. I then asked for a transfer. I asked Coetzee why I should guard a person for 24 hours and he did not give me an answer. He said that in the security branch you must no complain you must comply with instructions. I was then transferred to John Vorster Vehicle Branch.

96-07-26 before Capt Ndlovu

WARNING AGAINST W H J COETZEE ITO S35 OF THE CONSTITUTION: at 14h30 on 6-07-1998 at Pretoria – A23

In the case of murder of Nokhuthula Simelane – during September 1983 at about Carlton Jhb. Declined to make a statement.

3 PHOTOGRAPHS OF THE WELTHAGEN FARM

CORRESPONDENCE

LETTER FROM N W THOMS, HEAD PRIORITY CRIMES, GAUTENG TO A CACHALIA, SECRETIRIAT FOR SAFETY & SECURITY AND NATIONAL HEAD, PRIORITY CRIMES DATED 96-02-19 – B1

Reference 29/36/2 Director Thoms/ Capt Leask

Investigation has received priority attention. Listed people who have given statements.

Pointed out that Sgt Moleke Peter Lengene still works under direct command of Superintendent Anton Pretorius.

TP

Sketched the facts as given by the persons interviewed.

In paragraph 3.5 she was taken to a room in the married quarters of SAPS Norwood where she was detained and tortured for about 2 weeks. Then taken to a farm at Northham where she was further detained, tortured and interrogated. This lasted till the festive season, December 1983. This was the last time she was seen by the witnesses.

Par 4: the actual interrogators are alleged to be: Coetzee, Pretorius, Mong, Lengene and Radebe.

Par 5: Witnesess/ suspects believed to be deceased are Sgt Mathuba and Frank Langa "Big Boy".

Par 7: On 1996-02-17 on the request of Sgt Lengene I (Capt Leask) re-interviewed him. He said his first statement was not truthful. Because he was serving under Pretorius. Pretorius told him that "it was up to him and Norman "Scotch" to save their skins". That Director Thoms would reveal all that he said in his statement. That Capt Leask would not be able to prove any charges as he had no proof of a body.

After the interview he was taken to the Coetzee who wanted to know what had been said in the interview. He was led into an argument because he had mentioned the name of Scotch. He was told to rewrite a statement which Pretorius okayed and told him to keep it in a safe place so that it could later be handed to their attorney as they were busy arranging this through the police.

On 96-02-07 Coetzee promised Leask to make the suspect Scotch available which he never did. Leask however found him.

Par 8.2: On 95-02-10 Pretorius and Coetzee secretly met with Scotch and coached him into what his version should be if Capt Leask approached him. This discussion was secretly taped by the investigation team.

Par 9: It has become very clear from the meeting with Sgt Lengene on 96-02-17 that Nokhuthula's incident was not a one off event but part of an extensive programme involving bombings, kidnapping and murder of numerous persons.

Lengene confesses his own part in a murder in which he shot someone with an AK47 given to him by Pretorius and Coetzee.

A detailed statement will be obtained from Sgt Lengene on 96-02-19 at a secret rendezvous at which he will reveal all the dirty tricks he was involved in.

Par11: It is of great concern that Coetzee and Pretorius are still in positions in the police where they can easily continue with intimidation, defeating the ends of justice because of their contacts with the CIS and its members. This could lead to the elimination of members. It is suggested that they be transferred to the Uniform pro-active division.

TP

An official murder and kidnapping investigation has been launched - John Vorster Square CAS 1469/02/96.

TELEFAX FROM CAPT LEASK TO MINISTER MUFAMADI, DATED 96/02/22 –B2

LETTER FROM CAPT LEASK TO CO, ELECTRONICS UNIT, FORENSIC LAB, DATED 96-02-26 – B3

Attached one micro cassette tape properly sealed with no 224. Conversation with three parties in a busy restaurant. As a result of background noise this impaired to a certain extent the proper hearing of the discussion.

Seeks assistance to diminish background noise but to maintain authenticity.

LETTER FROM N W THOMS, HEAD PRIORITY CRIMES, GAUTENG TO DIVISIONAL CHIEF, NATIONAL CRIME INVESTIGATION SERVICES AND HEAD, NATIONAL PRIORITY CRIMES DATED 96-02-19 – B4

Same letter as B1

TELEFAX TO DUMA NKOSI FROM CAPT LEASK DATED 96/03/05 – B5

Attached statement of Duma. Advised that he (Leask) had made contact with Steven Markowitz and believe that we will be getting all the necessary assistance. States that the Director and myself have already been to Swaziland and all went well there.

LETTER FROM J S FOURIE, FORENSIC SCIENCES LAB TO CO SAP, JOHN VORSTER SQUARE DATED 96-03-04 – B6

Returns evidential items to Capt Leask with seal number 1815

RESULT OF TRIAL: INVESTIGATION BY FORENSIC SCIENCE LAB. REF NO: 8625/96 (T1759)

Nothing stated in the document.

LETTER FROM ASST COMMISSIONER L VAN DER WESTHUIZEN, NCIS, GAUTENG TO PROVINCIAL COMMISSIONERS – NORTHERN PROVINCE, NORTH WEST, MPUMALANGA, GAUTENG, FREE STATE, EASTERN CAPE, WESTERN CAPE, KWAZULU NATAL, NORTHERN CAPE DATED 96-03-06 – B7

TP

Re: Missing persons period 1980 to 1996. Unidentified bodies recovered by the SAPS. Requests assistance of all SAPS Govt mortuaries to supply list of all unidentified bodies removed by the SAPS, race and sex, place of discovery and cause of death, case or inquest number, fingerprints or photos on record.

INVESTIGATION DIARY

INVESTIGATION DIARY: Krugersdorp 1263/01/96: 96/01/30 – 98/02/10: C1 –12

Selected extracts: 96/02/07: 16.00 Const Selomolela interviewed. Knows the woman but wishes to first seek advice and clear his thoughts before making statements. Appointment made for the next day at Nandos Krugersdorp.

96/02/08: 08.30: he is willing to give a statement as he fully intends to approach the TRC. He will first approach his attorney and then make a new appointment.

96/02/14: meeting with Thoms at office Azar Cachalia.

96/02/26 Case discussed with Deputy Attorney General Adv Kevin Attwell and Adv De Vries on 96/02/23. Recommendation that the matter be discussed with Dr De Oliviera of the 3rd Force Investigations. Discussion was held with de Oliviera. All possible evidence must be gathered and investigation must proceed.

96/02/28: Linda Moni contacted at his home. Represented by Wynand Louw of Joubert & Cornelius. Wished to consult with client before statements.

96/08/05: correspondence forwarded to Duma Nkosi as per B5. Mr Steve Markowitz of New Vision productions was interviewed.

96-10-22: Saak word vir afwagting van PG terruggehou. Adv Ebrahim lees die stukke. Open n Ondersoek dag we..eus (?) boek - NW Thoms

96/10/23 Noted. Investigation notes are filed in respective files – Leask

98/02/10 – amnesty hearings o/s.

TP 07

TN 21.215

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Priority Crimes Litigation Unit

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi baMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

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5 December 2013

Your Ref: B Sibiya

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Dear Sir/Madam

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA SIMELANE

1. I acknowledge receipt of your letter, addressed to the Acting National Director, dated 28 November 2013, which was brought to my attention on 4 December 2013.

2. I must however apologise to you for not forwarding a reply to you in response to your letter of 20 September 2013. A reply and a progress report were prepared, but due to other pressing commitments, were not forwarded to you prior to the arrival of your latest letter.

3. Due to the contents of your latest letter, I deem it unnecessary to respond to the issues raised in the letter of 20 September 2013, but my failure to respond should not be construed as an admission of any of the facts stated therein.

4. I wish to correct your claim that the police docket was referred to the PCLU in 2001. The PCLU was only created by Presidential Proclamation in March 2003 and officials only assumed duty in either July or August of that year. The investigation initiated by then Captain Leask was not referred by SAPS to the PCLU. It is also not correct that little or no action was taken in this matter

until earlier this year. This issue was comprehensively dealt with by Dr Ramaite SC in his communications with your client earlier this year.

5. I respond to your queries raised in para 4 of your letter as follows:

5.1 Ad para 4.1: Failure to hold an inquest between 2001 and 2010

5.1.1 Shortly after his appointment in late 1998, Mr Ngcuka, the then National Director, established a TRC component within his Head Office to attend to prosecution-related matters arising from the TRC. The majority of the amnesty judgments had not been delivered at that time (including the case of your client) and the unit was disbanded in 2001. Captain Leask was instructed by his superiors to suspend his investigation and surrender his docket to Captain Holmes so that the matter could be investigated as part of a larger case against former SAPS General Engelbrecht. Captain Holmes appears not to have investigated your client's case further and his unit was thereafter disbanded and he subsequently died of cancer.

5.1.2 In 2003, the work of the TRC Amnesty Committee was concluded and once the PCLU had become operational, Mr Ngcuka referred the TRC cases to it.

5.1.3 Your client's case was not referred to the PCLU by the authorities who had previously been responsible for the investigation and prosecution of TRC matters, despite a request by the PCLU that all outstanding cases requiring decisions whether or not to prosecute should be referred to it.

5.1.4 It would appear that this matter was brought to the attention of the PCLU in November 2004 when a submission was made by the Foundation for Human Rights (who at that stage represented your client) that the persons who were refused amnesty should be prosecuted. This was taken forward by way of a recommendation in March 2006 that consideration be given to the customary international law crime of torture.

TP

5.1.5 I have been advised that several discussions took place between Adv Ackermann SC, the then Head of the PCLU and representatives of the Foundation. In this regard I have been further advised that although at one stage Adv Ackermann SC raised the issue of holding an inquest, this was resisted by the Foundation who then proposed that Sergeant Radebe be prosecuted for kidnapping.

5.1.6 Obviously, consideration to the institution of a prosecution could only be conducted on the basis of a fully investigated police docket. It is clear that Captain Leask had not concluded his investigation and that no further investigations were conducted thereafter. The NPA had no role to play in these decisions. Dr Ramaite SC has explained in his letters to your client why the necessary investigations were not conducted by the relevant law enforcement agencies once the PCLU had become seized with the matter.

5.1.7 As is clear from the instructions given by Adv Macadam when he became seized with the matter, he required the matter to be properly investigated, including the issue of Sergeant Radebe's role in the kidnapping. These investigations have been in progress since October 2010. The holding of an inquest would only be appropriate once a decision whether or not to prosecute had first been taken.

5.2 Ad para 4.2: DNA analysis

A DNA sample was retrieved from the skeletal remains found in the Brits area in April 2013 for comparison with the sample provided by your client. In June 2013, the SAPS laboratory indicated that the sample retrieved from the remains contained inadequate DNA material for comparison purposes. The Head of the SAPS laboratory has however indicated that a second sample will be obtained and submitted to a specialist DNA laboratory in Bosnia, which specialises in DNA analysis relating to bones which are of archaeological significance. The results of the second analysis are still awaited.

5.3 Ad para 4.3: Exhumation-related issues

During the course of a routine excavation in the Brits area, the skeletal remains were found by contractors. In the opinion of

TP

the investigating officer and his commander, the remains could be those of Nokuthula Simelane due to the proximity of the site to the farm where she was detained and tortured. The remains were submitted to an anthropologist who made certain findings which may be consistent with the missing person. However, SAPS has been requested to provide a more comprehensive case history in order to establish whether the anthropologist can make more specific findings. In addition, photographs of Nokuthula Simelane taken shortly before her disappearance have been provided to a facial reconstruction expert for forensic investigation. The PCLU has requested a meeting with the Head of the SAPS Forensic Laboratory in order to determine when all the outstanding examinations may be concluded.

5.4 Ad paras 4.5 and 4.6: Westonaria Plot

The plot in question was pointed out by a former police under-cover agent, who was involved in your client's case. Certain investigations were conducted by the NPA's Missing Persons' Task Team (MPTT). A recommendation has been made that the plot be inspected by a specialist anthropologist to determine the feasibility of an exhumation. This aspect must be taken up further by the SAPS Victim Recovery Unit and the necessary direction given to SAPS in this regard.

5.5 Ad para 4.7: Mortuary Records

The MPTT was requested to peruse the records of all mortuaries in areas which have relevance to your client's case. The criteria applied were unidentified females (corresponding with the race, gender and age of the missing person) who had been admitted to the mortuaries during the period of her disappearance and detention. Only the Krugersdorp mortuary (located midway between other key areas, e.g. Westonaria, Soweto, Northam, etc) revealed entries consistent with the criteria set. The records however do not have police reference numbers and the post mortems are illegible. An enquiry directed to the Police Photographic Units established that no photographs were taken at that mortuary at that time. A request has however been made to the SAPS Victim Recovery Unit to canvas the possibility of being able to locate the graves in question and if this is possible, to take a DNA sample from each grave. If a positive connection was made with the sample provided by your client, then obviously that grave will be exhumed.

TP

5.6 Ad para 4.8: Monthly reports

I have already explained why the October report was not provided. I have no record of Legal Resources Centre acting on behalf of your client from February 2013. Adv Macadam was contacted by Adv Palmer, who informed him that he represented your client. From that date, there were ongoing meetings, email communications and telecoms between the two advocates where progress with your client's case was reported on and discussed.

5.7 Ad para 4.9: Reasons for not holding an inquest

I will respond to these issues hereunder.

6. I am prepared to meet with you and would request you to provide me with proposed dates so as to enable me to decide when I can accommodate you. My view is that the outstanding investigations should be concluded in early 2014 and that the holding of an inquest should be held over until the decision whether to prosecute or not has been taken. In terms of the Inquests Act, an inquest is only held when a prosecution on a charge relating to the death of a person is not instituted. I am of the view that the following factors would indicate the inappropriateness of holding an inquest prior to the conclusion of the investigations and the decision being taken:

6.1 A judicial officer would not be inclined to hold an inquest in the absence of a decision not to prosecute and on the basis of an affidavit by the investigating officer that there are key outstanding investigations. Section 4 of the Inquests Act in any event requires that a prosecutor request further information if he/she is not satisfied with the police investigation.

6.2 All the persons (including those who submitted witness statements), who were involved in the kidnapping and torture are entitled to legal representation and to decline to answer incriminating questions. It is only to be expected that their lawyers would object to the commencement of the inquest prior to the investigation being concluded.

6.3 The investigating officer would be seized with the inquest and be unable to continue with his investigations.

6.4 Were an inquest to commence, there would be frequent postponements due to all the outstanding issues.

TP

6.5 Were a prosecution to be instituted, the witnesses would be prejudiced, as they would then be subject to cross-examination in two *fora* on the same issues.

7. I provide the following further information by way of a progress report covering the period October to December 2013:

7.1 I have already dealt with the issues relating to the skeletal remains found in Brits, the mortuary entries and the Westonaria plot. The SAPS has been requested to address and expedite the outstanding issues relating to these matters. If positive, these investigations could establish that the missing person never returned to Swaziland and would have a serious impact on the version of certain of the amnesty applicants.

7.2 The archive records relating to the persons, whom certain of the applicants claim were arrested as a result of the information provided by the missing person, have been retrieved and carefully perused. The investigating officer has been requested to trace the relevant persons and to obtain comprehensive statements relating to this issue. Where the persons' versions can be verified by the authors of the State documentation retrieved, then those former State officials should also be traced and affidavits obtained from them.

7.3 Additional statements have been requested from certain of the State witnesses arising from material now obtained.

7.4 Photograph albums and maps of the relevant scenes have also been requested.

7.5 A proper search of the State Archives has revealed that documentation referred to during the course of the amnesty hearing cannot be located. However, additional statements taken either by the TRC or SAPS, which appear not to have been before the committee, have been found and the contents of those statements require investigation.

8. As indicated, key evidence relating to the amnesty hearing is no longer available. The records reflect that an Adv van den Berg represented your client at the hearing. If your client is in possession of any of the records relating to the amnesty hearing, it would be appreciated if these could be made available to the investigating officer in order to establish whether the missing

TP

documents can be traced. Further evidence available to the investigating officer is that your client's family collected Nokuthula Simelane's passport from Mr Duma after her disappearance. If the family is still in possession of the passport, it would be appreciated if this could be made available to the investigating officer, as it contains highly relevant information.

9. I therefore await your communication regarding a meeting.

Yours sincerely

9/12/2013

ADV SK ABRAHAMS
ACTING SPECIAL DIRECTOR OF PUBLIC PROSECUTIONS
AND ACTING HEAD: PRIORITY CRIMES LITIGATION UNIT
OFFICE OF THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

TP

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31 January 2013

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Dear Ms Nkadimeng

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. I acknowledge receipt of your letter, dated 29 January 2013 and at the outset express my extreme sympathy for the suffering you and your family have experienced due to the unresolved disappearance of your sister. The purpose of my communicating with you is to explain fully all the relevant facts relating to your sister's disappearance so as to allay your criticisms levelled at the PCLU. Your case has and will continue to receive diligent attention by the NPA. As will be explained hereunder, it is not possible to hold an inquest prior to the conclusion of the outstanding investigations, which must be conducted by the DPCI.

