

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

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

Our Ref: URN0002026OOP000042

Adv. I Semanya  
Evidence Leader  
Commission of Inquiry into Stopped TRC Investigations and/or Prosecutions

By e-mail: [investigations@trc-inquiry.org.za](mailto:investigations@trc-inquiry.org.za) / [research2@trc-inquiry.org.za](mailto:research2@trc-inquiry.org.za)

Dear Adv. Semanya

**RE: REQUEST FOR CABINET MINUTES, MEMORANDA AND STATEMENTS  
FROM THE GINWALA COMMISSION OF INQUIRY**

1. Your letter dated 11 February 2026, regarding the above, refers.
2. In the letter, you requested the following:
  - 1.1. *All Cabinet minutes and Cabinet memoranda relevant to matters falling within the mandate of the TRC; and more specifically, the minutes of the Cabinet meeting of 22 June 2005 at which the amendments to the Prosecutions Policy were approved and the Cabinet Memorandum referred to in the amended Prosecutions Policy, which records the Cabinet's decision in respect of the amendments to the Prosecutions Policy; and [www.trc-inquiry.org.za](http://www.trc-inquiry.org.za) TRC-Inquiry TRC-Inquiry TRC-Inquiry*
  - 1.2. *All statements, submissions, and related documentation generated or received by the Ginwala Commission of Inquiry and subsequently handed over to yourselves."*
2. I have considered your request to declassify and make available, the documents mentioned in your letter to assist the commission in its ongoing work.
3. I have declassified the Minutes of the Cabinet meeting of 22 June 2025 and have attached a copy to this letter. Please note that the Cabinet Minutes have been declassified for the sole purpose of assisting the Commission in its investigation.

4. The Presidency was only provided with a copy of the final report of Ginwala Commission of Inquiry. All statements, submissions, and related documentation generated or received by the Ginwala Commission of Inquiry were kept by the Department of Justice and Constitutional Development. Please contact the Department of Justice and Constitutional Development for this record.
5. In relation to the Cabinet Memorandum and Prosecution Policy, we wish to advise that the author and owner of the Cabinet Memorandum is the Department of Justice & Constitutional Development and as such, it is the responsibility of the relevant Department as the author and custodian of the memorandum to declassify and make it available to your office. This is in line with paragraph 1.2 of the Minimum Information Security Standards which provides as follows:  
  

*“1.2 The responsibility for the gradings and regradings of document classifications rests with the institution where the documents have their origin. This function rests with the author or head of the institution or his delegate(s).*

*1.3 The classifications assigned to documents shall be strictly observed and may not be changed without the consent of the head of the institution or his delegate”*
6. Following the above, we suggest that you approach the Department of Justice & Constitutional Development regarding the grading and/or regrading of the cabinet memorandum.
7. I trust you find the above in order.

Yours sincerely



**Phindile Baleni (Ms)**  
**Director-General and Secretary of the Cabinet**  
Date: 26/02/2026

**9 MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

**9.1 REVIEW OF THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM (CJS)**

(Cabinet memorandum 3 of 2005, dated 17 May 2005, file number B/G/Nie/1, Department of Justice and Constitutional Development. Refer to paragraph 3.1.2(c)(ii) of the minutes of the Cabinet dated 19 to 21 January 2005 as well as paragraph 3.1.2(a)(iv) of the minutes of the Cabinet dated 11 to 12 May 2004)

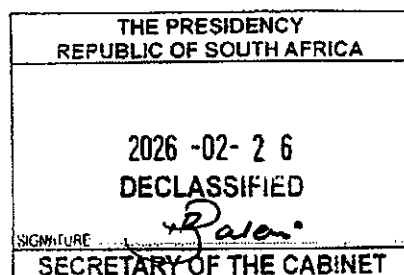
The Cabinet approved the terms of reference of the Criminal Justice System Review (CJSR) as outlined in Annexure A of the memorandum.

**9.2 PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF CRIMINAL MATTERS ARISING FROM CONFLICTS OF THE PAST, AND WHICH WERE COMMITTED BEFORE 11 MAY 1994**

(Cabinet memorandum 4 of 2005, dated March 2005, file number 1/3/P (SGN), Department of Justice and Constitutional Development. Refer to item 3.2.1 of the minutes of the Cabinet dated 16 April 2003)

The Cabinet approved -

- (a) the Prosecutorial Policy and Directives relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994; and
- (b) that the Prosecutorial Policy and Directives be submitted to Parliament for consideration in terms of Section 21(2) of the National Prosecuting Authority Act, 1998.



Copy of 99 copies



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

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INTERNAL MEMORANDUM

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TO : THE MINISTER FOR JUSTICE AND CONSTITUTIONAL  
 DEVELOPMENT

FROM : THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

SUBJECT : PROSECUTORIAL POLICY AND DIRECTIVES RELATING  
 TO PROSECUTION OF CRIMINAL MATTERS ARISING  
 FROM CONFLICTS OF THE PAST: TABLING IN  
 PARLIAMENT

DATE : 22 JULY 2005

REF NO. : 3/2P(SG Nel)

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1. PURPOSE OF MEMORANDUM

To inform the Minister regarding the consultation process that took place in respect of the above-mentioned Policy and Directives and to request the Minister to table the amended Prosecution Policy together with the above Policy and Directives in Parliament.

2. BACKGROUND INFORMATION

On 22 June 2005 Cabinet approved—

- (a) the Prosecutorial Policy and Directives relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994; and
- (b) that the Prosecutorial Policy and Directives be submitted to Parliament for consideration in terms of section 21(2) of the

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National Prosecuting Authority Act, 1998 (Act No. 32 of 1998)(NPA Act).("A")

**3. STATUTORY REQUIREMENTS**

- 3.1 Section 179(5)(a) of the Constitution provides that the National Director of Public Prosecutions (National Director) must determine, "with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy which must be observed in the prosecution process". (Emphasis added)
- 3.2 Furthermore, section 179(5)((b) of the Constitution and section 21(1)(b) of the NPA Act provide for the issuing of policy directives by the National Director.
- 3.3 In terms of section 21(2) of the NPA Act, such prosecution policy or amendments to such policy must be included in the report referred to in section 35(2)(a) of the NPA Act (the annual report), which report must be tabled in Parliament by the Minister.

**4. DISCUSSION**

- 4.1 The National Director has consulted with all the Directors of Public Prosecutions. They all support the Policy and Directives as approved by Cabinet. However, the following comments were received in respect of certain aspects of the Policy:
- (a) Adv S Mzinyathi, the Director of Public Prosecutions of the Northern Cape, points out that at page 5, in paragraph 3 of Section B, the word "undercover" should read "uncover". The NPA supports this proposal and the Policy has been amended accordingly.
- (b) Adv MJ Mpshe, SC, Director of Public Prosecutions of the Transvaal Provincial Division, holds the view that these cases should not be centralised at the Office of the National Director. He proposes that the cases should be dealt with at the various offices of the Directors of Public Prosecutions.
- 4.2 The NPA does not support the last-mentioned proposal for the following reasons:
- (a) In the first instance it is not foreseen that there are going be that

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many cases as predicted by Adv Mpshe.

- (b) Cabinet is of the view that these prosecutions should not undermine nation building and it therefore makes perfect sense that the cases be synchronised in the Office of the National Director in order to ensure that there is consistency in decision-making.
- (c) This decision is also consistent with the request of many Directors of Public Prosecutions to the National Director that the National Office should take over these cases, because of the complexities implicit therein.
- (d) As indicated in paragraph B4 of the approved Policy, the Priority Crimes Litigation Unit in the Office of the National Director shall be responsible for overseeing the investigations and instituting prosecutions. Furthermore, senior designated officials of various departments and other components of the NPA must assist this Unit in the execution of its duties (see paragraph B6 of the Policy). Since this Task Team will be based in Pretoria, it is desirable that the cases be centralised in the Office of the National Director.

4.3 To give effect to Cabinet's decision as indicated in paragraph 5.1 of the Cabinet Memorandum ("B"), it is proposed that the present Prosecution Policy ("C") be amended as follows:

To insert after paragraph 8 the following new paragraph 8A:

**"8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS**

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

The Prosecutorial Policy and Directives, in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, are hereby determined in terms of section 179(5) of the Constitution, with effect from 1 May 2005."

To insert after paragraph 9 the following new Appendix A:<sup>1</sup>

<sup>1</sup> Appendix is in the cover.

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4.4 The NPA is at present in a process of reviewing the first Prosecution Policy and the Policy Directives issued during 1998 in terms of section 179(5)(b) of the Constitution read with section 21(1)(b) of the NPA Act. This process has essentially been completed, but it may take another month or two to finalise the reviewed Policies. In view of the urgency of the above Policy relating to the TRC cases, it is suggested that Cabinet's decision regarding the tabling of that Policy be adhered to as soon as possible.

5. CONCLUSION

The consultation process as required by the Constitution has been finalised and, except for the typographical error referred to in paragraph 4.1(a) *supra*, no further changes are proposed to the Policy.

6. RECOMMENDATIONS

That the Minister be requested to table in Parliament the amended Prosecution Policy, together with Appendix A relating to the Prosecuting Policy and Directives to the prosecution of offences emanating from conflicts of the past and which were committed on or before 11 May 1994.

\_\_\_\_\_  
Adv VP PIKOLI  
NATIONAL DIRECTOR OF  
PUBLIC PROSECUTIONS

1. Paragraph 6 APPROVED / NOT APPROVED

\_\_\_\_\_  
MS BS MABANDLA, MP  
MINISTER FOR JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT

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

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STATEMENT

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I, the undersigned.

**STEPHAN HOFSTATTER**

do hereby make oath and state that:

1. I am an adult male freelance investigative journalist resident in Johannesburg, South Africa.
2. The facts contained in this statement are within my own personal knowledge unless the context indicates otherwise and are to the best of my knowledge true and correct.
3. I co-authored two articles that were published on 24 October 2020 in the Dutch daily paper, De Volkskrant. The first article was titled *Mijn vader moet bekennen* (translated: My father must confess) and the second *ANC onderzoekt eigen rol bij afhandeling moorden op honderden anti-apartheidsstrijders* (translated: ANC to Investigate its Own Role in the Death of Hundreds of Anti-Apartheid Fighters). Copies of the articles are annexed as **SH1** and **SH2**.
4. In the course of my research, I conducted two telephonic interviews with the late Jan Wagener, who was a prominent criminal defence attorney who frequently acted for several former members of the security forces of the apartheid regime. The transcripts of my telephonic interviews dated 9 June 2020 and 10 July 2020 with Wagener are annexed respectively as **SH3** and **SH4**.
5. Amongst Wagener's clients were the late former Minister of Law and Order, Adriaan Vlok, the late former Commissioner of Police, Johan 'Velde' van der Merwe, and the late former State President FW De Klerk. Vlok and Van Der Merwe were convicted in 2007 for their role in the 1989 attempted murder of anti-

JEM

SH

apartheid activist and head of the South African Council of Churches, Reverend Frank Chikane.

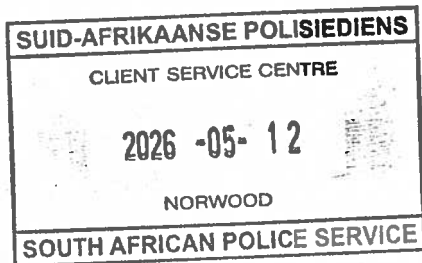
6. During the telephonic interviews, Wagener disclosed to me, among other things, that:
  - 6.1 Since the days of the D'Oliveira unit in the early 1990s there were ongoing discussions at a substantially high level between the ANC and the former apartheid regime regarding a blanket amnesty for political crimes committed under apartheid, and circumventing prosecutions on both sides of the apartheid conflict (from page 2 of the 9 June 2020 transcript). He stated that he had participated in some of those discussions (page 4 of the 9 June 2020 transcript).
  - 6.2 He had knowledge that the arrests of the former Security Branch officers involved in the attempted murder of Chikane would be halted in November 2004 (page 4 of the 9 June 2020 transcript from line 21);
  - 6.3 He played a part in the November 2004 instruction that was given to Advocate Ackermann SC of the PCLU to halt the arrests in the Chikane matter (from page 3 of the 10 July 2020 transcript);
  - 6.4 He maintained that a blanket amnesty should have been applied post-apartheid, and if that did not happen then, in terms of the principle of equality before the law, both sides of the conflict, i.e. the liberation movements and members of the apartheid regime, had to be prosecuted. He claimed that he was satisfied when Anton Ackermann SC rose in the Pretoria High Court in the Chikane matter and openly stated, he was not afraid to prosecute both sides of the conflict (page 9 of the 9 June 2020 transcript).
7. I confirm the contents of the transcripts in annexes as **SH3** and **SH4** and will make the recording available to the Commission together with this affidavit.

*Wagener* *SA*

*[Handwritten signature of Stephan Hofstatter]*

**STEPHAN HOFSTATTER**

The Deponent has acknowledged that the Deponent knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Norwood on 12-05-2026 2026, 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.



*[Handwritten signature of Tokosela Mhobkane]*

**COMMISSIONER OF OATHS**

Full Names: Tokosela Mhobkane

Business Address: 12 Paterson Street  
NORWOOD

Designation: POLICE OFFICER

LOES REIJMER

Complotdenken neemt ons het zicht op echt misbruik



Een richte-lijn... spot op complotten... niet, nodig ook, nu... toemen door de gif... tige moektaill van... dwingende algem...

men en een wereld die door corona onderscheven is... geseerd... twee miljoen mensen... kelen naar de uitge...

Op de bank moest u waarschijnlijk ook even grin-... niken. Lubach noemde de complottheorie niet bij... naam, maar lange Frans en de mensen die politici uit...

De gekte grijp om zich heen, zou je kunnen zeg-... gen, maar sinds de zomer, was er ik ook met een an-... ders hoesste; wanneer ontneemt de gekte van...

Eind juni zond het radtopprogramma Agos een... aflevering uit over geor-... ganiseerd ritueel mis-... druk en seks in No...

Laat het werk van Sanne Terlingen een voorbeeld zijn

van slachtoffers bleken over een te komen: zonder... elkaar te kennen, wezen ze dezelfde daders en... lucties aan. De redacteur zag, hoogs van dreigementen...

Maar Agos is een abn gerepsecteerd pri-... s... Niet voor niets nam de 'werde Kamer vorige week... een motie aan voor een onderzoek naar de georgani...

Oké, maar dat natuurlijke over veel meer: Het is een... duistere verhouding met de politieke elite en de... d... De gekte dat zo ongewe alle politici waren werd...

In de strijd tegen desinformatie moeten media... oplossen tal van tekorten. Laat de op... werp tegen soectrad een voorbeeld zijn. Want alleen... zo kunnen traditionele media zich onderscheiden...

van de handelaars in wantrouwen op YouTube.

ZUID-AFRIKA

DOCHTER  
Tilana Stander, thuis in Kaapstad en op een jeugdtoer uit de jaren zeventig. Zij groeide op in een familie van gezin met zes broers en zussen. De band met haar vader is altijd moeitzaam geweest.

Foto: privé-archief



In de familie heerste een strikte Afrikaanse mentaliteit. Alles was gebaseerd op racisme. Je mocht niet met zwarten praten of ze zells maar aankijken. Het was verschrompelijk.