2. Although your sister disappeared in September 1983, the first information identifying suspects was only received by SAPS in 1996.

3. When the TRC was established, SAPS elected to put on hold all investigations where amnesty application had been lodged. Your sister's matter was one such case.

4. The judgment of the Amnesty Committee was only released in May 2001.

TP

5. When the PCLU was established in 2003, the National Director referred all TRC cases to it.

6. It is correct that the TRC cases were temporarily put on hold pending the formulation of guidelines. This was because it was deemed important that special considerations applied to these cases.

7. Your application to have the provisions (which you state constituted a second amnesty process) set aside, resulted in the Court declaring the whole guidelines unconstitutional, including the mechanisms creating structures for the investigation of such cases.

8. When the President established the Ginwala Commission, SAPS declined to further investigate the matters, pending the conclusion of the Commission. One of the matters falling within the terms of reference of the Commission was the manner in which TRC cases were dealt with by the NPA.

9. The dissolution of the DSO, the establishment of the DPCI and the redefining of the mandate of the detective service did unfortunately hamper efforts to have your case investigated.

10. In early 2010, Adv Macadam was appointed by the Acting National Director to take over all the matters and to liaise directly with the DPCI, following an agreement reached between the NPA and General Dramat.

11. I enclose a copy of Adv Macadam's letter of 25 March 2010, addressed to the Unit Commander of the DPCI, who had been mandated to investigate TRC cases. As emerges from the letter, Adv Macadam did specifically request that the issue of prosecuting Detective Inspector Radebe be investigated. As is also clear from the letter, the NPA at that stage merely had a duplicate docket and it was obviously essential that the original docket and other evidence be located.

12. Captain Masegela was appointed to investigate the matter and in late 2010 submitted a docket to Adv Macadam. I enclose a copy of a letter, dated 27 October 2010, written by Adv Macadam to Captain Masegela, requesting an extensive number of all-embracing investigations. Yet again, the role of Detective Inspector Radebe was emphasised. As is evident from the investigations requested, your sister's case had obviously not been fully investigated, either by the TRC or by SAPS. It is also clear that it would not be possible to quickly finalise the investigation, because of the issues required to be canvassed.

13. It is correct that the PCLU declined to institute a prosecution on the Customary International Law crime of torture and on a

TP

charge of attempting to defeat the ends of justice. The two letters, written by Adv Macadam, however demonstrate that the request that consideration be given to the prosecution of Detective Inspector Radebe, was acceded to.

14. It is the view of John Dugard, one of the world's leading experts in the field of International Law, that international crimes require domestic legislation before they can become enforceable in South Africa. The Constitutional Court, in the *Wouter Basson* matter, also specifically refrained from directing that he be charged for Geneva Convention crimes and in fact limited his potential prosecution only to offences under the Riotous Assemblies Act. The domestic Rome Statute, which criminalises certain international crimes, specifically prohibits prosecutions for such offences committed prior to the enactment of the Statute. The Torture Convention Bill also makes no provision for retrospective criminalisation. The PCLU's decision not to institute a prosecution on a charge of torture was correct. Only a charge of assault with intent to do grievous bodily harm could have been considered, but such crime had prescribed in 2003.

15. The person who alleged that he had been influenced to change his version was deceased even prior to the amnesty hearing. The tape recordings were lost while in police custody. There could therefore be no basis for a prosecution and in addition, charges of defeating the ends of justice would have prescribed in 2006.

16. The docket was not submitted to the PCLU in July 2011 under cover of a report, let alone one as required in terms of Section 4 of the Inquests Act. In fact, the docket was re-submitted with a substantial number of the original investigations not having been conducted and no evidence establishing that your sister was murdered.

Report referred to in the letter

→ Which of those in the 2010 letter

17. Rather than requesting that the outstanding investigations be conducted at that stage, Adv Macadam explored a number of other options, aimed at trying to establish that your sister was in fact murdered by the Security Branch:

    17.1 In a statement, dated May 2011, the original investigating officer indicated that he had been instructed to hand over the docket to Captain Holmes so that it could be part of an investigation against General Engelbrecht. The original docket when located contained no statements taken by Captain Holmes and it was established that he had passed away many years previously. A perusal of the D'Oliveira material failed to reveal any record of investigations conducted by him into your sister's case. It was established that an investigation into General Engelbrecht was conducted, but that the Director of

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Public Prosecutions: Pretoria declined to prosecute and the National Director concurred with this decision. That investigation contained no evidence referring to your sister's disappearance and murder.

17.2 A matter completely overlooked by both the TRC and SAPS was the claim by three of the suspects that bombings of two power stations and a railway line and the arrest of Justice Ngidi confirmed their version. After an extensive search, the dockets relating to the bombings were located and in fact found to contain evidence which would have been materially relevant at the time of the amnesty application. It was however further established that a separate committee of the TRC granted the persons involved in the bombings amnesty. The docket relating to Justice Ngidi could not be located; however, other evidence was obtained which indicated that he was arrested at a different time as alleged by the suspects.

17.3 The discovery of this additional evidence led Adv Macadam to conclude that your sister may have been in fact murdered on the farm. He requested the Missing Persons' Task Team (MPTT) to look into the possibility of conducting an exhumation. A senior international forensic anthropologist however advised that an exploration of the farm should only take place in spring before the summer re-growth of vegetation, but when the ground was again moist after spring rains.

17.4 As an interim measure, the MPTT commenced inspecting mortuary records with the aim of locating cases which matched the description of your sister. This has led to a process of retrieving various inquest records relating to unidentified persons. Once all the records have been obtained, they will be placed before Adv Macadam in order for him to decide whether any of them relate to your sister.

17.5 Although the exploration of the farm was conducted in October 2012, the report from the MPTT was only made available on 25 January 2013. This was because the MPTT explored every possible option which could lead to the identification of the burial site. All these options however were too of no avail and the MPTT has concluded that no exhumation is feasible in the absence of clear evidence as to a specific burial site.

18. The docket was only resubmitted to the PCLU late last week, again containing no further statements, save for the report of the MPTT. The allegation that Ms Fullard advised you to approach the suspects is disputed by her. In any event, I would not

authorise any such conduct, as this would not be conducive to the interests of justice.

19. The docket has been carefully perused by Adv Macadam and a Senior State Advocate and is in the process of being re-submitted to the investigating officer with an instruction that all outstanding investigations be concluded without further delay.

20. Only after the matter has fully been investigated can Adv Macadam, in consultation with the relevant Directors of Public Prosecutions, make a properly informed recommendation as to whether a prosecution can be instituted or not. The decision rests with me.

21. The placing of the existing statements before a Magistrate would not serve any useful purpose, because the Magistrate would be constrained not to hold an inquest until the matter has been properly investigated

22. Insofar as you request that the inquest be held in the High Court is concerned, the Inquests Act requires that the Minister approach the Judge President of the relevant division to appoint a Judge. I cannot request the Minister to exercise these powers in the absence of a fully investigated case.

23. As the evidence currently stands, there is confusion as to where your sister was last seen alive and consequently, Section 6(3) of the Inquests Act may apply, which requires that the Minister appoint a specially designated Magistrate. This provision also could not be invoked in the absence of a fully investigated case.

24. Insofar as you also request the appointment of a special prosecutor in consultation with your family, I am of the view that this would impede on the independence of the NPA, because in certain cases, the Courts have set aside appointments of prosecutors where there is a connection to the complainant.

25. I trust that the above reassures you that the matter is receiving proper attention. You will be informed when the matter has been investigated and a decision taken. In the event of the decision being taken to hold an inquest, the various provisions of the Inquests Act will be invoked to ensure that it will be a formal one.

Yours sincerely

DR MS RAMAITE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

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13 August 2013

Your Ref: B Sibiya

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Dear Sir/Madam

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA SIMELANE

Your letters dated 31 July 2013 and 5 August 2013 have reference.

I must at the outset express my understanding of your client's anguish and frustration at the unresolved investigation into the disappearance of her sister.

I am however constrained to respond to the issues raised in your letters.

In response to your client's letter of 29 January 2013, Dr Ramaite SC in detail on 31 January 2013 explained why, although regrettable, no investigations were conducted into the disappearance of your client's sister from 2001 until March 2010.

It must be emphasised that the National Prosecuting Authority (NPA) is not an investigative agency and the mandate of conducting investigations into your clients matter rests with the Directorate for Priority Crime Investigations (DPCI) of the South African Police Service (SAPS).

TP

Since its inception in March 2003, the Priority Crimes Litigation Unit (PCLU) in my office, in addition to conducting and managing prosecutions, has been mandated solely to manage and direct investigations which are conducted by other law enforcement agencies.

It is therefore not correct, as you claim in your letter of 31 July 2013, that it is the NPA (and more specifically the PCLU and/or Adv Macadam of my staff), which is conducting the instant investigation.

During a meeting on 18 February 2013 between your client's then legal representative (Adv Palmer), Adv Macadam, the investigating officer (Captain Ali Masigela) and his commander (Colonel Xaba), the latter endeavoured to conclude the investigation by the end of May 2013.

During May 2013 the DPCI advised the PCLU that its investigation into your client's sister's disappearance would not be concluded by the end of that month. As a result Adv Macadam informed Adv Palmer in writing, on 17 May 2013, that the investigations would not be finished by the end of May 2013, and requested him to indicate his availability for a meeting to discuss the issues as it had previously been agreed that the parties would have a progress meeting at the end of May 2013. Although Adv Palmer was unavailable to attend such a meeting as he was abroad, he was nevertheless informed in writing of what further investigations were being carried out by the DPCI.

On 27 June 2013, Adv Palmer was again provided with written feedback as to the status of the further investigations which had to be conducted. In this regard, he was specifically informed at the time that an exact date for the conclusion of such investigations could not be given.

I have been advised that in addition to the written communications between Adv Macadam and Adv Palmer, there were several telephonic communications where the issue of the progress and investigations was discussed.

Towards the end of July 2013 Adv Macadam was contacted telephonically by Adv Palmer, phoning from abroad, who requested a meeting which was consequently scheduled for 20 August 2013. This was the earliest date that Adv Palmer was available.

TP 07

Your client's contention that the investigation can be finalised by 30 August 2013 is unfortunately practically impossible and hence entirely misplaced. I am constrained to point out the following:

i. Ms Nokuthula Simelane disappeared in 1983.

ii. The first information relating to her disappearance came to light in 1996, resulting in a police docket being opened.

iii. The investigating officer at that time was instructed by his superiors not to continue with the investigation.

iv. An amnesty hearing of the Truth and Reconciliation Commission (TRC) produced a series of contradictory versions from the witnesses who testified.

v. The judgment of the Amnesty Committee was only handed down in May 2001.

vi. In March 2010 a duplicate docket as well as TRC material which had been requested from the State Archives was available.

vii. The original docket was only located later the same year, which resulted in the investigating officer being directed to conduct a number of extensive and complex investigations on 27 October 2010.

viii. What transpired further has been dealt with extensively in Dr Ramaite SC's letter referred to above.

I have been advised that the following aspects are under investigation by the DPCI:

i. Skeletal remains were found during the course of an exhumation, which are currently undergoing full forensic and DNA analysis. The DPCI has indicated that the outcome of these examinations will determine the nature of further investigations which are necessary. I have been advised that the results of the analysis are only expected within the next four to five months.

ii. The Missing Persons' Task Team (MPTT) has examined the mortuary records of all mortuaries which have relevance to the disappearance of your client's sister. Four mortuary entries have been shortlisted. However, the records do not

TP

contain legible post mortem reports and in certain instances the relevant police station and docket particulars are not reflected. As an interim measure enquiries are being conducted with the local fingerprint bureaus in order to establish whether photographs were taken prior to the post mortems and whether such albums are currently still in existence.

iii. The various safe houses in use by the Soweto Security Branch were inspected by the MPTT in order to establish whether human remains could have been buried there. The examinations produced negative results. However, in respect of a small holding in Westonaria, enquiries are being conducted to assess the feasibility of an exhumation. Obviously the outcome of all the other exhumation-related issues will determine whether an exhumation should be conducted at this site.

iv. It was a key submission by several of the amnesty applicants that the arrest of a number of MK operatives supported their version that Ms Simelane had not been tortured for a month, as alleged by other applicants. Extensive efforts are being made, via the SAPS, Justice and other State Archive systems, to locate the relevant dockets, court records and other relevant documentation so that not only properly informed consultations may be conducted with these persons, but also so that corroboration from former State officials may be forthcoming. It is an extremely time consuming process to request and retrieve such information which has to be followed up carefully.

In your letter of 31 July 2013, you demand that I make a decision to prosecute the alleged perpetrators or refer the matter for the holding of an inquest by no later than 30 August 2013. In your letter of 5 August 2013, you infer that your client would review her instruction should no decision be forthcoming on the premise that a reasonable explanation for the delay in the finalisation of the investigation is provided.

In light of the nature of the investigations, I am not persuaded that the DPCI would be able to conclude same by the end of August 2013.

In terms of the NPA Policy, a decision whether or not to prosecute must be carefully considered and may only be taken once all the relevant issues have been properly investigated. In the event that I decide to institute a prosecution, I must, *inter alia*, be satisfied that there are reasonable prospects of a successful prosecution.

TP

Similarly, an inquest may only be held once a case has been fully investigated and where a prosecutor has declined to prosecute. The holding of an inquest before the issues set out above have been investigated would in all probability result in the presiding officer declining to hold an inquest.

The amnesty hearing demonstrated serious legal challenges to the conflicting versions of witnesses and applicants. Any attempts made to hold an inquest without all the relevant issues having been investigated would result in objections from the lawyers representing the implicated parties causing an untenable delay.

Once the matter has been fully investigated, the evidence must be carefully evaluated by the PCLU, which must also canvas the views of the Directors of Prosecution of the South and North Gauteng High Courts where key elements of the offences were committed. I will thereafter be provided with a recommendation on whether or not to prosecute. I will thereafter advise you of my decision herein once I have fully applied my mind to the relevant material.

I wish to reassure your client that the PCLU is doing its level best to ensure the DPCI speedily and efficiently conclude the investigation into the kidnapping, torture, disappearance and murder of her sister, Ms Nokuthula Simelane.

The PCLU will also advise your client, through you, on any progress with the outstanding investigation on a monthly basis up until the finalisation of the investigation.

I therefore advise you to consult carefully with your client on the contents of this letter. Should you nevertheless proceed with a court application, same will be opposed and an appropriate order of cost sought.

I trust you find the above in order.

Yours sincerely

ADV N JIBA
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

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25 March 2010

Senior Superintendent Louis Bester
Directorate for Priority Crimes Investigations
PRETORIA
0001

By hand

Dear Superintendent Bester

INVESTIGATION: NOKUTHULA SIMELANE; JOHN VORSTER PLEIN CR 1469/02/1998

In this case, the deceased disappeared from the Carlton Centre in 1983 and to date, her body has not been recovered.

An investigation by the D'Oliveira Unit obtained evidence to the effect that she was kidnapped from the Carlton Centre, taken to the Norwood Police Barracks and thereafter, to a farm in the North West Province, where she was assaulted by Security Branch members.

Several former Security Branch members, including Coetzee, Pretorius and Mong received amnesty for her kidnapping, but not for her assault. The assault crime prescribed in 2003 and consequently at this stage, consideration can only be given to an investigation into her murder. At present, there is no evidence indicating where and when she was killed and what was done with her body.

The family are represented by Adv Howard Varney (Cell: 0716720122 and 0832617062) and have requested that consideration by given to prosecuting former Detective Inspector Msebenzi Timothy Radebe, who was involved in the kidnapping at the Carlton Centre and Norwood Police Station. He had submitted a witness statement, "A22" in the docket.

TP M

It must be established whether the witnesses are still available and whether they confirm their statements in the docket, as well as their testimony before the Truth Commission. They should also indicate whether there is anything in addition which they would like at this stage to indicate.

The version of Radebe differs from that of the other persons, who were State witnesses. The decision to treat Radebe as a witness and to obtain an affidavit from him rather than warning him, appears strange. The former investigating officer must be approached and requested to explain why a witness statement was taken from Radebe. If he was made a witness, it would be difficult at this stage to justify now charging him.

In the event of the National Director declining to prosecute in this matter, then an inquest would have to be held and it must be established in which Magisterial District the farm where the deceased was last seen alive is located.

The NPA was only provided with a duplicate docket. It is only to be anticipated that it may be difficult to locate the original, as this was opened by the D'Oliveira Unit, which closed down 10 years ago. However, the witnesses can confirm that the statements in the duplicate docket properly reflect their versions as provided to the D'Oliveira Investigation Unit.

The duplicate docket and four other files are attached herewith and must be returned once the investigation has been completed.

Kind regards

RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
AND DEPUTY HEAD: PRIORITY CRIMES LITIGATION UNIT

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27 October 2010

Captain TP Masegela
Crimes Against the State
PRETORIA
0001

Email: BesterL@saps.org.za

Dear Captain Masegela

NOKUTHULA SIMELANE
JOHN VORSTER SQUARE CAS 1469/02/96
CATS 01/082010

In this matter no person has as yet been arrested or prosecuted. No corpse has been found which matches that of the missing person. In the event of a prosecution not being conducted, an inquest would have to be held. Having regard to the facts of the case, were an inquest to be held, it would be desirable that a formal one be held.

The material placed before me consists of the following:

(a) A duplicate John Vorster Plein docket missing certain statements;

(b) An original investigation diary;

(c) Loose photographs;

(d) Extracts from the Amnesty application.

I have added the judgment of the Amnesty Committee to the TRC documents.

Both the initial investigation and the amnesty hearing require further investigations, which are set out hereunder. In the event of a

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prosecution, only the police investigation and the statements and evidence of the State witnesses, who applied for amnesty, may form part of the docket. The amnesty statements and evidence of the accused could not form part of the docket.

In the event of an inquest, all the relevant facts would have to be placed before the inquest Magistrate, in which case all the amnesty material would have to be included.

It is therefore recommended that the docket be compiled in three separate sections:

1. The police investigation and all investigations carried out thereon;
2. All the material which was placed before the Amnesty Committee;
3. All investigations carried out as a result of the evidence before the Amnesty Committee.

A complete set of all the evidential material (testimony applications and documents) placed before the Amnesty Committee must be obtained. A bundle would have been compiled by the TRC of all the relevant documentary evidence, placed before the Committee. (This may have included the police docket.)

The applicants completed application forms and attached thereto statements and other documents.

The applicants and witnesses then testified and the transcripts of their evidence are necessary, as well as any documents which may have been introduced during their testimony.

Documentation currently missing includes:

- The testimony of Duma Nkosi;
- Portions of the cross-examination of Veyi;
- Statement made by Veyi, which accompanied his amnesty application.

As far as the police investigation is concerned, the following further investigations are necessary:

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- ✓ Although the original "C"-clip is in the docket, the "B"-clip and the original "A"-clip are missing. There is a duplicate docket, but certain statements are missing, certain statements have not been allocated an "A"-clip number and certain statements have not been signed, nor commissioned.

- ✓ A portion of another docket Krugersdorp CAS 1263/01/96 has been included in the John Vorster docket, but the whole Krugersdorp docket is required.

- ✓ The original investigating officer is required to submit a statement, setting out all the steps taken in the investigation and indicating when last he had the original docket in his possession. He should also assist in reconstructing the docket and addressing issues relating to the unsigned statements, etc.

- ✓ According to the investigation diary, in 1996 the Rustenburg LCRC compiled a photograph album and sketch plan of the farm where the missing person was detained. This album and plan should be obtained, as at present, there are only loose photographs. If the original album cannot be located, then the farm must be revisited with the relevant witnesses and a new album and sketch plan compiled.

- ✓ It must be established whether all the original witnesses are available and if so, they must be requested to comment on whether they stand by their original statements and if they testified before the TRC, their TRC versions. Any contradictions or retractions should be properly explained.

- ✓ In several of the statements reference is made to persons who are claimed to be dead. Confirmation of these deaths must be obtained.

- ✓ The issue of "A22" (MT Radebe) is puzzling and must be clarified:

    - The first witness to come forward was Vayi, who indicated that Radebe participated in the torture at the farm. The statement of Radebe is however to the effect that he only guarded the missing person at the Norwood flat for a week and was then transferred to the John Vorster Vehicle Branch. Another witness, Selamolela, also alleges that Radebe was at the farm and in fact claims that the missing person was last seen in Radebe's company, together with two other persons, namely Coetzee and Pretorius. All the witnesses involved in the kidnapping and assault of the missing person made statements to Captain Leask, who warned them of their right against self-incrimination.

- In the case of Radebe, we only have an unsigned and unattested statement, purportedly taken by Captain Ndlovu of the Braamfontein Police. Radebe was not warned of his right against self-incrimination according to the statement. The circumstances under which the statement was obtained must be properly established and in particular, it must be established whether at any stage, Radebe signed an affidavit.

- If Veyi and Selamolela are telling the truth about Radebe's involvement at the farm, then his statement to the effect that he was never there must be a lie. Conversely, if in fact he was transferred to the Vehicle Branch, then a question mark hangs over the veracity and the reliability of Veyi and Selamolela as witnesses.

- Whether Radebe is being truthful or not could easily have been verified by establishing whether in fact he was transferred to the Vehicle Branch in early September 1983. The original investigating officer must indicate whether any investigations in this regard were conducted and if so, what the outcome thereof was. If this was not properly established at the time of the initial investigation, then this aspect must be now investigated. I assume that the SAPS personnel registers could provide relevant information. According to the private investigator, Radebe is still a serving member of SAPS.

- Radebe never applied for amnesty and the family of the missing person have made representations that he should be prosecuted. Whether he can at this stage be prosecuted would depend on whether he was given the status of a witness at the time of the initial investigation. The investigating officer must be requested to fully explain this issue.

- Once all of the above has been investigated, Radebe should be approached, warned of his rights and requested to indicate if he wishes to make a statement at this stage.

✓ Although it is alleged that Peter Lengene is dead, he made various statements in the docket. He alleges that there was an attempt by Pretorius and Coetzee involving Director Thoms, to induce him to make a false statement. The docket shows that the original investigators and other police officers were involved in arranging for the under-cover policeman, Norman Mkonza (Scotch) to have a taped conversation with either Pretorius or Coetzee. Various entries have been made in the investigation diary and reference is made to

TP

a tape being kept as an exhibit. The investigating officer must explain what the outcome of all of this was and Director Thoms must also be approached to indicate whether he has any knowledge of this matter.

- ✓ According to Patrick Kobe ("A7"), he heard that Coetzee, Pretorius and Mong had killed the missing person. He must indicate from whom he received this information.

- ✓ A further statement must be taken from Duma Nkosi, providing the further additional detail:

  - o Whether the missing person was known to him prior to her being sent to him by Mpho;
  - o How he received instructions from Mpho;
  - o What the missing person exactly was to do;
  - o To whom he made enquiries to trace the missing person's whereabouts;
  - o Whether he suspected that the missing person had been detained by the Security Branch and if so, whether he adopted any counter-measures.

- ✓ A further statement from Justice Ngidi must be obtained covering the following:

  - o What the nature of his dealings with the missing person were;
  - o When last he saw her before she disappeared;
  - o Whether he was aware of what duties she was performing on behalf of Mpho;
  - o What missions Mpho gave to Scotch and Frank;
  - o What training was given to these persons and how well were they known to Mpho;
  - o Since it appears that he was based in Swaziland at the time, he should comment on what structures were in place in Swaziland at the time. Lengene said that Coetzee and others were taking the missing person to Swaziland. The witness must be requested to indicate what structures would have

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been in place on the Swaziland side of the border post and what would have happened had the missing person presented herself at that point.

- ✓ It must be established how far from the Oshoek Border Post the University where the missing person was studying at, the premises from which Gilbert Twala operated and the home of Thembi Vilakatim are.

- ✓ The person referred to as John June in paragraph 9 of Gilbert Twala's affidavit must be traced and requested to submit a statement regarding his knowledge of the matter.

- ✓ According to Veyi, Manuel from Mozambique was also involved. Efforts should be made to identify him and obtain a statement from him.

- ✓ There is also reference to an Adrian Bambo, who is also referred to as "Strongman". It must be established whether in fact he is now deceased.

- ✓ According to the witness statements, the following premises and intersections have relevance:

  - o The Norwood Flats;
  - o The farm at Northam;
  - o The Potchefstroom Security Branch office;
  - o The intersection referred to by Veyi;

  A map should be obtained where all these points are marked and the distances between them indicated.

- ✓ At the end of the police investigation, the following emerges:

  - o Veyi says that he was in the company of Selamolela when he saw the missing person in the boot of Coetzee's car after she had left the farm and at a four-way stop.
  - o Selamolela however claims that he last saw her at the farm in the company of Coetzee, Pretorius and Radebe.

TP 07

- Lengene says that the missing person was told to wash and put on new clothes, because she was being taken to Swaziland. He claims he drove her in a van to the servants' quarters in a certain house in Westonaria where she was left in the company of Sefuthi, Pretorius and Coetzee.

- Sefuthi merely mentions being at the farm, does not indicate when he last saw her and in whose company she was, but claims that he suspects that she was killed by Coetzee, Pretorius and Mong, because they threatened her with death during the interrogation. He does not mention Radebe as being present at the farm.

- It would appear that Pretorius, Coetzee and Mong were not informed of the allegations and invited to respond.

✓ The versions referred to above are all contradictory and on the very points where corroboration should be obtained, the witnesses contradict each other, e.g. Selamolela makes no mention of being at the intersection with Veyi and Sefuthi makes no mention of being at the house in Westonaria. Lengene's version of the missing person being prepared to return to Swaziland and leaving in his van is not supported by the other witnesses. It must be established whether there are other members of the Security Branch Unit to which all these persons belonged, who could possibly at this stage shed light on the various allegations.

✓ The confusion continues at the amnesty application where for example Selamolela is emphatic that he did not accompany Veyi to the intersection and suggests that this was Sefuthi. Sefuthi never testified at the amnesty application and as is clear from his statement to the police, last saw the missing person at the farm.

✓ Coetzee, Pretorius and Mong all testified at the amnesty application and denied that the missing person was as severely assaulted as claimed by the other witnesses. They also claimed that she agreed to become a police informer and was handed over to two under-cover police officers (whom they claimed were now dead), who dropped her off at the Oshoek Border Post. This contradicts the version of the other witnesses to the effect that the missing person at no stage agreed to cooperate and being an informer.

✓ Coetzee was cross-examined on the basis of information which Lengene provided to Fanie Malapo. A statement must be obtained from Mr Malapo in which he sets out what he knows about this

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matter and what exactly was conveyed to him by Lengene and any other person whom he may have interviewed.

- ✓ It was a key feature of Mong, Pretorius and Coetzee's amnesty applications that they could not have participated in the protracted assaults as alleged, because at that time they were involved in the investigation of certain terrorist cases and carried out arrests. Efforts should be made to trace these cases in order to confirm whether there is objective proof that he was performing duties outside the farm at Northam at the relevant time. A Mr Brits was at one stage in charge of all the dockets opened by the Security Branch and I believe that these dockets are currently being stored at CATS.

- ✓ It was also a feature of the applications that they claimed that they planted certain explosive devices at power stations and a railway line in order to create the impression that these attacks had been carried out by MK. This was ostensibly to deceive the ANC into believing that these attacks had been carried out as a result of the missing person's information. Again with reference to the dockets and other records (e.g. Bomb Disposal Unit records) held by SAPS, it must be established whether these explosions in fact took place and whether there is evidence showing that it was these persons who carried out these attacks.

- ✓ Finally, it was also alleged that as a result of the information provided by the missing person that certain MK members were arrested and prosecuted. This issue also surfaced in the cross-examination of Gilbert Twala, who admitted that certain persons had been arrested, but alleged that this had taken place before the disappearance of the missing person and on the basis of the information of an informer. Again, efforts must be made to establish the relevant details regarding the arrest of these persons in order to establish which of the two versions is correct. In this regard, the Department of Justice & Constitutional Development still retains records relating to the detention of various people and these should also be checked.

- ✓ Coetzee, Mong and Pretorius place reliance on various people who they allege are now dead. In addition to the two under-cover police officers referred to above, reference is also made to Brigadier Muller, Coetzee's commanding officer, as well as to "Strongman" Mbombo. It must be established whether these persons did in fact hold the positions as alleged and when they died. This is important, because it will have to be decided whether they were implicated

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specifically because it was known that they were dead and could not refute the allegations.

✓ Coetzee claims that Brigadier Muller briefed Brigadier Schoon about the plan to use the missing person as an informer. It must be established whether Brigadier Schoon is alive and if he can comment on this allegation.

✓ Coetzee also claims that the Eastern Transvaal Security Branch had a file on the missing person, who had been identified as a MK member. Efforts should be made to identify the members of this branch at that time to see if anyone can confirm or deny this allegation.

✓ The version of how the missing person was tortured, became an informer, was dropped off at the border post and then no inquiries made when she disappeared, appears to me to be implausible. Efforts should be made to establish whether there is a reliable senior member of the Security Branch who could indicate whether the process followed by Coetzee was in fact appropriate in the light of the procedures and practices of the Security Branch of that time.

✓ According to Veyi, he met with the Divisional Head of the Security Branch at Potchefstroom after leaving the farm. (See pages 105 and 106.) It must be established who the Divisional Head was at the time and if he is available, a statement must be obtained from him.

✓ It was common cause that Veyi first approached The Sowetan and in particular a journalist, Sharon Chetty. Veyi was cross-examined about the fact that the journalist reported that he had decided to come forward, because Coetzee and the others had been promoted and not himself. He denied having said this. The journalist also reported that the ANC only contacted the missing person's family 10 years after she had disappeared, which was also disputed by Gilbert Twala. The journalist must be traced and asked to comment on these allegations.

✓ Selamolela alleges that there was only one entrance to the Norwood Flats, which was disputed by Coetzee. It must be established which version is true. If the building has been unaltered, then current photographs can be taken. If however it has subsequently changed, then efforts must be made to establish whether there are plans or photographs of it as it existed in 1983.

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✓ There were major disputes between the witnesses surrounding the dam, the outbuilding, the main farm house and the washing facilities available. If the premises have not been altered in the interim, they should be photographed to obtain clarity on all these issues.

✓ In his evidence, Gilbert Twala mentioned a number of persons who might have knowledge of the events, e.g. Wally and Wendy Mbana. Efforts must be made to trace these people to obtain statements from them.

✓ Gilbert Twala was called to refute the allegation that the missing person had returned to Swaziland and been murdered by the ANC. Under cross-examination he however alleged that he could not talk about ANC structures in Swaziland, but only knew about the Transvaal Unit located in Soweto. Efforts would have to be made to identify the relevant structures in Swaziland at the time, who can comment on the allegation made by Coetzee and others. Twala alleged that Siphiwe Nyanda, currently the Minister of Communications, may well be placed to assist in this regard. It was specifically alleged that the missing person had meetings with the current Minister. The Minister would have to be approached to provide a statement.

✓ Under cross-examination of Mr Twala, it was put to him that there was an intelligence unit which killed MK members, who were traitors. It was also alleged that the Motsoanyane Commission also made a finding concerning a person who had the same MK name as the missing person. These aspects would have to be investigated and if necessary, statements obtained.

✓ Swaziland is a SADC member and consequently, the SADC policing protocol applies. Contact should be made with the Swaziland authorities to establish whether it is at all feasible that records would exist showing that a body matching that of the missing person was ever found. It is highly unlikely that such a search of police dockets and inquests could be conducted, but it would have to be explained to a Court that this avenue was explored.

✓ It is clear that there are considerable disputes regarding how and under what circumstances the missing person left the farm. This raises the possibility as to whether she was not in fact killed and buried on the farm. A suitably qualified exhumation expert should be requested to visit the farm in order to establish whether any exhumation is at all possible. An exhumation under forensic procedures should be carried out if the response is positive.

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- ✓ According to Lengene, the missing person was taken to a private residence in Westonaria. Under cross-examination, Coetzee admitted that he had a brother who lived in Westonaria and worked on a mine. This avenue should be properly investigated.

- ✓ According to Veyi, he was told by a former police officer who subsequently died, that Coetzee and Pretorius had shot the missing person and buried her in Rustenburg. It should be established whether Coetzee and Pretorius had safe houses in the Rustenburg area or friends or relatives who had plots or farms in Rustenburg. If any premises are identified, consideration should be given to whether an exhumation is feasible.

- ✓ As I have already indicated, the witnesses who gave statements must be requested to confirm what has already been said. It would appear that Coetzee, Pretorius and Mong have never cooperated with the investigation and it would be appropriate, once all the investigations have been concluded, to approach them via their attorney, Mr Wagener, to comment on the allegations.

- ✓ As I have also already indicated, the situation relating to Radebe is strange. It may well be that he could hold the key to explaining what really happened on the farm and he should be approached in this light.

The duplicate docket and four blue files may be collected from my office, but must be returned to me once the investigations have been concluded.

Kind regards

RC MACADAM
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
AND DEPUTY HEAD: PRIORITY CRIMES LITIGATION UNIT

TP

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11 February 2013

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BY HAND

Dear Dr Silas Ramaite,

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I thank you for your letter dated 29 January 2013. The purpose of this letter is to respond to your letter and secondly to consider the most appropriate way forward.