Tilana Stander, dochter van oud-agent Joao Rodrigues

leide. Daders die zich tot nu toe veilig waanden, voelden zich ineens opeengepakt. Ter grote bezorgdheid van Standers schagroot. Wat als haar vader waak zou nemen? Hij kon zomaar iets organiseren met zijn oude collega's. Zelf denkt Stander nauwelijks aan de risico's, ze is vastbesloten. 'Wat er ook gebeurt, ik wil dat de waarheid en eerlijk aan het licht komt.'

Op een oktoberavond in 1971 werden de 29-jarige Ahmed Timol en zijn vriend Salim Essop staande gehouden in een buitenwijk van Johannesburg, niet ver van Standers ouderlijk huis. Timol, die van Indoeskoma was, ging zoals vaker op vrijdag met de gele Ford Anglia van zijn tante langs wat vrienden. Dit keer stuurde hij op een wegversperring.

ties zoals het Afrikaans Nationaal Congres (ANC) de kop in meesten drukken. Standers vader, Joao Rodrigues, was een van deze bewakers. Agent bij de Security Branch, de gevreesde geheimepolitie, bij wie hij le vrede gebreide politie bij wie hij le werk ging. 'Mijn vader had een ziele met een zwarte man was getrouwd. Niet in Zuid-Afrika neem ik aan, dat was niet toegestaan. En ze werd zwanger van hem. Ik weet mijn vader heeft hun belood.

De volgende dag werden ze overgedragen aan de Security Branch en naar het gevangeniscomplex John Vorster. Het was de Security Branch die het centrum van de stad doorslijdt. De Security Branch had de twee bovenste verdiepingen in gebruik, alleen toegankelijk met een lift vanuit de kelder. Daar begon Timols verblijf. In kamer 1026. Wie hielpen hem? Hoe groot was zijn netwerk? Dag en nacht werd hij bewaakt

er was van haar. Geboren te Kaapstad, Prorsia leidt Tilana Stander een anoniem leven. Ze wil zo min mogelijk prissgewen over haar vader. Stander woont met haar man en twee kinderen. Ze heeft hun belood. Het is een bezorging te zijn aan de telefoon, tegeanklijk. Zoals het gezicht op de jeugdfoto uit de jaren zeventig die ze heeft gestuurd. Toen ze nog Tilana Rodrigues heette. Een jong meisje met blonde lokken, bloete voren op het gras. Ze zit er bij uit, als ze ergens anders in - niet in het gras waarin ze ver achterwa. Het is een bezorging te zijn aan de telefoon, tegeanklijk. Zoals het gezicht op de jeugdfoto uit de jaren zeventig die ze heeft gestuurd.

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Mijn vader moet bekennen

Begin jaren zeventig kwam anti-apartheidsactivist Ahmed Timol onder verdachte omstandigheden om het leven in politiehechtenis - net als tientallen anderen voor en na hem. De betrokken agenten zijn nooit ter verantwoording geroepen. Tot een opstandige dochter zich tegen haar vader keerde.

Door Thomas Blom en Stephan Hofstatter. Foto: James Oatway

De volgende dag werden ze overgedragen aan de Security Branch en naar het gevangeniscomplex John Vorster. Het was de Security Branch die het centrum van de stad doorslijdt. De Security Branch had de twee bovenste verdiepingen in gebruik, alleen toegankelijk met een lift vanuit de kelder. Daar begon Timols verblijf. In kamer 1026. Wie hielpen hem? Hoe groot was zijn netwerk? Dag en nacht werd hij bewaakt





Tilana Stander betrayed her father, former apartheid agent 'He has to tell what he has done. How else can those people move on with their lives?'

From Volkskrant.nl

24 October 2020 Saturday 03:00 AM GMT

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**Length:** 6884 words

**Byline:** Thomas Blom, Stephan Hofstatter

## Body

In the early 1970s, anti-apartheid activist Ahmed Timol died under suspicious circumstances in police custody – just like dozens of others before and after him. The officers involved were never held accountable. Until a rebellious daughter turned against her father.

Far from her native Pretoria, Tilana Stander leads an anonymous life. She wants to reveal as little as possible about her existence, only that she lives somewhere in Cape Town with her husband and two children. She has promised them to be careful.

Her voice sounds open on the phone, approachable. Like the face in the childhood photo from the seventies she sent. When she was still called Tilana Roderigues. A young girl with blonde locks, bare feet on the grass. She looks happy, as if she is somewhere else – not in the family she grew up in, with six brothers and sisters and a father she detested.

'A strict Afrikaner mentality prevailed in the family,' she says. 'The children didn't ask questions, you didn't have normal conversations. You had to think in a certain way. Everything was based on racism. You weren't allowed to mix with people of a different skin color, not to associate with blacks. You weren't allowed to talk to them or even look at them. It was terrible.'

It was a world of extreme racial segregation. Formalized in the late forties with the introduction of a series of apartheid laws. Mixed marriages were forbidden, black people were not allowed to sit on the same park benches as white South Africans. In the 1950s, it was further tightened by President Hendrik Verwoerd, who stripped the colored population of universal suffrage. The white minority seized absolute power. The guardians of this world were members of the apartheid security forces: soldiers and police officers who—with or without violence—had to crush banned political organizations such as the African National Congress (ANC). Stander's father, Joao Roderigues, was one of these guardians. An agent with the Security Branch, the feared secret police.

Stander saw firsthand how he operated: 'My father had a sister who was married to a black man. Not in South Africa, I assume; that wasn't allowed. And she became pregnant by him. I know that my father made sure she ended up in prison. She gave birth to her baby there, who was

taken from her. I found it so cruel. A black woman worked for us doing the housework. Her name was Emma, and she was like a mother to me. I didn't like how they treated her at all. She was only allowed to come into the house to clean and cook.'

Yet she said nothing about it to her father and mother. 'No way. They would probably kill me.' She pauses for a moment. 'So you understand the disgust I felt when I lived there. I hated it. I couldn't wait until I was finished with school and could go my own way.'

It is not without reason that Stander now lives in anonymity. Three years ago, she made a radical decision: she betrayed her father. A decision with far-reaching consequences, through which she exposed the secrets of the apartheid regime. Perpetrators who had felt safe until now suddenly felt hunted. To the great concern of Stander's husband. What if her father took revenge? He could easily organize something with his former colleagues. Stander herself hardly thinks about the risks; she is determined. 'Whatever happens, I want the truth to finally come to light.'

#### Arrested

On an October night in 1971, 29-year-old Ahmed Timol and his friend Salim Essop were stopped in a suburb of Johannesburg, not far from Stander's childhood home. Timol, who was of Indian descent and worked as a teacher at a segregated secondary school, was visiting friends on Fridays in his aunt's yellow Ford Anglia, as he often did. This time, he encountered a roadblock. A few years earlier, Timol had traveled to London to join the SCAP, the banned South African Communist Party. After intensive training, nine months of which were spent in Moscow, he had become a convinced revolutionary. He had returned to South Africa with a dangerous mission: to distribute anti-apartheid literature. Now, two white police officers stood in front of his car. Papers were checked, and Essop, who was behind the wheel, was asked to open the trunk. After some fumbling, one of the officers held up a banned 'political pamphlet.' The two activists were arrested.

The next day, they were handed over to the Security Branch and taken to the dreaded John Vorster Square police station, a gray behemoth on the highway that cuts through the city center. The Security Branch occupied the two top floors, accessible only by elevator from the basement. That is where Timol's interrogation began, in room 1026. Who helped him? How extensive was his network? Day and night, he was pressured to provide information about accomplices before they could flee.