I acknowledge and appreciate your expression of sympathy for me and my family. Regrettably, I am unable to accept your contention that the murder of my sister has received the "*diligent attention of the NPA*". Very little has happened in this matter since a docket was opened in the mid-1990s and not much more has transpired since the matter was referred to the PCLU in 2003. I find it very difficult to understand how a murder investigation can proceed for nearly 2 decades with no progress or conclusion one way or another. Either a prosecution or an inquest should have taken place by now. The failure to resolve this matter, and other outstanding cases from the past, has done a great disservice to me and my family, as well as many other families and communities, and indeed to the country.

I am also advised that an inquest may not be unreasonably delayed simply because every last aspect has not been completed. The holding of an inquest and even the making of an inquest finding does not prevent further investigation from taking place. If one had to wait until every last aspect of an investigation is completed a neglectful official or one acting in bad faith may delay or prevent a public inquiry into a death by never completing the investigation.

I note that in your paragraph 12 you state that by late 2010 the case had "*not been fully investigated by the TRC or by (the) SAPS*". I agree with this conclusion but would state further that more than 2 years later the same situation pertains. I would also suggest that the responsibility for this dire state of affairs cannot be laid exclusively at the door of the SAPS. The

TP

NPA must also bear some responsibility as it oversees and directs investigations of the police and as from 2003 was directly responsible for the "*TRC cases*", including this matter.

I have been advised to respond to certain matters raised in your letter. I do not intend to deal with every matter raised in your letter and the attached correspondence and such failure should not be construed as acceptance of the contentions made therein. For the moment I will confine my response to those matters which are simply incorrect and cannot stand uncontested.

At paragraph 2 of your letter you state that the first information identifying the suspects was only received by the SAPS in 1996. This assertion is not consistent with the facts. The culprits were the police themselves. My sister was kidnapped, tortured and murdered by the police. These crimes were authorized at the highest level of the organisation. Not only did the police know who the suspects were they also colluded in the cover-up of the crimes. It is possible that up to the present day elements in the police are still colluding in this cover-up.

I note that in paragraph 6 you concede that the "*TRC cases were temporarily put on hold pending the formulation of the guidelines*" since "*it was deemed important that special considerations*" applied to them. You do not state how long the TRC cases were put on hold or what special considerations warranted their holding back and differentiation from other cases. It is clear that this case, as well as other serious cases, were held back for several years. During this time many crimes that ought to have been prosecuted prescribed in terms of the statute of limitations. This, in my view, was unforgiveable. The formulation of the so-called guidelines in no way justified the suspension of investigations into murder and other serious crimes. Such suspension grossly undermined the rule of law as well as our rights to justice, equality and human dignity, In striking down the guidelines, (the amendments to the National Prosecution Policy dated 1 December 2005 made in terms of s 179(5) of the Constitution) ("the amendments") the High Court found that they amounted to a "*copy-cat*" of the TRC amnesty process.[1] Far from the guidelines constituting "*important*" or "*special considerations*" the High Court found such considerations to be irrelevant for purposes of taking prosecutorial decisions and that they were "*a recipe for conflict and absurdity*".[2]

In your paragraph 7 you state that the court case which struck down the amendments to the Prosecution Policy also disabled the "*structures for the investigation of such cases.*" Presumably this was stated in order to give the impression that the investigative capacity had to be rebuilt thereby causing further delay. I am advised that the striking down of the amendments had no such effect. In terms of paragraph B4 of the amendments responsibility for oversight of investigations and institution of prosecutions of such cases remained with the PCLU. Under paragraph B6 the PCLU was to be "*assisted*" by "*senior designated officials*" from the National Intelligence Agency, the Department of Justice, the SAPS and the then Directorate of Special Operations. This so-called assistance was presumably to advise the PCLU on who should receive immunity under the amendments. The then Director of the PCLU complained bitterly, in a meeting attended by my legal representatives, that the so called "*senior designated officials*" were never available to meet and as a result the process had ground to a halt. If anything the striking down of the amendments removed the investigatory constraints as well as the unlawful interference of other bodies in the constitutional duties of the NPA.

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[1] Judgment, par 15.4.3.1, *Thembisile Nkadimeng and Others vs. The National Director of Public Prosecutions and Another* (TPD case no 32709/07)

[2] Judgment, par 15.5.3

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I am advised that the content of your paragraph 14 is not a correct interpretation of the applicable international criminal law. The suggestion that the Constitutional Court in *S v Basson* '*specifically refrained from directly that he be charged for Geneva Conventions crimes*' because '*international crimes require domestic legislation before they can become enforceable in South Africa*' is wrong. In fact the Constitutional Court explicitly refrained from addressing the question of whether prosecutions can be brought directly under customary international law, noting: "*We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act.*"[3] On the question of whether South African law allows for prosecutions under customary international law *directly* through the common law (in the absence of implementing legislation) I am advised that section 232 of the Constitution supports such prosecutions. In any event Parliament has recently settled this question with the adoption of the *Implementation of the Geneva Conventions Act 8 of 2012,* which contains a provision stating:[4]

> "*Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect*".

In light of this, the references to a temporal limitation on the *Implementation of the Rome Statute Act 12 of 2002* and the *Torture Convention Bill* are misplaced, as specific legislation is not required in order to prosecute a crime that was "an offence under ... *international law* at the time it was committed ...".

The factual claim in your paragraph 15 that the person who alleged he had been influenced to change his version is deceased is incorrect. That person is Norman "Scotch" Mkhonza. He is not deceased as claimed. Moreover your assertion that the charge of 'defeating the ends of justice' would have prescribed in 2006 cannot be correct. The conversation in question took place on 10 February 1996. Section 18 of the Criminal Procedure Act provides for the lapsing of the right to prosecute after 20 years which means that such a charge would only prescribe in 2016.

The claim made in your paragraph 17.2 that the explosions at the power stations and railway lines on 10 September 1983 was "*completely overlooked*" by the TRC is not correct. Since those explosions occurred shortly before Nokuthula was kidnapped these facts were put before the TRC's Amnesty Commission as it established the falsity of the version of the white Security Branch officers. The officers claimed that the explosions were instigated as a result of information provided to them by Nokuthula. This version is false if the explosions occurred before Nokuthula's kidnapping on 11 September 1983. In relation to the arrest of Justice Ngidi, the former Mayor of Sandton, I am advised that there was nothing stopping the police from carrying out elementary inquiries that would have easily demonstrated that Ngidi's capture did not remotely coincide with the period that Nokuthula was held captive. Accordingly she could not have provided the information that led to Ngidi's arrest as the white officers so forcefully claimed. It took the NPA and the police some 10 years to establish this crucial evidence notwithstanding the fact that the obvious flaw in this version was conspicuously highlighted during the Amnesty proceedings in the late 1990s.

I am advised that the tasks referred to in your paragraphs 17.3 to 17.5 are not good reasons for the delay in the investigation. These are basic tasks that should have occurred many years previously.

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[3] Footnote 147.
[4] Section 7(4), ICC Act.

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I am advised that your assertion in paragraph 21 that it would be pointless placing existing information before an inquest court since the presiding officer would be "*constrained not to hold inquest until the matter has been properly investigated*" is not correct. In the first place this matter has never been properly investigated. Pursuing a few inquiries at the last moment is not going to remedy this state of affairs. An inquest has primarily an investigative function. Section 8(1) of the Inquests Act authorizes the presiding officer of an inquest court to, of his or her own accord, or at the request of any person with an interest, to subpoena any person to give evidence or produce any document or thing at the inquest. Accordingly an inquest is well placed to remedy shortcomings in an investigation, such as this one.

I assume in your paragraph 23 that the section you refer to in the Inquest Act is section 6(c) and not 6(3) which does not exist.

I now deal with the claim that it would be difficult to charge Radebe at this stage if he had been made a witness previously (PLCU Letter addressed to the Directorate of Priority Crimes dated 25 March 2010). I am advised that a person previously approached as a witness (presuming this was the case in respect of Radebe) can be subsequently charged and prosecuted. This is particularly the case where the statement made by such witness is patently false. Radebe has been blatantly untruthful in respect of his statement. He has not been given any express or implied immunity from prosecution. I am further advised that If Radebe agrees to be a cooperating state witness he can be warned in terms of s204 of the Criminal Procedure Act. He can be prosecuted subsequently if found to be mendacious; and indeed he can be charged directly if he refuses to fully cooperate at the outset. In any event the concern expressed appears to be an academic one since the letter dated 27 October 2010 from RC Macadam to Captain Masegela discloses that the Radebe's statement in the docket is "*unsigned and unattested*".

I note that Advocate Macadam is of the view that establishing whether Radebe was transferred to the Vehicle Branch in early September 2003 will determine whether he was being truthful about his presence at the farm. I am constrained to advise that mere evidence of a transfer to another unit does not in itself mean that he was not at the farm at the relevant time. Evidence of physical presence at another location will be required. I note that the 27 October 2010 letter is silent on Radebe's evidence of the actual kidnapping of Nokuthula where it is clear that he is lying.

In the circumstances I am of the firm view that there has been more than ample time to carry out these investigations, which ought to be in its final stages. I note that you state that this case is being attended to diligently in order to finalize the outstanding tasks. In this regard I am concerned that as recently as 4th and 8th February the investigating officer advised me that he had received no instructions to continue with the investigation.

I wish for a decision to be made one way or the other within the very near future. In view of the inordinately long delay I have sought legal advice from my legal team on how best to ensure that such decision is taken within a reasonable time. While they have advised that legal action is a real possibility they have also indicated that I should permit you and the police a reasonable time period within which to complete those investigations that are strictly necessary.

Your letter of 31 January 2013 does not disclose what these outstanding tasks are aside from the perusal of mortuary records. The letters of Advocate Macadam addressed to the investigating officers in March and October 2010 do disclose outstanding tasks. I would have thought that after more than 2 years these tasks would have been finalized by now. If they have not been attended I must insist on an explanation as to why not. The tasks include the tracing of missing documents and items, the drawing of a map and the taking of some 4 statements. I am entitled to know which

TP

of these tasks have been completed and which ones are outstanding. I further wish you to advise me approximately how much more time is required to finalize the investigation.

I wish to place on record that I will no longer accept inordinate delays and that my rights in this regard are reserved. I have requested some of my legal representatives to meet with Advocate Macadam and Captain Masegela on 18 February 2013 in order to discuss what outstanding tasks are strictly necessary for purposes of completing the investigation; what a reasonable deadline would be for such tasks; and the criteria that the NPA will employ for deciding whether to prosecute or refer to a formal inquest.

Yours sincerely,

T P NKADIMENG

Copy to: Advocate Chris Macadam, Priority Crimes Litigation Unit
Captain Masegela, South African Police Service

TP

Office of the National Director of Public Prosecutions

NATIONAL PROSECUTING AUTHORITY
South Africa

Victoria & Griffiths
Mxenge Building
123 Westlake Avenue
eavind Park
Silverton

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0001
Tel: (012) 845-6000
Fax: (012) 804 9529
www.npa.gov.za

12 February 2013

Ms TP Nkadimeng
698 Umhlanga Street
Wingate Park
Pretoria
0181

Fax: (012) 421 3516
Email: nkadimeng.thembi@gmail.com

Dear Ms Nkadimeng

REQUEST FOR THE HOLDING OF A FORMAL INQUEST IN TERMS OF SECTION 5 OF THE INQUESTS ACT 58 OF 1959 IN RESPECT OF THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. I acknowledge receipt of your letter, dated 11 February 2013 and confirm that Adv Macadam of my staff will be meeting with your lawyers on Monday, 18 February 2013 to discuss all the issues relating to the investigation of the matter.

2. I trust that a number of issues raised in your letter will be addressed in this meeting and therefore I do not propose to respond to all the matters which you raise. Since however you have raised the possibility of instituting legal action, I confirm that my failure to respond paragraph-by-paragraph to your letter in no way constitutes an admission of the various complaints you have made.

3. I however reconfirm my view that the interests of justice require that the case be fully investigated before a decision to prosecute can be taken and if the decision is not to prosecute, to arrange for the holding of an inquest.

Yours sincerely

DR MS RAMAITE SC
ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

TP 87

TN 21.9
TN21.9
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Priority Crimes Litigation Unit

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi boMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

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13 February 2013

The Commander
Crimes Against the State
Organised Crime
Directorate for Priority Crimes Investigations
South African Police Service
Private Bag x X1500
SILVERTON
0127

Attention: Col N Xaba

Email: XabaN@saps.org.za

Dear Col Xaba

NOKUTHULA SIMELANE

Further to my earlier request for further investigations, the following also requires attention:

1. Efforts must be made to trace Nompumelelo Zakade, whom it is alleged supplied the information which led to the arrest of Justice Ngidi and not Nokuthula Simelane. It is alleged that this person is well known to Justice Ngidi and he should be able to assist in having her traced. A full statement should be obtained from her regarding all the issues relevant to the matter pertaining to Nokuthula Simelane.

2. At the amnesty hearing, Nimrod Veyi testified that he had knowledge of three houses in Klipspruit and one in Rustenburg. It must be

established whether he is in a position to point these safe houses out and if any houses are identified, then the Missing Persons' Task Team must be requested to do an assessment as to whether an exhumation should be carried out at any one of them.

3. Norman Mkhonza testified at the amnesty committee that there was a safe house in Klipspruit West, which was used by Strongman Bambo. Evidence was led at the amnesty hearing that Mr Bambo was also present on the farm. He must be requested to point this house out and again the Missing Persons' Task Team must be requested to conduct an assessment.

4. A Mr Gilbert Twala testified at the amnesty hearing that before the disappearance of Nokuthula Simelane, she attended meetings with himself and Simphiwe Nyanda. Mr Nyanda is the former Chief of the SANDF and is currently an adviser in the Office of the President. He should be approached and asked whether he has any information which could shed light on Nokuthula Simelane's disappearance. If so, an affidavit must be obtained.

Kind regards

ADV RC MACADAM
SENIOR DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS

TP

Simelane Meeting – 18 February 2013 – National Prosecuting Authority, Pretoria

Minutes

In attendance:

- Alan Wallis - SALC
- Robin Palmer - UKZN
- Chris McAdam (CM) – PCLU
- Susanne Bukau – PCLU
- Colonel Xaba (CX)– The Hawks
- Captain Masagela (M) – SAPS

- CM provided an overview of the case, emphasizing that he was only seized with the matter in 2010. He again mentioned tasks that he had identified for M (As outlined in the 2010 letter in our possession) to carry out and that of those tasks none had been properly carried out or carried out at all. Whilst he didn't explain why this case wasn't moved on before he was seized with it, he gave the impression that he is committed to ensuring that this matter be prioritized and investigated as fully as possible so that they can institute a prosecution or to request that in inquest be set up.

- We did not get the impression that they did not want to pursue this case or that they have attempted to cover the case up. The lack of action on their part appears to be due to it not being prioritized by the SAPS, and inadequate follow up on the part of the NPA.

- It was encouraging to see CX from the Hawks at the meeting, and he has been fully briefed on the matter. We hope that will provide oversight within the SAPS investigations.

- CM showed us the docket, which consists of one lever arch file.

- Whilst the tasks he identified in 2010 still need to be pursued CM identified a number of avenues that should be immediately undertaken which could render some of the identified tasks unnecessary. These tasks are aimed at determining course of events that led to the disappearance of Simelane and addressing inconsistencies. Specifically:

    - Further information was obtained by Captain Leask that there was another farm in Westonaria, near the farm that Simelane was held and that Simelane which have been taken to and buried there. A former police officer by the name of Sylvester has been identified as a person that may have knowledge of this farm.

    - Additional safe houses in and around Rustenburg have been identified.

TP

- In respect of Coetzee's, Pretorius' and Mong's alibi that they could not have been involved in Simelane's month long torture because they were involved in the planting of explosives at power stations, CM located and showed us two dockets on two explosions that occurred around Simelane's kidnapping. The explosions took place at two Eskom substations (Randburg – docket no: 387/09/83 and Fairlands – docket number 100/09/83) on 10 September 1983. A day before Simelane's kidnapping on 11 September 1983.

- CM located Justice Ngidi's detention files, and the dates of his incarceration and escape, in his view, raise questions about the veracity of his version of events.

- CM informed us that Radebe is a Johannesburg City Counselor.

- In light of this information CM has proposed the following:
-
  - Visit the 'new' farm and obtain a statement from Sylvester as well as visiting safe houses;
  - Re-interview Justice Ngidi and Radebe;
  - Approach Coetzee, Pretorius and Mong. Using the new bombing information regarding their alibi and statements made by Mong, CM believes that Mong should be approached to become a section 204 witness. This approach will have to be done carefully and may involve their lawyers. Robin mentioned that he would like to be present at any further communications with Mong or to discuss strategy before hand,

- CX agreed to make another investigating officer available to M.

- A follow up meeting has been tentatively set up for **30 May 2013**.

- CM agreed that if they are not able to take investigation further he agrees that there should be an inquest and that it should be presided over by the a judge and not a magistrate.