On the fifth day, Joao Anastacio Roderigues knocked on the door of room 1026. Because the two interrogators wanted to confer in the hallway, they asked him to keep an eye on the arrestee. The burly officer of Portuguese descent sat down opposite him. According to Roderigues, the following happened: Timol asked if he could go to the toilet, whereupon both men stood up simultaneously. Then Timol suddenly rushed to the window. Before Roderigues could stop him, he had opened it and dove out from the tenth floor. The fall proved fatal. Injuries "I have nothing but wonderful memories of Uncle Timol," says Imtiaz Cajee (52) with a weary smile when we meet him in a simple restaurant on the edge of a shopping centre in Pretoria. "I was allowed to ride along with him in the yellow Anglia. I was just a child, but he really talked to me. He took me seriously."

Cajee was 5 when his uncle was arrested. He can still vividly remember that week. His family sat whispering around the table, huddled close together. "And then the knocking on the door. Burly Afrikaner men walking through the apartment."

A few days later they returned with the news of Timol's death. "They simply told my grandmother: he jumped, your husband needs to come and identify him." Cajee shakes his head. "My grandparents were completely devastated."

Timol was the 22nd activist in eight years to die in police custody. The news sent shockwaves

through the country. Rumors about the cause of his death soon began to emerge. The family did not believe it was suicide. They had seen him on Friday evening, just before his arrest. He looked well. 'The following Friday, his body was brought back. There was no doubt whatsoever that he had been murdered,' says Cajee. 'You only have to look at the photos – clearly old injuries from before his fall. A skull fracture, a broken ankle, bruises. That makes it so difficult; he was a gentle, kind person, and when you look at the state of his body..'

After a few months, a judicial investigation into the cause of death began. Salim Essop, who had been arrested along with Timol, was not required to make a statement. After his interrogation, he was taken to a hospital half-dead and kept in strict isolation. The court was not told what had happened to him.

During those months, it became increasingly busy in the house of crown witness Joao Roderigues, which was shielded by dense vegetation and concrete posts. It did not go unnoticed by his daughter. Tilana Stander was only 10, but she remembers that 'many police officers helped him'. She thinks they tried to hide their own role in Timol's death. 'There was a government man, someone who was specially assigned to him. They were talking about the case. The officers said jokingly that if an Indian got in their way, they would kick his ankles. That kind of terrible stuff.

'You know, they saw them as terrorists. Anyone without white skin was a criminal who planted bombs or committed murders. It was like the Broederbond,' she says, referring to the secret society that protected Afrikaner interests in South Africa. 'That gave my father an incredible amount of confidence. He was so sure of himself – bordering on narcissistic, I would say.'

In 1972, Roderigues gave his testimony in a stately courtroom in Johannesburg. Confidently, he declared: "When I looked up, I saw the Indian moving around the table towards the window. I tried to get past the table, but I could not reach him."

After the hearing, the investigating judge determined that Timol had not been mistreated, let alone tortured. He concluded that Timol's death was suicide. "No living person is responsible for his death."

The verdict encouraged the apartheid security forces to continue their actions. According to the famous human rights lawyer George Bizos, who represented the Timol family, officers mocked among themselves that it had only been proven "that Indians cannot fly." Timol would not be the last activist to die in police custody. Between 1963 and 1990, 73 detainees met the same fate. Among them were Steven Biko and Dr. Neil Aggett, well-known names in the fight against apartheid. Almost without exception, their deaths were officially labeled 'suicide by hanging' or 'jumped out of a window'. Not a single police officer was ever held responsible.

#### Uprising

From the age of 12, Cajee began to take a greater interest in the case. During school holidays, he asked his grandmother about it. 'She brushed off my questions and said: why do you want to know that?' But Cajee kept insisting. Uprisings had broken out in South Africa; there was civil unrest. He wanted to understand where it came from. 'Eventually, she told me, bit by bit, what had taken place.'

Cajee's grandfather, Hajee Timol, was never able to come to terms with his son's death. He died too soon to witness the unthinkable: the release of Nelson Mandela, South Africa's most famous political prisoner, in February 1990. 'Finally free,' he addressed the crowd four years later as the new president. The apartheid system officially belonged to the past.

But how do you heal a country in which so many atrocities have been committed? To the enthusiasm of foreign countries, the emphasis shifted to reconciliation. With the support of Western donors, the Truth and Reconciliation Commission (TRC) was established to uncover secrets from the past. The Netherlands also contributed generously. Three agents were

stationed in South Africa for years to search police archives. The equivalent of 1.5 million euros went to the President's Fund, which compensated victims of the apartheid era. They were able to testify before the TRC about the horrors under the regime. At the same time, perpetrators were granted amnesty if they provided full disclosure regarding their crimes. The hope was that if the truth was told, the gap between white and black would slowly close.

Timol's mother initially refused to testify. She saw no point in it. "I persuaded her. I said: it is important to know, for yourself and for the country," says Cajee. After months of insistence, she agreed. In October 1996, 78-year-old Hawa Timol mustered the courage and took her place before the truth commission. She was on her own. To her disappointment, Joao Roderigues and the other officers involved did not apply for amnesty. They did not consider it necessary; a judicial inquiry had already cleared them. Moreover, they had not been summoned to appear before the commission.

Under the watchful eye of the charismatic chairman, Bishop Desmond Tutu, Hawa Timol stated in a fragile but determined voice that her son's body had been brought home. "The officers had beaten him severely." She wanted to know what had taken place at the station. "I will never forget what happened. (...) I \*must\* know."

Cajee: 'When I sat there and listened to her statement, I became very emotional. Perhaps it was because of the place where I heard her, but I promised myself that day that I would do something about it.'

The 1972 verdict stood. The official cause of death of Ahmed Timol was and remained suicide, even in the new South Africa. Hawa Timol died a year after her testimony. She would never learn the truth about her son's death.

Two convictions.

Ultimately, more than 22,000 victims and surviving relatives had their statements recorded. In contrast, as far as is known, since 1994 only two members of the apartheid security forces have been convicted and actually served time in prison. The most notorious: Eugene de Kock, commander of a death squad. He received a life sentence for at least six murders. This earned him the nickname 'Prime Evil'. The other was Ferdi Barnard, a member of a secret unit. He was convicted of one murder, although he had probably committed more. The vast majority of police officers remained in service or transferred to the security sector without accounting for their crimes. The Truth Commission acknowledged this and recommended prosecution in more than three hundred cases. One of them concerned the death of Ahmed Timol.

It was now up to the Public Prosecution Service, the National Prosecution Office (NPA), to pursue the suspects. But nothing happened, much to Cajee's frustration. This was even after Thabo Mbeki, Timol's comrade in Moscow, had succeeded Nelson Mandela as president in 1999. "My uncle was with Mbeki in the Soviet Union for nine months," says Cajee. Not that Mbeki had to grant the family a special favor for that, but it still bothered him that the new government offered all sorts of excuses not to investigate the crimes. Cajee, a civil servant himself, tried to understand that passivity. "I think there was no political will. I think they just let things slide." In a letter to the NPA, he pointed out that none of the officers involved had applied for amnesty or requested that the case be reopened. Shortly thereafter, he was told that there was insufficient evidence to charge anyone. Cajee was deeply disappointed by the NPA's "indifferent attitude." And he was not the only one: the families of hundreds of other murdered activists also demanded justice. Many felt betrayed and began to suspect that there was another, sinister motive for this attitude.

A secret deal

Due to the lack of prosecution, many perpetrators concluded that they had gotten away with it. Eugene de Kock, however, brought about a turnaround. He had already been sentenced to life

imprisonment, but applied for amnesty with the TRC. De Kock accepted responsibility for the murders under his command, but also testified against the men who had given him the orders, including the political leaders. He accused more than one hundred high-ranking police, military, and political officials of involvement in dozens of murders, both in South Africa and abroad. De Kock's revelations led to a flood of amnesty applications from members of the apartheid security forces. By the time the hearings concluded in 2001, more than seven thousand had been received and about one thousand granted. But to De Kock's surprise, his most sensational revelations, including those against former presidents FW de Klerk and PW Botha, were not investigated. The authorities did not seem to intend to go after the highest leaders.