- Robin will provide research on inquests in respect of which jurisdiction could be used and whether it is possible to request a judge led inquest instead of magistrate led inquest.

- All involved are happy to be contacted regarding progress.

TP 07

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THEMBISILE PHUMELELE NKADIMENG

698 Umhlanga Street
Wingate Park
PRETORIA 0181

Tel: 012 421 3500
Fax: 012 4213516
Cell: 082 553 6680
Email: nkadimeng.thembi@gmail.com

6 March 2013

TO:

RC Macadam
Priority Crimes Litigation Unit
National Prosecuting Authority
Private Bag X752
Pretoria
0001

AND

Dr. MS Ramaite
Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

Dear Adv. Macadam,

OUTSTANDING INVESTIGATIVE TASKS IN THE INVESTIGATION INTO THE KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

I want to thank you, and Colonel Xaba and Captain Masegela, for meeting with Adv. Robin Palmer and Allan Wallis on Monday 18 February 2013 to discuss the investigation in the case of Nokuthula Simelane. They advised me that they were encouraged by your assurances that this matter will be prioritised and that it will receive the PCLU's immediate attention through the completion of specific tasks within an agreed upon timeframe.

TP

I note from your letter dated 13 February 2013 addressed to the Commander of the Directorate of Priority Crimes Investigations, which you forwarded to Adv. Palmer on 5 March 2013, that certain instructions were given to Col. Xaba. It however came as a surprise, following communications between Captain Masegela and I on 26 February and 5 March 2013 that Captain Masegela is yet to receive any instructions from your office regarding the investigative priorities that you outlined in the meeting. I am advised that Captain Masegela joined the meeting on 18 February late and you had indicated that you would appraise him of what tasks should be completed and how they were to be prioritised. I would be grateful for your explanation as to why the investigating officer has not been given any further instructions.

At our meeting you informed us of the following:

- The majority of tasks identified in your letter to Captain Masegela dated 27 October 2010 still need to be pursued.

- You identified a number of avenues that should be immediately pursued which could render some of the previously identified tasks unnecessary. These tasks are aimed at determining the course of events that led to the disappearance of Ms. Simelane and addressing the following issues and inconsistencies:

    - Further information was obtained by Captain Leask that there is another farm in Westonaria, near the farm that Ms. Simelane was held and that Ms. Simelane could have been taken to and buried there. A former police officer by the name of Sylvester has been identified as a person that may have knowledge of this farm.

    - Additional safe houses in and around Rustenburg and Westonaria have been identified.

    - In respect of Coetzee's, Pretorius's and Mong's alleged alibi that they could not have been involved in Ms. Simelane's torture and disappearance because they were involved in the planting of explosives at power stations you located and showed me two dockets relating to two explosions that occurred around the date of Ms. Simelane's kidnapping. The explosions took place at two Eskom substations (Randburg – docket no: 387/09/83 and Fairlands – docket number: 100/09/83) on 10 September 1983. These occurred a day before Ms. Simelane's kidnapping on or around 11 September 1983.

    - You indicated that Justice Ngidi's detention files had been located and the dates of his incarceration and escape and are of the view that this raises questions about the veracity of his version of events.

    - You disclosed that Radebe is a Johannesburg City Counselor.

In light of the above you identified the following tasks:

TP

- That the investigating officers will visit the 'new' farm and obtain a statement from Sylvester. The investigating officer will also visit the safe houses;
- The investigating officers will interview Justice Ngidi and Radebe again;
- The investigating officer or members of the PCLU will speak to Coetzee, Pretorius and Mong. You also recommended approaching Mong to become a section 204 witness.

Additionally:

- Colonel Xaba agreed to make an additional investigating officer available to assist Captain Masegela;
- 30 May 2013 was tentatively agreed upon as a date on which to hold a follow-up meeting.

I note that in your letter to Col. Xaba (dated 13 February 2013) you asked him to carry out some but not all of the abovementioned tasks:

- Trace one N Zakade who could help in tracing Justice Ngidi;
- Identify certain safe houses for purposes of establishing whether exhumations should take place there;
- Interview Simphiwe Nyanda.

Please advise who is to carry out the additional tasks.

I have a number of queries that warrant your consideration and response and which may assist the investigation:

- In respect of the 'new' farm identified, there is no evidence that a second farm featured or played a role. The Security Police used multiple farms in their operations. Whilst this lead should be followed, the investigation of this information can be quickly finalised and must not be allowed to cause further and unnecessary delays or divert resources from other priorities unless there is specific evidence as to the whereabouts of the mortal remains of Ms Simelane

- Proving the existence of safe houses that were used by Coetzee and his team of Security Policemen during 1983 will contradict versions of events given by officers who testified that they did not use or have safe houses in 1983. This investigation is therefore important and can be quickly accomplished.

- Justice Ngidi's detention files are relevant in respect of the dates of his incarceration. In this regard I would ask you to provide us with the exact dates contained in Justice Ngidi's detention files and the reason these files cause you to question the veracity of his version.

- The bombings orchestrated by Coetzee et al. and the case dockets you located do not represent new evidence as these bombings on 10 September 1983 were conceded in their amnesty hearings.

TP

- In respect of the intention to re-interview Radebe it should be clarified whether you intend to speak to Radebe as a witness or a suspect. This will have an important impact on the case and should be carefully considered.

- Re-interviewing Mong solely on the bombing dockets is not advisable as this has already been conceded by Coetzee et al. Mong can be approached to become a witness to avoid the risk of prosecution. However any approach to Mong or others implicated must be done with the utmost care so as to avoid negatively impacting the investigation.

- In respect of the proposed interview with Simphiwe Nyanda we believe that the only significant matter to canvass with him is whether, to his knowledge, Nokuthula ever returned to Swaziland as claimed by the suspects.

Please urgently consider my concerns and suggestions outlined above and let me have your responses per return.

I further wish to place on record the telephone conversation you held with Adv. Palmer on 5 March 2013. During this conversation you confirmed that:

- You are being updated on a weekly basis by the investigation team;
- You will keep us updated by email (supplied) on progress;
- You will canvass with us the use of certain persons as possible state witnesses once the investigation has reached a more advanced state.

I attach a copy of a timeline of the investigation into the disappearance of Nokuthula which reflects the terrible neglect received by this case. I confirm that I expect these investigations to be finalized by the end of May by which time a decision must be taken either to prosecute or establish a formal judicial inquest. I look forward to hearing from you.

Yours sincerely,

T P NKADIMENG

Copy to: Captain Masegela, South African Police Service
Colonel Xaba, Directorate of Priority Crimes Investigations -- XabaN@saps.org.za
Advocate Susan Bukau -- sbukau@npa.gov.za

TP

TN 21.12 88

Angela Mudukuti

From: Robin Palmer <PALMER@ukzn.ac.za>
Sent: Wednesday, March 13, 2013 10:21 AM
To: Alan Wallis
Subject: FW: Nokuthula Simelane
Attachments: 20130308095040770.pdf

Alan- Please read and discuss- Robin.

From: Chris Macadam [mailto:cmacadam@npa.gov.za]
Sent: Wednesday, March 13, 2013 10:02 AM
To: Robin Palmer
Cc: Susan Bukau
Subject: Nokuthula Simelane

Dear Robin

I note with concern the contents of this letter. It contains several serious incorrect statements about what was discussed at our meeting, the most serious being the claim that I indicated that Ngidi was being untruthful. If any legal challenge is brought to any decision I may take in this matter, this document would have to be discovered and if subsequently Ngidi were to be a key witness in any proceedings, then his integrity will have been wrongfully brought into dispute and I will then have to become a witness in those proceedings. In fact, what I said was that in the light of the dates of the arrest of Mr Ngidi, a major question mark hangs around the veracity of the versions of certain of the suspects.

Both I and the DPCI must perform our duties without fear, favour or prejudice. In addition, the Courts have ruled that investigations must be conducted in an objective manner and that due weight must also be attached to any exculpatory versions which might assist the suspect's defence.

In the light thereof, I consider it improper to request that I have to give reasons for my decisions that certain matters be investigated (All the more so when there are incorrect statements about what I said.), explain my communications with the investigating officer and supply evidence out of the police docket to the victims. Consequently I am not prepared to accede to any of these requests. If this document were discovered, it would lay the basis for alleging that there was a manipulation of the investigation by persons who have a subjective interest therein.

I confirm that the matter will continue to be fully investigated, covering all the relevant issues raised in the evidence and an attempt will be made to have the investigation finalised by 31 May 2013. I would also be grateful if you could request your client to in future address her concerns with you and that you communicate with me having done the necessary filtering so as to eliminate any contentious issues which could be the subject of litigation.

Kind regards

Chris Macadam

TP 17

The message was checked by ESET Endpoint Antivirus. 89

http://www.eset.com
======= Please find our Email Disclaimer here-->: http://www.ukzn.ac.za/disclaimer =======

TN 21.13 90

Angela Mudukuti

Subject: FW: Nokuthula Simelane
Attachments: letter to macadam- proposed response (22-3)- changes (Robin)finalx.docx

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From: PALMER@ukzn.ac.za
To: cmacadam@npa.gov.za
CC: frankdutton@hotmail.com; nkadimeng.thembi@gmail.com; yasmin.sooka@gmail.com; nicolef@salc.org.za; alanw@salc.org.za; PALMER@ukzn.ac.za; Gevers@ukzn.ac.za
Subject: RE: Nokuthula Simelane
Date: Sat, 6 Apr 2013 13:25:55 +0000

Dear Chris,
I have extensively canvassed the concerns raised in your email of 13 March 2013 with our client and all members of her legal team, and attach the team's response. I will also call you on Monday 8 April (if suitable) to discuss this and related issues.
Regards,
Robin Palmer.

From: palmer@ukzn.ac.za [mailto:palmer@ukzn.ac.za]
Sent: Wednesday, March 13, 2013 10:13 AM
To: Chris Macadam
Subject: Re: Nokuthula Simelane

Hi Chris - I will phone to discuss- Robin.
Sent via my BlackBerry from Vodacom - let your email find you!

From: Chris Macadam <cmacadam@npa.gov.za>
Date: Wed, 13 Mar 2013 08:01:43 +0000
To: Robin Palmer<PALMER@ukzn.ac.za>
Cc: Susan Bukau<sbukau@npa.gov.za>
Subject: Nokuthula Simelane

Dear Robin

I note with concern the contents of this letter. It contains several serious incorrect statements about what was discussed at our meeting, the most serious being the claim that I indicated that Ngidi was being untruthful. If any legal challenge is brought to any decision I may take in this matter, this document would have to be discovered and if subsequently Ngidi were to be a key witness in any proceedings, then his integrity will have been wrongfully brought into dispute and I will then have to become a witness in those proceedings. In fact, what I said was that in the light of the dates of the arrest of Mr Ngidi, a major question mark hangs around the veracity of the versions of certain of the suspects.

Both I and the DPCI must perform our duties without fear, favour or prejudice. In addition, the Courts have ruled that investigations must be conducted in an objective manner and that due weight must also be attached to any exculpatory versions which might assist the suspect's defence.

TP

In the light thereof, I consider it improper to request that I have to give reasons for my decisions that certain matters be investigated (All the more so when there are incorrect statements about what I said.), explain my communications with the investigating officer and supply evidence out of the police docket to the victims. Consequently I am not prepared to accede to any of these requests. If this document were discovered, it would lay the basis for alleging that there was a manipulation of the investigation by persons who have a subjective interest therein.

I confirm that the matter will continue to be fully investigated, covering all the relevant issues raised in the evidence and an attempt will be made to have the investigation finalised by 31 May 2013. I would also be grateful if you could request your client to in future address her concerns with you and that you communicate with me having done the necessary filtering so as to eliminate any contentious issues which could be the subject of litigation.

Kind regards

Chris Macadam

TP

Email between Chris Macadam and Robin dated 15 April 2013

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 02 May 2013 12:40 PM
To: Helena Zwart (H)
Cc: nicolef@salc.org.za; howardvarney@gmail.com; alanw@salc.org.za
Subject: RE: Nokuthula Simelane

Dear Chris,

I confirm receipt, and shall circulate to other team members. Do you have an update on the current status of the investigation?

Regards,

Robin Palmer.

From: Helena Zwart (H) [mailto:hzwart@npa.gov.za]
Sent: Monday, April 15, 2013 3:47 PM
To: Robin Palmer
Subject: Nokuthula Simelane

Dear Robin

With reference to our telcon last Friday, I do not deem it necessary to reply to the last letter from your clients, as we discussed all the issues during the course of our telcon. In the light of the DA/NDPP matter, a number of decisions of the NPA may now be reviewed and I would be obliged to file a record of all the communications which could cause embarrassment and open the doors for allegations.

I confirm that you drew my attention to a Sunday Times article where extracts from one of my letters were quoted. It should be brought to your client's attention that these types of disclosures are potentially prejudicial, as if proceedings are instituted, the other parties may then on the basis of the article require discovery fo my internal communications with you and your client.

TP

I note that Frank Dutton is being copied on the correspondence. He approached me two years ago, informing me that he had been appointed to investigate the matter on behalf of the family. It may well be necessary for him to provide the investigating officer with a statement outlining what he did.

I confirm that investigations are continuing regarding Radebe's claim to have been transferred to the Vehicle Theft Unit via the relevant police documentation and also locating all the dockets and background information relating to the detention of the various MK members as became relevant at the amnesty hearing.

Checks are also being conducted on the mortuaries in areas relevant to the investigation for any records which might correspond with the missing person.

Kind regards

Chris Macadam

TP

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 02 May 2013 02:12 PM
To: Robin Palmer
Subject: RE: Nokuthula Simelane

Dear Robin

There are no new developments at present.

Kind regards

Chris Macadam

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 02 May 2013 12:40 PM
To: Helena Zwart (H)
Cc: nicolef@salc.org.za; howardvarney@gmail.com; alanw@salc.org.za
Subject: RE: Nokuthula Simelane

Dear Chris,

I confirm receipt, and shall circulate to other team members. Do you have an update on the current status of the investigation?

Regards,

Robin Palmer.

TP 7

From: Robin Palmer
Sent: 17 May 2013 04:25 PM
To: Helena Zwart (H)
Subject: RE: NOKUTHULA SIMELANE

Thanks Chris- I will report back. Please let me know about timelines at the end of May.

Regards,

Robin.

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 17 May 2013 04:21 PM
To: Robin Palmer
Subject: RE: NOKUTHULA SIMELANE

Dear Robin

I agree that it is not necessary to meet. The alibi of Mr Radebe has been investigated and it was established that he was only transferred to the Vehicle Theft Unit in September 1984 and therefore he was still at the Security Branch at the time when Ms Simelane was on the farm at Northam.

The safe houses in use by the Soweto Security Branch at the time have all been identified and all have been eliminated as having exhumation potential, save for the smallholding at Westonaria where consideration is being given to the feasibility of a probe. The detention files relating to Mr Ngidi have been obtained from Justice. They give the case reference number of the docket upon which he was arrested, as well as dates of his detentions. Investigations are now in progress to locate the docket and other evidence whereupon he will be interviewed. The detention files relating to Gilbert Twala are still awaited from Justice. The original under-cover agent, Scotch, has been traced and will be re-interviewed as it would appear that he has also knowledge relating to the arrest of the MK members, which is central to the defence put up by Coetzee, Pretorius and Mong. The outcome of these investigations will determine whether it is still necessary to approach General Nyanda for a statement.

Work is in progress regarding checking mortuary records for entries which could correspond to the physical description of Ms Simelane and the time of her disappearance and once more information is forthcoming, consideration will be given as to whether exhumations are

TP

necessary. The outcome of these investigations will determine the necessity or otherwise of having to conduct the original queries directed by myself.

Kind regards

Chris

From: Robin Palmer [mailto:PALMER@ukzn.ac.za]
Sent: 17 May 2013 03:46 PM
To: Helena Zwart (H)
Cc: Chris Macadam
Subject: RE: NOKUTHULA SIMELANE

Dear Chris,

I am out of the country for a while- perhaps you can update me on progress, and actions still to be taken with projected time-frames, at the end of May, and I will report to the other team members- a meeting seems unnecessary at this stage. I will be back in mid-to late June if a meeting is indicated at that stage.

Regards,

Robin Palmer.

From: Helena Zwart (H) [hzwart@npa.gov.za]
Sent: 17 May 2013 02:40 PM
To: Robin Palmer
Cc: XabaN@saps.org.za; Susan Bukau
Subject: NOKUTHULA SIMELANE

Dear Robin

With reference to our undertaking to meet at the end of May 2013, I would like you to indicate your availability. We are not in a position at this stage to have finalised all the investigations, but a number of key aspects have been dealt with and the remaining investigations should be finalised within a reasonable period of time.

TP

97

Kind regards

Chris Macadam

TP

To Advocate C MacAdam ,

NPA.

Re Nokuthula Simelane

Dear Chris

I write on behalf of the legal team in this matter. In response to your indication that you are not satisfied that the investigation has progressed sufficiently to make a decision in this matter, I attempted to discuss this matter telephonically with you, but was unable to do so due to your involvement in an urgent application and court proceedings. Mrs Helena Zwart indicated that you would be available in the late afternoon of 26 June to discuss the matter but on calling her, she informed me that you were still not available. I did try your cell number and will try to speak to you again tomorrow morning, i.e. 27 June 2013.

In essence, the issues I wish to canvass on behalf of the family are the following:

1. *Finalisation of investigations for decision on the docket*

   Following early meetings with yourself and the police investigators in this matter, you did indicate that a decision would be made by the end of May 2013. This date has now passed and we still have no indication on what further investigative steps are envisaged before the NPA will be in a position to either make a decision to prosecute one or more alleged perpetrators, or to refer the matter for a formal inquest as this matter has now dragged on for the best part of 13 years. We respectfully request your urgent indication on what information or investigations you still require to put the NPA in a position to make a decision. In this regard, kindly also indicate how the complainant or any members of the complainant's legal support team can assist to expedite the making of this decision (in particular you did indicate that you would require an affidavit from Frank Dutton). In our view, there appears to be sufficient information and *prima facie* evidence to justify a formal judicial inquest, and we request you to seriously consider whether the matter should be referred for inquest at this stage. As you well know, the fact that the matter is referred for an inquest does not preclude the continuation of any investigations you nevertheless consider necessary.

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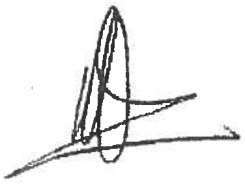
2. *The emotional toll on the family and friends of Nokuthula Simelane*

   As you can appreciate, the delays in finalising this matter create severe and on-going emotional stress and trauma for the family and friends of Nokuthula. I am sure you will agree that they are entitled to finalisation of the matter and emotional closure if the circumstances of the investigation indicate that no substantial progress is likely, especially given the length of time that has lapsed since the death of Nokuthula.

3. *Specific indications of remaining steps and actions*

   We kindly request that any remaining investigative steps and actions that the NPA requires still to be carried out be itemised and linked to specific target dates to prevent this matter from dragging on indefinitely. As requested above, the failure to make substantial progress on reaching these target dates should result in the referral of the matter to a formal inquest if sufficient evidence for a prosecution is not available. In this regard, your undertaking to assist with the motivation for a judicial inquest should there be insufficient evidence for a prosecution, is gratefully noted.

Yours faithfully,



Robin Palmer

(On behalf of the legal support team)

TP

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Constitutional Litigation Unit • 16th Floor Bram Fischer Towers • 20 Albert Street • Marshalltown, Johannesburg 2001 • South Africa • www.lrc.org.za
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Your Ref:
Our Ref: Our Ref: B Sibiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291

16 January 2014

Dear Mr. Nxasana

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We refer to the letter of Adv S K Abrahams. Acting Director of the Priority Crimes Litigation Unit (PCLU), dated 5 December 2013 and received on 9 December 2013, in response to our letters dated 20 September 2013 and 28 November 2013.

2. We assume that Adv Abrahams' letter constitutes a full response to both our letters. If this is not the case he is invited to supplement his response or provide us with the letter prepared in response to our 20 September 2013 but not transmitted.

3. From the outset we note that nearly a year has elapsed from our client's request for an inquest and your predecessor's refusal. We appear to be no closer to resolution.

4. We note the point that the PCLU was only formed in 2003 and could not have attended to our client's matter prior to this year. However the TRC cases, including the Simelane case, was referred to the National Prosecuting Authority (NPA) in 2001. The NPA ought to have acted on these cases from 2001. The fact that the PCLU was only formed in 2003 is no excuse for the inaction during this period.

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5. We note with dismay that the NPA persists in claiming that the Simelane matter received attention prior to October 2010. Adv Abrahams denies that 'little of no action' was taken in the years prior to October 2010 and refers to the letter of Adv Ramaite dated 31 January 2013. The relevant paragraphs of Adv Ramaite's letter are at 6 to 9. These paragraphs disclose no investigations. Instead they set out a litany of excuses as to why no investigations took place. These are the so-called "guidelines", the Ginwala Commission, the closure of the DSO and creation of the Hawks. None of these excuses justify the NPA's idleness.

6. Adv Abrahams maintains that the Simelane matter was not referred by the SAPS or the authorities previously dealing with the TRC cases. He does not disclose who referred the case to the NPA nor does he identify the 'authorities' previously handling these matters. It is claimed that the Simelane case only came to the attention of the PCLU when the Foundation for Human Rights (FHR) made a submission to it in November 2004. It would seem that if it were not for the intervention of the FHR in 2004 the Simelane matter would never have been taken up, even though it was on the list of TRC cases originally referred to the NPA. Our client will not be persuaded that the NPA has acted diligently in this matter. The failure of the NPA to resolve this matter one way or the other constitutes monumental neglect or incompetence; alternatively it is the function of an erstwhile policy or political decision or arrangement not to pursue the "TRC cases".

7. We note that the Simelane matter was part of a broader investigation against former SAP General Engelbrecht. General Krappies Engelbrecht was implicated in organised violent crime by both the Goldstone Commission and the Truth and Reconciliation Commission. We assume that this investigation was yet another case arising from past conflicts that was abandoned by the NPA.

8. There is much irony in the fact that in the mid-2000s the then head of the PCLU resisted prosecutions in favour of an inquest only for the PCLU to resist an inquest several years later in 2013. It is correct that the family's representatives motivated for prosecutions at that time, particularly of those suspects who had

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not applied for kidnapping. I am advised that this was dismissed by the PCLU who did not wish to pursue "small fish". The family's representatives' advice that pursuing the small fish could lead to the conviction of more senior perpetrators fell on deaf ears. In any event it was not just "small fish" who had not applied for amnesty. The Commander of the Security Branch C1 Section under whose auspices the operation against Nokuthula took place also did not apply for amnesty. In the circumstances it is not difficult to see why my client and her family hold the view that the authorities do not wish to see justice done this matter.

9. We note that the NPA again attempts to escape responsibility for the failure to investigate on the basis that investigations are the responsibility of the police. According to Adv Abrahams the NPA played no role in the decisions to discontinue the investigations in this matter. My client does not accept this claim. It is common cause that the TRC matters (including my sister's case) were referred to the NPA not the police. The NPA accordingly had the responsibility to ensure that the cases were investigated. They failed to do so. In any event, the NPA has the authority to refer matters to the police for further investigation. Indeed it has been common practice for many years for prosecutors to direct investigations in serious or complex crime, as Adv Macadam is belatedly doing in the instant matter.

10. On the version of the NPA between November 2004 and 2010 (a period of more than 5 years) besides a few meetings between the PCLU and the representatives of the FHR nothing else was done. There was not the slightest attempt to investigate. According to my client very little happened between October 2010 and January 2013 when our client and her family finally gave up and sought an inquest.

<u>Investigation report</u>

11. The investigation report raises more questions than answers.

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DNA analysis and exhumations

12. In relation to the DNA analysis it is not stated when the second sample was sent for testing to Bosnia. Indeed it appears it has not been obtained, let alone sent. Par 5.2 says that a second sample "will be obtained and submitted to ... ." It is apparent from the paragraph on exhumations that as at the end of 2013, and notwithstanding our requests back in September 2013, the PCLU has no idea when the examinations will be complete. This is notwithstanding that a DNA sample was collected from my client on 4 April 2013.

13. I am advised that hundreds of unidentified remains are found each year in South Africa, many of which are of young women. Your Adv Abrahams advises that the remains could be of Nokuthula only because of the proximity of the site to the farm in Northham. Brits is situated 108 km south east of Northam; and is 68 km east of Rustenburg. A claim made before the Amnesty Committee of the TRC was that Nokuthula was taken from Northam to Westonaria via Rustenburg. Brits was not mentioned in evidence or in any statements as a place of interest in the Nokuthula matter. This exercise is accordingly a shot in the dark. While we would want the DNA from the remains of any and all young females in the wider region to be analysed, it would be pointless for the NPA to hold back from making a decision every time the remains of a young female was discovered.

14. Advocate Abrahams says that an anthropologist has made certain findings that the remains may be consistent with the missing person. Surprisingly no mention is made as to what these findings are. Since nothing was disclosed we must assume that such findings are tenuous. Strikingly, no mention is made as to whether there is evidence that the cause of death was violent. The modus operandi of the Security Branch at the time was to shoot their victims in the head. Since Adv Abrahams letter is silent on this point we must assume that there is no evidence of a violent death in respect of the remains found at or near Brits.

15. I am advised that it was wrong to have provided a photograph of Nokuthula to the facial reconstruction expert. The reconstruction should have been done independently of a photograph so as to avoid accusations that the face was

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reconstructed to resemble the photograph. In the circumstances any evidence arising from this work will have little evidential weight.

16. In short, as matters stand, there is no reasonable nexus between Nokuthula and the skeletal remains. There is accordingly no compelling reason to delay the finalisation of the investigation on the basis of these or other remains found in similar circumstances. In any event if new evidence does come to light from the recovery of human remains proper decisions can be made accordingly. This could include stopping an inquest and proceeding to a prosecution.

Westonaria plot

17. In respect of the plot at Westonaria it should be noted that this is not fresh news. The black Security Branch members who testified before the TRC all knew about the safe-house at Westonaria. If basic investigation had been done the plot would have been pointed out decades ago as part of routine investigations.

18. In regard to possible exhumations on this plot I am advised that several years ago the mining company that owns the plot bulldozed the then existing structures, including the building used as the "safe house", which was levelled. Unless there is specific information pinpointing an exact location there is little or no prospect of recovering remains on this plot. Since no such information has been disclosed we must also assume that this is another shot in the dark. In any event I am advised that it would take an experienced specialist anthropologist a few hours to determine the feasibility of an exhumation.

19. Again, a possible exhumation on this plot should not be a reason for any additional delay, unless there is specific and detailed information about the exact location of a grave.

Mortuary Records

20. An inspection of mortuary records was made in 1996 by Captain Leask, which included the Rustenberg Mortuary. No connections were made between any

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records and Nokuthula. Towards the end of 2013 it is now said that some incomplete and obscure records are possibly linked to this case. Again there is no reason why such a study could not have been conducted many years ago. While these apparent connections should be explored they also constitute shots in the dark and should not hold back the taking of a decision.

21. It is becoming increasingly apparent that the PCLU will delay making a decision on this matter on the basis of the most tenuous lines of inquiry.

Monthly Reports

22. If monthly reports are to be given they should be sufficiently detailed so as to be meaningful. Vague comments such as, "an anthropologist has made certain findings that the skeletal remains may be consistent with the missing person" without stating the findings are not helpful. The bulk of what is said in the October to December report is equally vague and unhelpful.

23. The monthly reports should be substantive, accurate and contain all relevant information not just suggestions or hints on progress in respect of the investigation.

Reasons for not holding an inquest

24. Quite remarkable reasons are given as to why an inquest should not be held at this time.

25. It has been demonstrated above that the outstanding investigations are shots in the dark and are not 'key outstanding investigations' as claimed by Adv Abrahams. In fact the investigating officer, Captain Masehela, who submitted his report to Adv Macadam in July 2011 recommended an inquest, which recommendation was ignored.

26. It is noted that the setting up of an inquest in the High Court could take several months. During this period outstanding investigations could be finalized. If any of

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these lines of inquiry resulted in evidence warranting a prosecution such a decision could be taken and effected. Should this happen the inquest will not be proceeded with; and if it has commenced, it can be stopped in terms of section 21(2) of the Inquest Act.

27. While we accept that there may be potential prejudice to witnesses who have to testify in two fora we note that this was of no consequence to the PCLU in the 2000s who were pushing for an inquest at that time. Our instructions are that the interminable delay is of even greater prejudice to witnesses and our clients.

October to December report

28. The October to December report suggests that there is no end in sight. There is simply no reason why these matters could not have been pursued and resolved in the 12 months since my client sought an inquest.

29. We note that Adv Macdam identified these matters as investigational tasks back in 2010. It is quite apparent that little or no progress has been made on these tasks over the past three years and they remain as "work to be done". Many of these tasks are simple and basic and there is absolutely no reason why they should not have been quickly completed.

30. It is worth mentioning that other tasks identified by Adv Macadam in his 2010 letter of 2010 seem to have dropped off the list. No indication has been given whether these tasks were completed.

31. I have taken instructions from my client in respect of the requests made by Adv Abrahams in paragraph 8 of his letter. My client is not in possession of any of the records of the amnesty hearing. My client advises that members of her family did collect Nokuthula's belongings from the Duma Nkosi home in Soweto in late 1983 or early 1984. Unfortunately they cannot recall collecting a passport from amongst her clothes and other belongings. My client's mother advises that Nokuthula was a dual citizen of South Africa and Swaziland and possessed

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passports for both countries. Nokuthula apparently used her Swaziland passport on her last few trips.

32. In respect of the holding of a meeting we had requested a meeting with the NDPP. My client and her representatives have met with the PCLU over the years and such meetings have proven to be utterly fruitless. We see no point in holding another meeting with the PCLU. We persist with our request for a meeting with yourself. The purpose of such a meeting would be to request an imposition of a reasonable time limit on the investigations and for the taking of a decision whether to prosecute or not. If a decision cannot be taken within a reasonable time period then this matter must be referred to a formal inquest in the High Court. We would submit that, in the circumstances of this case, a reasonable time period would be a matter of weeks not months.

33. Kindly advise per return whether you are willing to meet with us, and if so, the soonest date for such a meeting. If a meeting in the near future is not possible, then please advise whether you are willing to bring this matter to finality within a reasonable period as described above.

34. We look forward to hearing from you.

Yours sincerely

Legal Resources Centre, Constitutional Litigation Unit, Johannesburg
Bongumusa Sibiya

Copy to: **Advocate Chris Macadam**
Priority Crimes Litigation Unit
By fax: (012) 845 6337
Email: cmacadam@npa.gov.za / hzwart@npa.gov.za

And to: **Advocate S K Abrahams**
Acting Head: Priority Crimes Litigation Unit
Office of the National Director of Public Prosecutions
By fax: (012) 845 6337

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* * * Communication Result Report (16. Jan. 2014 11:05) * * *

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Your Ref:
Our Ref: Our Ref: D Shiya

The Acting National Director of Public Prosecutions
National Prosecuting Authority
Private Bag X752
Pretoria
0001

By fax: 012 845 7291

16 January 2014

Dear Mr. Nxasana

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We refer to the letter of Adv S K Abrahams, Acting Director of the Priority Crimes Litigation Unit (PCLU), dated 5 December 2013 and received on 9 December 2013, in response to our letters dated 20 September 2013 and 28 November 2013.

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South African Police Service Suid-Afrikaanse Polisiediens

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Your reference :

Enquiries : Brigadier Kadwa

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E-mail : dpci.head@saps.gov.za

THE NATIONAL HEAD

DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

SOUTH AFRICAN POLICE SERVICE

Mr Bongumusa Sibiya
Legal Resources Centre
Constitutional Litigation Unit
JOHANNESBURG

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

Your letter dated 25 September 2013 bears reference.
Since the Legal Resource Centre has been dealing directly with NPA (Priority Crime Litigation Unit) regarding this investigation, the DPCI investigator was of the opinion that you were well informed about the developments of the case. The last correspondence was sent on the 3rd of December 2013 by NPA to your office.

Nevertheless, the DPCI will compile a comprehensive report in consultation with all the relevant stakeholders involved in this investigation. The entire investigation is based on the DNA analysis before we could conclude that the bones found in Brits were those of Nokuthula Simelane who disappeared 30 years ago. On the other hand, if results are negative the NPA will decide whether according to the evidence available the formal inquest could be held or not.

The comprehensive report will be submitted to your office by the end of January 2014 which will cover all the aspects raised in the letter.

Kind regards,

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
A DRAMAT
Date: 2014-01-16

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TN 21.20

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Your Ref: JB/ CAS: 1469/02/1996
Our Ref: Our Ref: B Sibiya

Lieutenant General A Dramat
Deputy National Commissioner: Directorate for Priority Crime Investigation
No 1 Cresswell Road
Silverton
Pretoria
By fax: 012 846 4400; and

Attention: Brigadier Kadwa
By fax: (012) 846-4400; and
By email: kadwaE@saps.gov.za

26 February 2014

Dear General Dramat

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1996)

1. We thank you for your letter dated 10 February 2013 in response to our letter dated 26 September 2013.

2. My client is disturbed to note that you do not accept any responsibility for the lengthy delay in finalizing this matter, or at least the delay of nearly 4 years, being the period from 25 March 2010 when the Directorate for Priority Crimes Investigation (DPCI) was given the file. Indeed you do not acknowledge that there has been any delay at all.