Piers Pigou, an experienced human rights researcher, visited De Kock several times in the high-security prison in Pretoria in the late 1990s. "He was really upset," Pigou tells us when we speak to him in a coffee shop in Johannesburg. "He didn't understand why the information he had provided about his superiors was not being followed up."

Pigou himself was not surprised. Earlier, a lawyer assisting security forces agents had confided in him that an agreement had been reached between the ANC and the apartheid government prior to the transition of power in 1994. 'We were discussing matters that were not being addressed, and he simply said that it wouldn't happen because there was a sort of unwritten agreement. His explanation was: if they go after our guys, we go after them. It was better for the ANC to let it rest.' He weighs his words carefully: 'I got the feeling that through their discussions, they had set the guidelines for what was acceptable to both parties. Out of a shared interest, they had reached a confidentiality agreement.'

Such a deal was apparently struck between the armed wing of the ANC and the generals of the apartheid regime, according to Pigou. There would be a general amnesty for fighters from both sides who had committed atrocities. There were enough cases that the ANC was concerned about. Such as the planting of landmines on border farms in South Africa, which resulted in fatalities.

There was more that could not bear the light of day. In 1994, the apartheid espionage network had compiled a number of compromising dossiers on corrupt, high-ranking ANC members. Furthermore, they were aware of which activists had defected and were operating as apartheid spies. Agents of the old security forces would not hesitate to release this information if cornered.

According to Pigou, this led to a 'containment strategy' by the police and the Public Prosecution Service. TRC cases ended up at the bottom of the pile and came to a standstill. Pigou considers Mbeki, Ahmed Timol's old comrade-in-arms, to be the central figure in this strategy. 'It was clear from the start that he was not in favor of the approach of the past – with the TRC and amnesty only for those who provided full disclosure. You could see that reflected in his antipathy towards the commission. In 1998, when Mandela was still president, it was Mbeki who led the ANC's attempts to stop the TRC. Mbeki did not respond to the request for an interview for this article. The lawyer Pigou had spoken to about the 'unwritten deal' turns out to be Jan Wagener. A former paratrooper, now 67 years old. For nearly two decades, he served as Attorney General and legal counsel to the apartheid government. When the ANC came to power, he worked in the same capacity for Mandela's cabinet until he resigned and started a private practice. Since then, he has assisted dozens of agents of the apartheid security forces. We speak to Wagener several times by phone. He confirms the high-level consultations between the ANC and the apartheid leaders regarding the prosecution of the murderers. Due to the change of government, he himself was involved in both sides of the process. 'At one point, there were talks about a general pardon,' he says.

Was there a secret pact that apartheid police officers would not be prosecuted and that, in

return, they would not reveal what they knew about ANC leaders? 'I don't think pact is the right word. Of course, there were discussions in that direction. If you prosecute one side, you have to deal with the other side as well.' 'You cannot expect the groups I represent, the former security forces, to simply stand by and watch one prosecution after another on their part and do nothing about it.' According to Wagener, his clients have 'a lot of evidence' against ANC members. 'Prosecution would be simple.'

Wagener realized that political tug-of-war behind the scenes could block criminal prosecution when three of his clients were on the verge of being arrested. He ensured that Mbeki intervened. 'I contacted people to whom I said: let's stop this. They subsequently approached Mr. Mbeki.' Is he convinced that President Mbeki intervened? 'Yes, I was told that the arrests would not go ahead.'

#### Breakthrough

Despite all the opposition, Cajee refused to let go of his uncle's case. He became convinced that the new South Africa could only function if the painful secrets from the past came to light. He started a website about Timol and gathered a group of lawyers and advisors around him. However, the 'containment strategy' continued unabated. The police did not appoint experienced detectives, documents and evidence went missing, and many key witnesses were not heard. For a time, a moratorium was even placed on all TRC cases. Later, the government intensified direct political interference. Judicial records in another case revealed how Mbeki's Minister of Justice tried to pressure the chief prosecutor to stop all TRC prosecutions. When the chief prosecutor refused, he was dismissed. The cases were frozen for years.

In an attempt to break the deadlock, Cajee and his lawyer met in February 2015 at the office of Yasmin Sooka, Executive Director of the Foundation for Human Rights. As a former member of the Truth Commission, she viewed prosecution as part of the TRC. 'If a suspect does not apply for amnesty or amnesty is denied, then the law must take its course.' She saw the fact that no perpetrator had yet ended up in prison in the three hundred recommended cases as 'a total disregard for the rights of the victims.'

They concluded that new evidence was necessary to get Timol's case reopened. Frank Dutton, a decorated former police detective who had also joined the meeting, was tasked with finding this.

After just a few months, there was a major breakthrough when he interviewed Salim Essop, Timol's friend who had driven the yellow Anglia. Essop, who now lives in the United Kingdom, described in detail the horrific torture he had endured. He had not been heard from before. 'There was no reason to assume that Mr. Timol was treated differently than Mr. Essop,' Dutton concluded. Finally, after 46 years, the Public Prosecution Service had to take action. Timol's case was reopened. The first of the 73 anti-apartheid activists who died in detention. An independent judge would investigate what had actually taken place in interrogation room 1026. Cajee's relief was enormous—for a moment. While tracing the key witnesses, he had to deal with one disappointment after another. It had taken years to get this far, and during that time almost all the officers involved had died. Only three remained, including Joao Roderigues, the crown witness who claimed to have seen Timol jump. But he was nowhere to be found. Cajee had no idea whether he too had died, or perhaps had built a new life under a false name.

#### New life

Meanwhile, Roderigues' daughter Tilana Stander had tried to leave the past behind. There was hardly any contact with her parents, brothers, and sisters. One evening, she was watching television with her husband when the latest news flashed across the bottom of the screen in a few sentences: the Timol case had been reopened, but investigators could not find any witnesses. They had probably all died. Stander: 'I said to my husband: that is nonsense. I am

going to contact the people who need information.'

Although she hadn't spoken to her father in years, she knew where he lived. After leaving the Security Branch, he had ended up at the national parks organization, for which he wrote books with titles such as *\*Die veldwagters vertel\**, about the exciting life of South African gamekeepers. All under the name Jan Roderigues (derived from his initials JA, Joao Anastacio). Stander found Cajee's website about Timol and sent him an email with her father's real name. It turned out that the authorities had misspelled his surname: Rodrigues instead of Roderigues with an 'e'. She didn't hesitate for a moment and included her father's address, alongside her own contact details.

'Just to let you know where ex-sergeant JA Roderigues (nickname JAN) is – he is alive and well. Own website – books about wildlife. Hopefully, this helps to bring closure.'

When he received Stander's email, Cajee was stunned. After years of persistence, he was receiving help from an unexpected source. 'She found it inspiring that we were still looking for answers,' says Cajee. 'We were totally surprised that she, of all people—as a daughter—was helping us find her father.'

That evening, Stander received a phone call from Cajee. 'He was emotional and absolutely thrilled. We started talking, and we went from there.' After speaking with Cajee, Stander informed her family. She approached her eldest brother, whom she feared the most. He was 'a huge racist,' who had followed in his father's footsteps and worked as a police officer. 'I sent him a WhatsApp message saying: 'I did it. It happened.'" Her family was furious. They wanted to know why she felt she had the right to expose her father. 'They have completely broken with me.'

On camera

And so, on a sunny winter day in 2017, a new judicial inquiry into Timol's death began. In addition to family and friends, the courtroom filled with journalists and lawyers. Not long after, the experienced Judge Billy Mothle also took his seat.

Salim Essop was one of the first witnesses. His statement made a deep impression. 'They tied me up and took those devices (...), with which they applied shocks to my upper legs.' For a moment, it became too much for him. After a sip of water, he continued: 'They increased the tension.' Electricity flowed from the machine (...). I felt disoriented, almost as if I were floating. The pain was unbearable.'

If this had happened to Salim Essop, why not to Timol? One man could provide clarity on this. A few days later, it was the turn of Joao Roderigues, the three officers' main witness. He was well over 70 by then and walked with a cane, but he still looked powerful. In a beige jacket and with an amused look, he braved the numerous cameras before taking his seat on the witness stand. Stander tried to follow everything from Cape Town as best she could. 'I was nervous, but relieved,' she says. Her father sat in the courtroom with a grin on his face. What did she think when she saw that? 'He was always so arrogant. I don't know if it was a facade, but that's how I know him. He is the big man, it's all about him – even with his wife.'

Imtiaz Cajee took in every word and every look in the courtroom. "It was hard to see those security guards standing in front of me," he says. "Especially Roderigues. He looked at me smiling. Smiling."

The cross-examination

With a hoarse voice, the former officer described how he had gone to room 1026. How he had brought cups of coffee, paychecks, and an envelope to the interrogators, Captain Johannes Hendrik Gloy and Captain Johannes van Niekerk. How he saw Ahmed Timol sitting at the table with them, without visible injuries. How another officer then came in to say that three of Timol's accomplices had been arrested. And how Timol had been terrified by the news. Roderigues: "His eyes were wide and he shook his head." Gloy allegedly asked him to keep an eye on the

suspect while they reviewed the new information outside the room. A few minutes later, Timol reportedly jumped out of the window.

Roderigues repeated his testimony from 1972 almost word for word. 'He showed no remorse whatsoever, absolutely nothing; he stuck to his lies,' says Cajee. 'He made it clear: you can't do anything to me. He had no shame in his eyes.'

The cross-examination focused on Timol's injuries. 'Could you see if Mr. Timol was limping when he moved towards the window?' asked the Attorney General.

'I couldn't see that. It happened so fast,' replied Roderigues.

'Could you have stopped him if you had been a bit more lenient?'

'I did my best,' replied Roderigues, and to Cajee's dismay, he smiled.

Based on the original post-mortem report, two pathologists determined that of the 35 injuries, 27 had been inflicted while Timol was in police custody. They concluded that he was barely alive or already unconscious when he fell. The prosecutor concluded that it was impossible for him, in his condition, to rush to the window, open it, and jump out. To Roderigues: 'It is yet another example of a transparent lie, of which you are a part.'

Roderigues responded angrily: 'Your Honor, what is being said now is absolutely not true. This is not true.'

Damning statements piled up. A prominent technical specialist calculated the trajectory of the fall and demonstrated that Timol had either been pushed out of the window or thrown from the roof. Moreover, other testimonies revealed that the two officers who had interrogated Timol, Gloy and Van Niekerk, had previously been accused of torturing detainees.

After the final testimony, Judge Mothle turned to Roderigues. 'In recent weeks, I have received evidence from experts, from former detainees (...), showing that your story is improbable or a complete lie.'

Roderigues braced himself for what was to come.

'What am I supposed to do?' the judge pressed. 'Should I accept your version and reject the autopsy report stating that there was eye damage?'

Roderigues: 'Well –'

'Because I cannot accept both.'

'I understand that completely,' said Roderigues. 'But you must not forget that it was 46 years ago. I may have forgotten. I don't know.'

Judge Mothle responded dismissively. 'Why are you referring now to the fact that it was 46 years ago? That you might have forgotten? You saw it or you didn't.'

'Okay. I didn't see it.'

Cajee says: 'We, the family, have constantly made it clear to Roderigues: it was war. And in a war, there are casualties and you follow instructions. If you are willing to come clean, even now, then we support your amnesty and say: do not prosecute. How else can we close this chapter? And by doing so, we set an example for other families.' Initially, Cajee was optimistic that Roderigues would confess his true role in Timol's death so many years later. 'We always had that hope, with all three witnesses. But they disappointed us so much. I mean, their version is that they had no idea about torture, that they only read about it in the newspapers.'

Initially, he was not seeking prosecution. But that has now changed. 'I was angry. So terribly angry. Yes, we want prosecution now.'

For Stander, too, it was incomprehensible that her father continued to conceal the truth. She still does not know the reason. 'Maybe because of his background. The group he works with is very closed; they protect each other. The problem is that they start believing their own story.'

Roderigues was free to go; he had given his testimony. Visibly relieved, he stepped outside. On the street, he couldn't resist raising a fist at one of the cameras. As if he wanted to let his old

comrades know that the authorities couldn't do anything to him. He was untouchable, still capable of concealing the most heinous crimes of the apartheid era.

Verdict

Seven weeks later, Judge Mothle was back in court to deliver his verdict. Television reporters in the courtroom explained the importance of the case to their audience. Imtiaz Cajee was closely watched by the camera crews. He was tense. Could the independent judiciary in South Africa overturn a verdict from the apartheid years?

Those present watched expectantly. Roderigues and the other members of the security services had not shown up. "The reopening of this judicial inquiry by the Supreme Court of South Africa is the first of its kind," Judge Mothle began solemnly. He rejected the claim that Timol had not been mistreated: "Timol was tortured." Based on the testimonies of experts, Mothle concluded: "He did not commit suicide, but was murdered."

Cajee felt a weight lifted from his shoulders. He immediately thought of his grandparents. "I hoped they would find peace now that there was finally justice for their son."

Not only had the truth about his uncle's death been established. The verdict also opened the door for the families of other victims of police violence.

To Cajee, it is incomprehensible that it has all taken so long. We present him with the statements regarding the unwritten agreement between the ANC and the apartheid leaders to cover up each other's secrets. Cajee: 'That explains the difficulties and obstacles we constantly encounter.' When asked whether it would have been possible to forge a new South Africa if prosecution had taken place, Cajee replied: 'I understand that compromises were necessary. But this specific compromise is in no way justifiable. There should have been full openness from both sides. Only then can we resolve it and move on. It is the greatest tragedy, the greatest betrayal ever.'

At the end of the verdict, Judge Mothle had one last recommendation for the Public Prosecution Service: 'With his testimony, Roderigues collaborated in covering up the murder (...) and subsequently committed perjury,' he said. 'It is recommended that he be investigated and that these crimes be prosecuted.' For Roderigues, the story was not over yet.

Cape Town

Tilana Stander needed time to process the verdict. She was not surprised that it turned out to be murder. The question remained whether her father had covered up the case, or whether he had been actively involved in it himself. 'The only thing I know for absolutely certain is that he was there.'

At the same time, the case reopened a deep wound from her past. She had seen how her father was treated in court. Despite his bravado, he looked different, more vulnerable; to her, he was no longer the powerful man who once dominated her. 'It had a huge effect on me,' she says. For the first time, she dared to face something she had suppressed for years: that she had been sexually abused by her father as a girl.

'What he did to me is, I think, characteristic of who he was. He thought highly of himself. And then he would come home, after whatever he had done and wherever he had been, and abuse me. Maybe it was an ego thing. I have no idea. All this time I was thinking: how can I show this man that what he did to me wasn't okay.' It is painful for her to talk about it. Yet she wants to discuss the subject. 'I was a small, scared child that he abused. The trial helped me talk about it. It is part of my recovery process.'

She cannot talk about it with her mother. 'She supports my father unconditionally. She is undoubtedly afraid of him, of what she might lose. Because if you move in his circles, he manipulates you. He is a very powerful manipulator.'

Stander wants the criminal case to proceed. She is convinced that it is the only way to get him

to confess. 'If he goes to prison, he will probably talk.' If she got the chance, she says, she would tell him that she is in the process of forgiving him. 'He just has to say what he has done. He could die just like that, he could have a heart attack. And then no one would know the full truth. Why doesn't he tell these people, so they can live on in peace?'