3. Since you have acknowledged that the DPCI was seized with this investigation since March 2010 my client holds you and your department responsible for failing to take expeditious steps to finalize this long outstanding investigation. Your letter provides no justifiable explanation for such delay. Your neglect has caused my client and her family considerable suffering and emotional anxiety. Moreover, such

neglect constitutes a great disservice to the memory of the late Nokuthula Simelane (Nokuthula) who gave her life for the struggle for freedom and democracy in South Africa.

4. It is apparent from your letter that, notwithstanding the special circumstances of this case, it is still not being prioritized or treated as urgent. This conclusion is premised on the following:

4.1 The DNA from the Brits skeletal remains have not as yet been sent for testing to Bosnia because the police have still not yet received approval to incur such expense. A second sample has not even been secured should approval be granted;

4.2 The Westonaria plot has not been evaluated let alone excavated;

4.3 Additional 'manpower' has not as yet been assigned to the investigation;

4.4 The four mortuary entries have not yet been acted upon i.e. graves have not been identified and no decision has been taken as to whether or not to exhume and conduct DNA testing; and

4.5 The DPCI refuses to commit to specific time frames.

5. If past conduct is anything to go by, there is no end in sight to this investigation. The basic investigation into the disappearance of Nokuthula has not been completed; neither have the lines of inquiry agreed to between Advocates Macadam and Palmer during February 2013 been finalized.

6. We note your statement that, but for '*a significant new development*', the agreed date for finalising the investigation, the end of May 2013 would have been met. This development related to the discovery of skeletal remains of a young woman in the Brits area, presumably in March 2013. It seemed that but for this development the investigations were on track for completion by the end of May last year. One

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would have then expected the different lines of inquiry to have been concluded by the end of May, bar the forensic examination of the Brits remains.

7. It appears, however, that the balance of the investigation ceased following the discovery of the said remains. This conclusion can be drawn from a consideration of your letter as well as that of Adv. Abrahams of the Priority Crimes Litigation Unit (PCLU) dated 9 December 2013. The letter of Adv. Abrahams disclosed that very little of the agreed investigation had been attended to.

8. By way of example, a central pillar of the investigation has always been the tracing and interviewing of the 16 MK operatives that Willem Coetzee and Anton Pretorius claimed were arrested as a result of Nokuthula's cooperation. In October 2010 Adv. Macadam set this as one of the tasks to be carried out by the DPCI. According to the letter of Advocate Abrahams' dated 9 December 2013 this particular task had not yet been accomplished. This was his observation, more than 3 years after the instruction was given and some 9 months after the discovery of the skeletal remains. Many of these 16 individuals are well known personalities, easy to locate and are available for interview by investigators.

9. Your letter is oddly silent as to why this key aspect of the investigation could not be completed by end of May 2013, or soon thereafter. You confirm this lapse in your letter where you advise that "*(p)ending the forensic results, the investigating officer will continue to focus on the investigations identified by Advocate McAdam*". Since you add that the investigations are "*quite extensive*" and that it may be necessary to "*assign additional manpower*" we must conclude that as of February 2014, some 11 months after the discovery of the remains, little or nothing has been done in relation to the said investigations.

10. We are advised that a period of 3 years and 4 months (since the tasks set by Adv. Macadam in October 2010) is more than sufficient time to have completed these investigations. This is irrespective of whether or not skeletal remains had been found.

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11. We point out that that there is no apparent reason why the Brits remains should be regarded as "*significant*". No reason has been advanced as to why such discovery justifies the delay in completing the agreed investigations. The discovery of remains of a young woman is not an uncommon occurrence in South Africa. Apart from age and gender there is apparently no other link between the remains and Nokuthula. There is accordingly only a remote possibility that the remains may be identified as Nokuthula. While there is a need to establish the identity of the remains such a task should not have halted or slowed all other investigations.

12. The outstanding investigational aspects remain relevant, and still need to be investigated irrespective of whether the remains prove to be those of Nokuthula or not.

13. As matters stand, the balance of the investigation is far from complete. The forensic results of the skeletal remains and the four other bodies (all of which have no meaningful links to Nokuthula) have to be traced, exhumed, DNA samples obtained, procurement procedures completed, dispatched to Bosnia and then await results that will take at 6 months or more.

14. In the meantime time marches on and takes its toll on witnesses and suspects. Time in this case is critical because we have already had a delay running into decades. As a result our client and her family may be deprived of a meaningful legal conclusion to Nokuthula's death.

15. In the circumstances, we seek your answers to the following questions:

    15.1 Have the investigative tasks set by Adv. Macadam on 10 October 2010 been diligently conducted at all times?

    15.2 Did the discovery of the skeletal remains at Brits cause the investigations to be neglected, halted or slowed in any way?

We look forward to hearing from you.

TP

Yours sincerely

Legal Resources Centre, Constitutional Litigation Unit, Johannesburg
Per: Bongumusa Sibiya

Copy to: **Advocate S K Abrahams, Acting Head: Priority Crimes Litigation Unit**
By fax: (012) 845 6337

Advocate C Macadam, Priority Crimes Litigation Unit
By fax: (012) 845 6337; and
By email: cmacadam@npa.gov.za / hzwart@npa.gov.za

TP

* * * Communication Result Report (26. Feb. 2014 10:40) * * *

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PO Box 9495 • Johannesburg 2000 • South Africa • Tel: (011) 836 9831 • Fax: (011) 834 4273

Your Ref: JB/ CAS: 1469/02/1998
Our Ref: Our Ref: B Sibiya

Lieutenant General A Dramat
Deputy National Commissioner: Directorate for Priority Crime Investigation
No 1 Cresswell Road
Silverton
Pretoria
By fax: 012 846 4400; and

Attention: Brigadier Kadwa
By fax: (012) 846-4400; and
By email: kadwaE@saps.gov.za

26 February 2014

Dear General Dramat

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE (PRIORITY INVESTIGATION: JV PLEIN: 1469/02/1998)

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3. Since you have acknowledged that the DPCI was seized with this investigation since March 2010 my client holds you and your department responsible for failing to take expeditious steps to finalize this long outstanding investigation. Your letter provides no justifiable explanation for such delay. Your neglect has caused my client and her family considerable suffering and emotional anxiety. Moreover, such

TP

South African Police Service Suid-Afrikaanse Polisiedienst

Private Bag X1500, SILVERTON, 0127 Fax No: (012) 846 4400

Your reference : JV Plein 1469/1996 THE NATIONAL HEAD

Enquiries : Brigadier Kadwa
Colonel Xaba DIRECTORATE FOR PRIORITY CRIME INVESTIGATION

Telephone no : 012 846 4372 SOUTH AFRICAN POLICE SERVICE

E-mail : dpci.head@saps.gov.za

Legal Resources Centre
PO Box 9495
JOHANNESBURG
2000

Dear Ms van der Linde

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996.

I am in receipt of your letter dated 10 July 2014 and have noted the contents thereof.

It is unfortunate that your letter once again persists with the suggestion of inaction on the part of the investigators and the allegation that your client is not kept informed of developments; both of which are denied. While I do not deem it necessary to respond to each and every allegation contained in your letter under reply or your letter dated 26 February 2014, it needs to be pointed out that the allegation that the investigating officer has only contacted your client once during the last six months is disputed.

I am advised that contrary to this allegation, the investigating officer was in contact with your client on a number of occasions and that during this period she in fact visited him at his office where he showed her the docket and explained to her in detail the progress which had been made. According to the investigating officer your client expressed her relief that she had seen that the investigation was progressing and that she appeared to be satisfied with the progress made. I am also advised that shortly after receipt of your letter dated 26 February 2014 they had spoken and that your client had agreed that instead of continuous correspondence it would be more expedient for a meeting to be arranged where the matter could rather be discussed. I am furthermore advised that she undertook to take this matter up with yourself and to arrange a meeting towards the end of April 2014. No feedback was however received.

TP

KIDNAPPING, TORTURE, DISAPPEARANCE AND MURDER OF NOKUTHULA AURELIA SIMELANE: JV PLEIN 1469/02/1996.

In addition to the above, I am advised that the investigating officer was also in telephonic contact with your client on 20 March, 3 April, 8 April and 11 May 2014. The last contact between your client and the investigator was during June 2014 when he contacted her whilst on leave, to inform her of this fact and to assure her that the investigation would continue in his absence. I am advised that a good relationship exists between the investigating officer and your client and, as such, the investigating officers surprise at being confronted with your letter, is, in the circumstances, is understandable.

As regards the DNA results, I may inform you that the laboratory in Bosnia has completed the tests and that the investigating officer received notification on 14 July 2014 that the samples provided by Ms Simelane's family are not consistent with the samples obtained from the skeletal remains which were uncovered.

Since my previous letter, extensive investigations have been conducted and the case docket has in view thereof recently been submitted to the National Prosecuting Authority for consideration and further instructions, if any.

In conclusion it needs to be reiterated, that the DPCI is, without compromising on the quality of the investigation, committed to finalising the same as soon as possible. The DPCI is also committed to building forth on the good relationship which already appears to exist between your client and the investigating officer. Accordingly I support the agreement reached between them that a meeting to resolve any issues you may have/ clarity which you may need is the preferable route to follow in order to ensure a common understanding of the matters at hand and the issues which need to be dealt with. You are therefore at liberty to contact the investigating officer's commander Colonel Xaba at telephone number 0798899582, should such a meeting be required.

Your cooperation in this regard will be appreciated.

Kind regards,

LIEUTENANT GENERAL
NATIONAL HEAD: DIRECTORATE FOR PRIORITY CRIME INVESTIGATION
A DRAMAT
Date: 2014-07-17

TP

"TN 21.22"

MEETING WITH THE DPCI REGARDING THE CASE OF NOKUTHULA SIMELANE 31 JULY 2014

ATTENDEES

Frank Dutton

Thembi Nkadimeng

Angela Mudukuti

Carien Van Der Linde

Colonel Xaba (Director, Directorate for Priority Crime Investigation –SAPS)

Captain Masegela (Investigating Officer)

SUMMARY

The meeting followed mostly a question answer format with Frank asking for details about the investigation. The docket was handed to the PCLU on 14 July 2014 and Captain Masegela and Colonel Xaba are of the opinion that investigations are complete.

CLARIFICATION OF TEAM COMPOSITION

After brief introductions Colonel Xaba indicated that they had previously dealt with Robin Palmer whom they have not heard from for a long time but that he seems to have been replaced by the LRC. Frank then indicated that Robin is still very much a part of the team. Angela explained the composition of the team and that the letters come on the LRC letterhead but are produced after consultation with the entire team.

STATUS OF INVESTIGATIONS

Delays and Challenges Faced

Captain Masegela began by explaining that he only started investigating the matter in 2010 and struggled to trace all the original documents from the TRC. Throughout the process he maintained direct contact with the Simelane family. He also indicated that the entire process of investigation was done in consultation with Advocate Macadam. All decisions and instructions came from Macadam. He indicated that the investigations have been difficult as many of the senior officials involved have died and the evidence has been hard to obtain. He also felt that the people who were previously investigating the case had failed to do a thorough job otherwise this matter would have been resolved a long time ago. He felt that most of the delays can be attributed to obtaining DNA results from the laboratories in Bosnia and due to the difficult nature of the case. Despite the delays and negative DNA results he indicated that he could leave no stone unturned, making securing DNA results a very important part of the process. After the DNA results were obtained he submitted his entire docket to Macadam on 14 July 2014. They are currently waiting for Macadam to make a decision and/ or give further instructions.

TP

Further delays were attributed to the difficulty faced when dealing with uncooperative witnesses. According to Captain Masegela, in order to talk to TRC witnesses one has to go through their lawyers first. He indicated that many of the lawyers took a very long time to respond to his requests. He also expressed disappointment about the tone in our correspondence as it insinuated that he was not adequately doing his work despite the delays being out of his control.

Certificate of Completed Investigations
Frank asked if a certificate indicating that the investigations were complete had been issued. Captain Masegela said that a certificate had been issued but that it came from a different police department. Frank asked if Captain Masegela felt the investigations were complete and Masegela responded affirmatively but qualified the response by making it clear that investigations are complete with respect to instructions and guidance given by Macadam. Captain Masegela also said that, when necessary, he expanded investigations based on leads. Frank asked him again if, as the investigating officer he was satisfied with the investigations. Captain Masegela responded affirmatively.

DNA Tests
Frank raised that General Dramat had indicated that more DNA tests were to be done based on mortuary records and asked Captain Masegela if this had been done. Masegela indicated that it had been done and that they have ruled out the possibility of any of those bodies being that of Nokuthula as they are too old to be her.

Westonaria Plot
Frank asked if they had investigated the burial site at Westonaria. Masegela indicated that they went to the site and there were no more unidentified remains to examine. However, the people at Westonaria will keep him informed should anything else turn up.

Skeletal Remains from Brits
Frank asked what made them think that the skeletal remains at Brits were linked to this case. Captain Masegela indicated that he had received information that a female body fitting the age requirement had been discovered and that he had to ensure that it was not her. Brits is also close to where she disappeared. Thembi then asked if this means that they will continuously check every single female body fitting the age requirement as she felt that this is similar to shooting in the dark. She also indicated that these far-fetched options were time consuming and should not be allowed to prevent the pursuit of more credible leads. She acknowledged that they should leave no stone unturned but this must not be an excuse to waste time. She felt that the SAPS are walking down dark alleys whilst ignoring people like Radebe who could possibly lead them to her remains. Colonel Xaba stated that he agrees with her, but she must understand that they cannot rule out any avenues.

18 MK Operatives
Frank asked if they had interviewed the 18 MK members and Captain Masegela said he knew nothing about 18 MK operatives. He stated that he was only instructed to interview Ngidi, Ngubese, Olifant and Twala. He reiterated that he was never given the names of 18 MK operatives. Frank referred him to the letter from Macadam addressed to Captain Masegela dated 27 October 2010 where this task is specifically mentioned. Masegela denied ever seeing such a letter and repeated that he had followed every single instruction received from Macadam. Frank then went on to explain how finding the 18 MK members is central to the

investigation. During the TRC hearings Coetzee alleged that Nokuthula had turned into a spy for them and that her information led to the arrest of those 18 MK members. Coetzee produced a newspaper displaying the announcement by the Minister of Police that 18 MK members had been arrested. The newspaper date had been removed. Coetzee tried to use this to prove that Nokuthula had been released as a spy and managed to give information that led to the arrests. Later, it was revealed that the date on the newspaper was September 1984 and Nokuthula disappeared in 1983 making it difficult to believe that she had been released as a spy and facilitated the arrests of the 18 MK members.

Captain Masegela then indicated that they had traced Ngidi and he is also supposed to be one of the people betrayed by Nokuthula. Ngidi confirmed that there is no way that Nokuthula could have given information that led to his arrest. Frank then indicated that finding the remaining operatives is important as it will prove that Coetzee lied.

Interviewing General Nyanda

Frank asked if General Nyanda had been interviewed. Masegela indicated that he was instructed by Macadam *not* to interview Nyanda. Frank went on to ask if there were any outstanding tasks and at that point Captain Masegela stated that he felt like he was being questioned in an accusatory manner. Frank apologized and indicated that this was not his intention. He made it clear that he was merely trying to fully understand what had and had not been done. It was at this point that Thembi explained that Captain Masegela had not been copied in any of the letters sent from the NPA to the team. Thembi shared the letters with Captain Masegela to make sure he knew exactly what the NPA had communicated to the team. Captain Masegela then said that there are no outstanding tasks and that if there was anything he was unable to do, for example- interview a man who has already passed away, he attached an affidavit to that effect and any supporting documentation, for example death certificates.

Brigadier Schoon

Frank asked if Brigadier Schoon was still alive and Masegela said yes but that he is very old and hard of hearing.

Extra Resources

Frank asked if Captain Masegela had requested extra resources for this investigation. Captain Masegela said he had and that they had received assistance from a number of departments including the Crime Scene Management team. Colonel Xaba also responded to say that unfortunately one of the people instructed to assist had recently been involved in a car accident.

Prosecution of Coetzee and Pretorius

Frank asked Captain Masegela whether he felt that sufficient evidence existed for the prosecution of Coetzee and Pretorius. Masegela indicated that there could be. Colonel Xaba responded by saying that there is no direct evidence that links them to the crime. Captain Masegela said that Radebe should be charged with kidnapping and torture. Frank then asked if they had been able to speak to Radebe. Captain Masegela indicated that Radebe and his lawyers refused to talk to them as did Coetzee and Mong.

Allegations of Nokuthula becoming a Spy for the Security Branch

TP

Frank explained that the white Security Branch members claimed that they managed to make Nokuthula a spy for them and that they took her to Swaziland and she never returned. Frank stated that this is unlikely because they never circulated Nokuthula as a wanted person after she failed to return to her "handlers". This is peculiar considering they had classified her as a "terrorist". Colonel Xaba said that in 1983 the police did not have the capacity to circulate wanted persons and that that Frank was speaking with modern day technology in mind.