A broken man,

Roderigues turned himself in as a suspect at the South Gauteng High Court in September 2018. This time there was hardly any public; the attention had waned now that it had been established that Timol had been murdered. Other suspects waiting their turn—fraudsters, robbers—ignored him. The only one keeping an eye on him from the back of the courtroom was Imtiaz Cajee. He noticed that Roderigues had changed: 'He was still tall and strong for his age. But now he was a broken man.' Cajee couldn't resist photographing him. In the same beige jacket, but now stripped of his strength. In the cold, nearly empty courtroom, the first murder trial began following the reopening of a judicial investigation into the death of an anti-apartheid activist. We try to get in touch with Roderigues. He still lives in Wonderboom South, a largely white suburb of Pretoria, in the house where Tilana grew up. At the entrance stands an imposing metal gate with an electric fence and the warning: 'You will suffer permanent injury if you dare to enter.' The doorbell has been removed, but a neighbor kindly offers to call him. Shortly afterwards, his wife Susan, Tilana's mother, shuffles down the driveway to let us know that her husband is unavailable. She keeps her distance, looking timid. 'He can't say anything. The case is pending, I can tell you that. He has been released on bail.' She complains that he is constantly being dragged to court. 'He had that first case. Now the Indians have come again to sue him. Our lawyer wants us not to talk about it.' She follows his advice closely. Before we can question her about her daughter, she turns around and goes back inside, where her husband is hiding from unwanted visitors.

Cajee does not think it will ever come to a conviction. The legal proceedings will be dragged out for as long as possible. Roderigues asked the court for a suspension of prosecution. When that failed, he appealed. 'He will probably die before a conviction comes,' says Cajee. 'Too old, yes.' He shrugs his shoulders, trying to keep his composure. Cajee has to accept it. He comforts himself with the thought that it is at least established that his beloved uncle Ahmed Timol was murdered.

Secret arrangement?

Two weeks ago, in the run-up to the appeal hearing in early November, the statement Roderigues had submitted to the Court of Appeal surfaced. It caused an unexpected turn of events. The lawyers argue that Roderigues assumes he has already been granted amnesty. According to them, it is clear that 'a decision has been made and/or an agreement and/or an arrangement between the government at the highest level and other interested parties (...) that no prosecution will be instituted for certain political crimes'. Otherwise, why did they never pursue Roderigues? Since the TRC, more than twenty years ago, no one has been prosecuted, the lawyers argue. The defense is using the unwritten agreement and discussions regarding general amnesty to avoid an appeal.

Yasmin Sooka, a former member of the Truth Commission, calls this argument 'complete nonsense'. A secret general amnesty would be unconstitutional. Together with other members of the Truth Commission, Sooka is advocating for an investigation into the political interference that led to the cases being dropped. The Public Prosecution Service has already admitted that politicians attempted intimidation to prevent the TRC cases from being prosecuted. However, the South African government led by Cyril Ramaphosa remains silent.

When we speak to Sooka, she confirms that behind-the-scenes talks have finally taken place in recent weeks with the leadership of the ANC, including the Minister of Justice. According to

Sooka, the ANC denies knowing anything about an agreement or political interference. 'But they say they support an investigation.' She remains suspicious after all these years and hopes that the Netherlands and other Western countries that supported the Truth Commission will put pressure on the South African government. That is 'crucial' to truly be able to begin an independent investigation. Sooka: 'You cannot build a new country on impunity. These perpetrators must be prosecuted. Otherwise, you make a mockery of all the work that preceded it.'

De Volkskrant approached the ANC asking whether the party leadership wanted to publicly confirm an investigation. This week, General Director Fébé Potgieter announced that the ANC, together with the affected families and a number of involved civil society groups, has formed a committee to investigate the matters. 'To do justice to the families of the victims of crimes from the apartheid era that remain unresolved.' For the first time, the ANC acknowledges the lack of justice and confirms its intention to address this. It is unclear how long it will take before more cases are reopened. For the time being, the official verdict from the apartheid years remains behind the names of dozens of freedom fighters who died in police custody. Cause of death: suicide.

Tilana Stander verraadde haar vader, oud-apartheidsagent: 'Hij moet vertellen wat hij heeft gedaan. Hoe kunnen die mensen anders verder met hun leven?'

## ANC onderzoekt eigen rol bij afhandeling moorden op honderden anti-apartheidsstrijders

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## Body

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26 jaar na de val van het apartheidsregime in Zuid-Afrika gaat regeringspartij ANC alsnog haar eigen rol onderzoeken bij het uitblijven van veroordelingen voor de honderden moorden op anti-apartheidsstrijders. Dat verklaart het ANC tegenover de Volkskrant.

Het is de eerste keer dat de partij officieel het uitblijven van gerechtigheid erkent en bereid is tot een onderzoek naar politieke inmenging in het voorkomen van rechtsvervolging.

Dat er decennialang vrijwel niemand werd vervolgd voor de moorden op anti-apartheidsstrijders komt volgens mensenrechtenonderzoekers door een geheime deal die de partij van wijlen Nelson Mandela in het verleden heeft gesloten met leden van het oude apartheidsregime. In ruil voor terughoudendheid zou dat geen belastende verklaringen naar buiten brengen over de misdaden die waren gepleegd door onder meer de gewapende vleugel van het ANC.

Dat er in de hoogste kringen gesproken werd over zo'n deal wordt tegenover de Volkskrant bevestigd door Jan Wagener, bijna twee decennia lang advocaat-generaal en juridisch adviseur van de apartheidsregering. 'Natuurlijk waren er discussies in die richting', zegt hij. 'Als je de ene kant vervolgt, moet je ook de andere kant aanpakken. Je kunt van de groeperingen die ik vertegenwoordig, de voormalige veiligheidstroepen, niet verwachten dat ze alleen maar toekijken bij de ene na de andere vervolging aan hun kant en er niets aan doen.'

Het nu aangekondigde onderzoek van het ANC kan ook hooggeplaatste leden van de partij raken. Aanleiding voor de verklaring is een artikel in de zaterdagkrant over de zaak-Ahmed Timol. Deze anti-apartheidsactivist werd in 1971 in politiehechtenis vermoord, maar zijn dood ging, zoals indertijd vaker gebeurde, de boeken in als zelfmoord. De betrokken politieagent, Joao Roderigues, werd jarenlang gezocht, tot zijn dochter Tilana Stander in 2017 zijn verblijfplaats verried. 'Mijn vader is zo'n racist', zegt Stander. 'Wat er ook gebeurt, ik wil dat de waarheid eindelijk naar buiten komt.' Roderigues is het eerste lid van het apartheidsregime dat na de heropening van een gerechtelijk onderzoek voor de rechter is gebracht wegens moord.

**Verdachte agenten**

Na de val van het apartheidsregime hebben slechts twee leden van de apartheidstroepen voor moord in de gevangenis gezeten. Honderden verdachte agenten hebben, zonder amnestie aan te vragen of volledige openheid te geven over hun misdaden, hun straf ontlopen.

Het ANC kondigt nu in de Volkskrant aan dat het samen met betrokken families en maatschappelijke groeperingen een comité heeft gevormd om het uitblijven van rechtsvervolging te onderzoeken en een actieplan te ontwikkelen.

Volgens algemeen directeur van het ANC Fébé Potgieter 'om recht te doen aan de families van de slachtoffers van misdaden uit het apartheidstijdperk die nog steeds niet zijn opgelost'.

Ook voormalige leden van de waarheids- en verzoeningscommissie (TRC) roepen op tot een onderzoek. Na 22 duizend slachtofferverklaringen kwam de commissie in 2003 met het advies om in 300 gevallen waarin een dader geen amnestie heeft aangevraagd of volledige openheid gegeven tot vervolging over te gaan. Dat in die zaken nog bijna geen enkele dader is veroordeeld, omschrijft Yasmin Sooka, toenmalig lid van de waarheidscommissie, als 'een totale minachting van de rechten van de slachtoffers'. Ze doet een beroep op Nederland en andere westerse landen die de waarheidscommissie steunden, om druk zetten op de Zuid-Afrikaanse regering om onafhankelijk onderzoek snel uit te voeren. Sooka: 'Deze daders moeten vervolgd worden. Anders maak je een aanfluiting van al het werk dat eraan voorafging.'