Captain Masegela said that according to Coetzee and Pretorius they turned her into a spy and Strongman (Bambo) took her to the Swaziland border. Bambo was later arrested for another crime and Coetzee and Pretorius panicked as they feared he would implicate them and so they arranged to have him killed.

SWT66
Frank asked if they were able to trace SWT66. Captain Masegela said that they were not able to trace SWT66.

Motsoanyame Commission
Frank asked if they had followed up with Motsoanyame Commission. Captain Masegela said they had not.

TRC cases sent for investigation
Frank said that the NPA wrote to the team indicating that South African president had directed the NDPP to give attention to 500 TRC missing people cases and according to the NDPP website 150 cases were identified for immediate investigation. He then asked Captain Masegela if he was aware of these 150 cases. Colonel Xaba and Captain Masegela both said that they were not aware of 150 cases being investigated but that they knew that a much smaller number of cases were sent for immediate investigation including that of Nokuthula.

Thembi then suggested that a meeting should be organized between the NPA, SAPS and the team so that the NPA can go through the docket with everyone. Thembi indicated that regardless of what the NPA's decision is- this meeting must be held as she would like to know all the details.

Hospital Records in Swaziland
Frank asked if they had looked into hospital records in Swaziland. Captain Masegela said that they had done so in conjunction with Interpol but that nothing useful had turned up.

Angela asked if Macadam had indicated when he would give them feedback and they responded by saying that he did not say when he would get back to them.

CONCLUSION
The meeting ended with Colonel Xaba asking for us all to focus on the positive aspects and he indicated that he would not object to having another meeting with the PCLU present.

TP

Carien van der Linde

From: Carien van der Linde <carien@lrc.org.za>
Sent: 16 September 2014 12:47 PM
To: 'XabaN@saps.org.za'
Subject: KIDNAPPING TORTURE DISAPEARANCE AND MURDER OF NOKHUTHULA AURELIA SIMELANE / PRIORITY INVESTIGATION; JV PLEIN 1469/02/1996
Attachments: AFFIDAVIT FRANK KENNAN DUTTON.pdf

Dear Col. Xaba

I attach a PDF version of the affidavit of Frank Kennan Dutton, the investigator appointed by the Simelane family.

The original copy is with Frank Dutton, if you should require it.

Warm regards

Carien van der Linde
Attorney

| Tel: 011 836 9831 | Fax: 011 836 8680 | Email: carien@lrc.org.za |
| Mobile: 060 346 9577 |
Physical : 15th Floor	Bram Fischer Towers	20 Albert street	Marshalltown
Johannesburg	South Africa
Postal: P.O Box 9495	Johannesburg 2000
Website: www.lrc.org.za
Johannesburg	Cape Town	Durban	Grahamstown

TP

AFFIDAVIT

I, the undersigned

FRANK KENNAN DUTTON

Do hereby make oath and state:

1. I am a South African citizen with ID Number 4905204085086. I reside at 18 Lawrence Place, Waterfall, 3650, KwaZulu Natal.

2. I am an International policing and investigation expert and provide expertise on a consultancy basis internationally as well as locally. I have played leading roles in complex investigations in South Africa and many other countries. Including Bosnia, Croatia, Kosovo, Sudan (Darfur), Afghanistan, DRC, Cameroon, Uganda, Nigeria, Rwanda, Kyrgyzstan, Liberia, Mozambique, Zimbabwe, Brazil and East Timor. I have 38 years of policing experience in South Africa and I was the first head of the Directorate of Special Operations.

3. In 2012 I was awarded the Order of Baobab in Gold by the President of South Africa for my South African and International police work. In particular the President made this award in order to recognize my "*exceptional contribution to and achievement in [my] investigative work as a dedicated and loyal policeman, for exposing the apartheid government's "Third Force*".

4. I make this affidavit in response to a request set out in a letter from Colonel Xaba, Commander, Crimes against the State, Directorate Priority Crimes Investigations (DPCI) dated 11 August 2014 to the family's legal representatives, the Legal Resources Centre (LRC). This letter sought an affidavit from me, as the family's

16/9/2014 TP

private investigator, setting out what investigation I had conducted and in particular what statements I had taken. In a letter dated 9 September 2014 the LRC advised Col Xaba that I took no statements. Col Xaba responded by way of a letter dated 10 September 2014 in which he indicated that the National Prosecuting Authority (NPA) claimed it could not make a decision without the requested affidavit.

5. During June 2011 I was retained as a consultant by the family of Nokuthula Aurelia Simelane to inquire into the whereabouts of Nokuthula Simelane who had been kidnapped from the Carlton Centre, Johannesburg in September 1983 by members of the former Security Branch of the South African Police. My investigation was sponsored by the Foundation for Human Rights (FHR). After her kidnapping she was secretly held captive on a farm in Northam for several weeks and severely tortured after which she disappeared.

6. I researched documents provided to me by the family's legal representatives as well as the contents of public records pertaining to Ms Simelane's disappearance. I thereafter studied the testimonies before the Amnesty Committee of the TRC in respect of the abduction and assault of Ms Simelane. I also acquainted myself with the Truth & Reconciliation Commission (TRC) Report and the TRC findings concerning the Security Branch of the South African Police.

7. In the course of my inquiry I met and spoke to people concerning the disappearance of Ms Simelane. I did not take any written or sworn statements.

8. I spoke to the following relatives of Nokuthula Simelane:

- Ernestina Simelane - Mother
- Thembisile Phumelele Nkadimeng – Sister
- Lungelo Simelane - brother who was also a student at the University of Swaziland at the time of the disappearance.
- Richard Vilakazi – Uncle

TP

16/9/2014

- Thembi Vilakazi – Aunt (Ms Simelane was a frequent visitor to her home in Swaziland and saw her shortly before she left and disappeared in Johannesburg)
- Bonginkosi Nkumalo - Cousin - who was also a Swaziland University student and MK courier in Barney Molekwane 's unit and stayed with his Uncle Richard Vilakazi (together with Barney Molekwane and members of the Special Operations MK Unit. Barney was Ms Simelane's cousin).

9. I also met and spoke to the following persons who were in regular contact with Ms Simelane (in Swaziland) prior to her disappearance:

- Wendy Mpama - close personal friend.
- Sipho Twala – MK friend in Swaziland
- Philisiwe Twala – MK member and friend in Swaziland
- Ray Lala – MK member and friend in Swaziland
- Totsi Memela – Personal friend in Swaziland
- Mbali Mnqadi – a close friend (roommate at University) now a Brigadier in the South African Police Service.
- Zweli Sizane – Uncle who served in MK Security and Intelligence (Swaziland) at time of disappearance and enjoyed a close relationship with Ms Simelane.
- R.S Moloi – headed MK Security and Intelligence in Swaziland at time of Ms. Simelane's disappearance. He is currently South Africa's Ambassador to Vietnam. He enjoyed a friendly relationship with Ms Simelane.
- Siphiwe Nyanda – currently the President's personal representative in Parliament. He was a MK Commander in Swaziland. His positions included: Commander Transvaal Urban Machinery (1979 - 1983). Chief of Staff Transvaal Command (Eastern Command) (1983 - 1986). Commander Border Operations, Swaziland (1986). Deputy Head, Political Military underground leadership in South Africa (1988 - 1990). He was acquainted with Ms Simelane and her family members in Swaziland.
- Ricky Mkhondo – A senior MK Intelligence officer in Swaziland at the time of Ms Simelane's disappearance. He was friendly with Ms Simelane and Gilbert Twala.

TP

16/9/2011

- Gilbert Twala – now Director General of the Department of Civil Aviation. He was the Commander of the Transvaal Urban Machinery he was Ms Simelane's MK Commander and was also having a romantic relationship with her.

10. They all maintained that Ms Simelane had not returned to Swaziland after her disappearance in South Africa early in September 1983.

11. I spoke to Duma Nkosi and his mother Nthombi Nkosi who both confirm that Ms Simelane arrived at their home in Soweto and spent one night with them. Ms Simelane left the following morning to go to the Carlton Centre. She left a small travel bag of personal belongings at their home. She did not return and was not seen by them again.

12. I spoke to Norman Mkhonza who said he had last seen Ms Simelane on the day of her capture and had not been instructed by any of his superiors thereafter to be on the alert for her, or informed that she was a wanted person (terrorist).

13. I spoke to Nimrod Veyi and Mohapi Selamolela who confirmed that Ms Simelane had very noticeable injuries to her ankles and wrists (as one would expect) from the prolonged and continued shackling that she had endured over five weeks of captivity and said that in their opinion these injuries (apart from other injuries) would have precluded any attempt to re-infiltrate her back into MK Swaziland. They also both said that they were never informed by their superiors that Ms. Simelane was a wanted person (terrorist) and to be alert for her or to gather information regarding her activities or whereabouts. We also discussed safe houses which were used by their SB during 1983 in Klipspruit and Westonaria.

14. I investigated the death of Barney Molekwane because Willem Coetzee said in his testimony before the Amnesty Committee that while Ms Simelane was held captive at the Northam farm, she had provided him with information that led to action been taken against the Sasol MK sabotage group who were led by Barney

TP
16/9/2016

Molekwane. According to Piet Retief Inquest No 79/85 which dealt with the death of Barney Molekwane and members of his Special Operations group in the Eastern Transvaal on 28 November 1985. (Two years after Ms Simelane's capture.) The Molekwane group were on their way back to Swaziland when they encountered members of the Security Forces unexpectedly. A shooting ensued and Barney Molekwane and his fellow operatives were killed. The contact was unexpected and spontaneous. It was not a planned Security Force Operation and cannot be linked to Ms Simelane.

15. Coetzee and Pretorius testified that during Ms Simelane's detention she also provided information which enabled the Security Branch to arrest ANC cadres whilst she was still in confinement at the farm at Northam. They referred to the arrest of Curtis Norman Mkhonza aka MK Mpho. I spoke to Curtis Mkhonza and he told me he was arrested during 1984 and that his arrest was not linked to Ms Simelane.

16. Coetzee and Pretorius also claimed in their testimony before the Amnesty Committee that information from Ms Simelane whilst she was held captive on the farm led "directly or indirectly" to the arrest of 18 persons and referred to an undated news article as follows:

> *"Police Strike Hard at ANC. Le Grange states 18 identified members of the banned African National Congress, as well as numerous active supporters have been arrested and detained by the Security Branch in the last three months..."*

17. It became apparent at the hearing that The Star newspaper published this report on 22 June 1984. It therefore seems that these arrests occurred about 9 months after Ms Simelane's disappearance.

TP
16/9/2010

18. I spoke to some of the 18 persons who were arrested (as referred to in The Star news article dated 22 June 1984). The persons I spoke to were:

- Justice Ngidi
- Jabu Ngubese
- Enoch Mthombeni
- Lillian Gabashane
- Amos Masondo
- Duma Nkosi

19. I spoke to them individually and was told that their arrests in 1984 could not have been as a result of information supplied by Ms Simelane. Amos Masondo explained further that the majority of the 18 arrests related to persons who were not taking an active part in the "armed struggle" but were merely providing shelter and safety to MK Operatives who had been ousted from Swaziland in consequence to the Nkomati Accord, signed on 16 March 1984 between South Africa and Swaziland.

20. I spoke to Manuel Antonio Olifant who told me about a farmhouse at Westonaria which the Soweto SB Intelligence Unit used as a safe house prior to 1983. He also said that in 1983 he lived in house 23 Klipspruit and that the other section of the house, number 21, was used by Coetzee's SB unit as a safe house. He said he did not know what had happened to Ms Simelane.

21. I was told by Ray Lala, Ricky Mkhonda and Tim Williams (all of whom were appointed to senior positions within the South African Intelligence and police intelligence structures after their return from exile in about 1990) that they had not come across any official documentation declaring Ms Simelane a wanted person.

TP
16/9/2010

22. I spoke to Dirk Coetzee who told me that it was a SB strategy to always (wherever feasible) to deflect blame to the ANC. He provided several examples of how this strategy was used. In his opinion deflecting blame to the ANC for Ms Simelane's disappearance was a perfect example of this tactic. In addition to what Coetzee told me I noted too that the TRC made a finding concerning this SB strategy.

16/9/2014

F K DUTTON

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at HILLCREST SAPS on this the 16 day of September 2014 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

COMMUNITY SERVICE CENTRE

2014 -09- 16

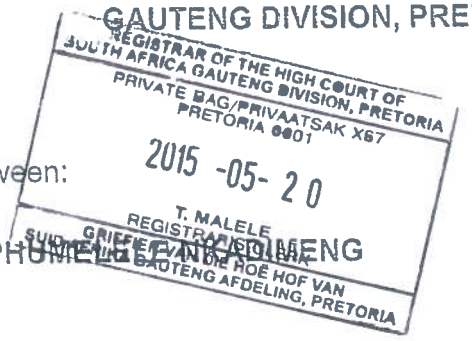
HILLCREST

TP

130

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA



Case Number:

In the matter between:

THEMBISILE PHUMELELE MADLOMENG	Applicant

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

TP

130

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG	Applicant
And	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	First Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE NATIONAL MINISTER OF POLICE	Fourth Respondent
WILLEM HELM COETZEE	Fifth Respondent
ANTON PRETORIUS	Sixth Respondent
FREDERICK BARNARD MONG	Seventh Respondent
MSEBENZI TIMOTHY RADEBE	Eighth Respondent
WILLEM SCHOON	Ninth Respondent

V.P.

TP

IN CAMERA SUPPORTING AFFIDAVIT

I, the undersigned

VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions. I have provided a supporting affidavit in these proceedings.

2. I refer to the memorandum mentioned in paragraph 51 of my supporting affidavit titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum is annexed hereto marked **"VPP1".** It was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

3. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to my open supporting affidavit. I have attached it this *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release.

TP V.P.

3.1. The issues and complaints raised in the memorandum have already been discussed in my affidavit filed before the Ginwala Commission, which has been part of the public record since 2008.

3.2. In my view, there is nothing in the memorandum that implicates or impairs national security.

3.3. It ought to be released as it points to unlawful and unconstitutional conduct.

4. In this memorandum I pointed out that:

4.1. The problems are "*hindering and obstructing the NPA in fulfilling its constitutional mandate, namely, to institute criminal proceedings without fear, favour or prejudice*".

4.2. The SAPS and NIA had not made dedicated members available to the NPA to gather sufficient and admissible evidence in the TRC cases. This was one of the tasks that the "Task Team" was required to address.

4.3. There were differences in interpretation in relation to the role of the other state departments in relation to the prosecutorial decision-making process.

5. I concluded by stating that:

VP

TP

I have now reached a point where I honestly believe that there is "improper interference with my work and that I am hindered and/ or obstructed from carrying out my functions on this particular matter.

It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

VUSUMZI PATRICK PIKOLI

I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at CAPE TOWN on this the 6th day of MAY 2011 ~~day of .....~~ 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

Andrew Lehlogo Bucky Mohobio
Commissioner of Oaths
Practising Attorney
2nd Floor, Leadership House,40 Shortmarket Str
Greenmarket Square, Cape Town, 8001

Copy 134

The National Prosecuting Authority of South Africa
Igunya Jikelele Labetshutshisi Bo Mzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

(a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;

(b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

V.P.
TP

(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past."*.

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies (NIA)
- The South African National Defence Force
- The South African Police Service (SAPS)
- Correctional Services
- The National Prosecuting Authority
- Office of the President

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2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

"(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings* ***and make recommendations to the National Director of Public Prosecutions in this regard***.

(b) *To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—*

(i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*

(ii) *the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision.*". (Emphasis added)

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

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Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament **and is binding on the prosecuting authority.**

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:[1]

(a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).

(b) The President, among others, stated that 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.[2]

(c) The President further stated that 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 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 the prosecuting mandate, and are accommodated in our legislation.[3]

(d) It is important to note that the President made it clear that—

[1] Attached hereto as Annexure "A".
[2] See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.
[3] See paragraph A.1(c) and (d) of Appendix A.

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(i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;

(ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;

(iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;

(iv) such agreements should be in accordance with the NPA's prosecution mandate; and

(v) such agreements should be in accordance with existing legislation.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

(a) 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.*).[4]

(b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(c) 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.

(d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

[4] See paragraph A.2 (h) to (k) of Appendix A.

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3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

(a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;

(b) 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:

(i) The National Intelligence Agency.

(ii) The Detective Division of the South African Police Service.

(iii) The Department of Justice & Constitutional Development.

(iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

(a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;

(b) such decision must be exercised in accordance with the Constitution and existing legislation;

(c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.

4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—

(a) the terms of reference of the Task Team were explained and agreed to;

(b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked **"B"** from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as **Annexures "C" and "D"**, respectively)

4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.

4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";
- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken.".
- "In my view a comprehensive report...should be discussed by the Directors-General".

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- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made.". (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy[5], the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

[5] See paragraph B.6 of Appendix A.

5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.

5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.

5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the **"normal legal processes"** and **"prosecuting mandate"** of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.

15.02.2007

Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development