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ANC investigates its own role in the handling of the murders of hundreds of anti-apartheid fighters

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Body

26 years after the fall of the apartheid regime in South Africa, the ruling ANC party will finally investigate its own role in the lack of convictions for the hundreds of murders of anti-apartheid activists. The ANC stated this to de Volkskrant.

It is the first time the party has officially acknowledged the lack of justice and is prepared to conduct an investigation into political interference in preventing prosecution.

According to human rights researchers, the fact that virtually no one was prosecuted for decades for the murders of anti-apartheid fighters is due to a secret deal that the party of the late Nelson Mandela struck in the past with members of the old apartheid regime. In exchange for restraint, the regime would not release incriminating statements regarding the crimes committed by, among others, the armed wing of the ANC.

That such a deal was discussed in the highest circles is confirmed to de Volkskrant by Jan Wagener, Attorney General and legal advisor to the apartheid government for nearly two decades. "Of course there were discussions in that direction," he says. "If you prosecute one side, you have to tackle the other side as well. You cannot expect the groups I represent, the former security forces, to simply stand by and watch one prosecution after another on their side and do nothing about it."

The investigation now announced by the ANC could also affect high-ranking members of the party. The statement was prompted by an article in the Saturday newspaper regarding the Ahmed Timol case. This anti-apartheid activist was murdered in police custody in 1971, but his death was recorded as suicide, as was common at the time. The police officer involved, Joao Roderigues, was sought for years until his daughter, Tilana Stander, revealed his whereabouts in 2017. "My father is such a racist," says Stander. "Whatever happens, I want the truth to finally come out." Roderigues is the first member of the apartheid regime to be brought before a court for murder following the reopening of a judicial investigation.

Suspect officers

After the fall of the apartheid regime, only two members of the apartheid forces served time in

prison for murder. Hundreds of suspected officers evaded punishment without applying for amnesty or providing full disclosure regarding their crimes.

The ANC has now announced in de Volkskrant that it has formed a committee together with involved families and civil society groups to investigate the lack of prosecution and to develop an action plan. According to ANC General Director Fébé Potgieter, this is 'to do justice to the families of the victims of crimes from the apartheid era that remain unresolved'.

Former members of the Truth and Reconciliation Commission (TRC) are also calling for an investigation. After 22,000 victim statements, the commission recommended in 2003 that prosecution proceed in 300 cases where a perpetrator had not applied for amnesty or provided full disclosure. Yasmin Sooka, a former member of the Truth and Reconciliation Commission, describes the fact that almost no perpetrators have been convicted in those cases as 'a total disregard for the rights of the victims'. She appeals to the Netherlands and other Western countries that supported the Truth and Reconciliation Commission to pressure the South African government to conduct an independent investigation quickly. Sooka: 'These perpetrators must be prosecuted. Otherwise, you make a mockery of all the work that preceded it.'

[ANC onderzoekt eigen rol bij afhandeling moorden op honderden anti-apartheidsstrijders](#)

**HOFSTATTER // WAGENER TELEPHONE INTERVIEW 9 JUNE 2020**

**MR WAGENER:** Jan Wagener.

**MR HOFSTATTER:** Hello Mr Wagener. It's Stephan Hofstatter here. Hello?

**MR WAGENER:** Yes I'm listening?

5 **MR HOFSTATTER:** Yes, hi. I'm a journalist and I'm just doing some research for an article for De Volkskrant in Amsterdam. We, with a colleague over there, we're looking at some of the old TRC cases and I've had various discussions and your name has come up several times. So I just wondered if we could have a chat. I don't know if now's a good time or we could schedule something.

10 **MR WAGENER:** No, you can. Should I make notes or something or can I just listen and talk?

**MR HOFSTATTER:** Yeah, you can listen and talk. I mean.

**MR WAGENER:** Okay, no, then it's fine. You can talk to me now.

**MR HOFSTATTER:** Okay, yeah, so.

15 **MR WAGENER:** What did you say your name is, Stephan?

**MR HOFSTATTER:** Stephan, yeah, Hofstatter.

**MR WAGENER:** Okay, okay, I've got it. Yes?

**MR HOFSTATTER:** Yeah, so there's a couple of cases in particular. I mean, look, it's a vast area, so I'm not going to traverse the whole thing, but I mean, if we can, perhaps  
20 we can look at others some other time. But there're one or two in particular where your

name came up. And the one the one, the first one was in an affidavit by Anton Ackermann relating to the prosecution of various parties including Minister Vlok in relation to the Chikane poisoning.

**MR WAGENER:** Yes.

5 **MR HOFSTATTER:** And.

**MR WAGENER:** I was the attorney for yeah, I think you know that, for Mr Vlok and Van der Merwe and the other two guys, yeah.

**MR HOFSTATTER:** That's right, yeah.

**MR WAGENER:** Three guys, the other three guys.

10 **MR HOFSTATTER:** Three guys. Yes. Yeah, so I was just looking at that again, at that affidavit, and the comment that was made by Advocate Ackerman was that, he received a call from you saying, the arrest of the three other guys should not go ahead because, he would receive a call from the minister's office or you had been in touch with the minister's office for the call not to go ahead. And I just thought you know, so he, you know,  
15 this became an issue around political interference in the TRC cases. I mean, I'm sure you followed some of the news around that. And I just wanted if you could, you know, let me know what exactly happened? You know, did you have a meeting with Minister Mabandla over that case? Was that you landed up phoning Advocate Ackerman with that comment?

20 **MR WAGENER:** No, I don't even remember who was the minister at the time. No, I had no meetings with the Minister of Justice.

**MR HOFSTATTER:** Okay. So how did it come about that you landed up saying to the prosecutor in charge that the minister Ministry of Justice is going to call you to say that there won't be, the arrest shouldn't go ahead and that's indeed what happened?

**MR WAGENER:** I'm aware that there were discussions, I mean, right from the days of Jan D'Oliviera and his investigation team.

**MR HOFSTATTER:** Okay.

5 **MR WAGENER:** Right from the days when people were arrested in the Vula matter in 1990. I mean, I was aware that there was discussions from those days how to proceed and whether to proceed with criminal prosecutions or not.

**MR HOFSTATTER:** Right.

**MR WAGNER:** That question has always been debated at certain levels.

**MR HOFSTATTER:** Okay.

10 **MR WAGNER:** Amongst others, even there were talks of, general amnesty was discussed at some stages like we had in Namibia, things like that. And you know, where would after we have a so-called democratic new government, what should happen to political prosecutions. And the debate has always been that, well, not everyone agreed, obviously, but the debate has always been, how should you go about in prosecuting  
15 because you can't prosecute only the one side of the conflict, for instance.

**MR HOFSTATTER:** Okay.

**MR WAGNER:** You can't decide I'm going to prosecute individuals one, two, three, and four, but five, six, seven, and eight, I'm not going to prosecute. Who's going to decide that?

20 **MR HOFSTATTER:** Right.

**MR WAGNER:** So I was aware that there was discussions of that nature all along.

**MR HOFSTATTER:** Okay. But I mean, were you part of those discussions yourself?

**MR WAGENER:** Yes.

**MR HOFSTATTER:** Okay. And at what level were those discussions?

**MR WAGENER:** It was at a substantial level.

5 **MR HOFSTATTER:** Okay. I mean, could you elaborate a bit? I mean, there must be some interesting memories you have of...

**MR WAGENER:** No, I'm not because there's a lot of people who seem to try and make a witch hunt out of this. I'm aware of people, certain NGOs and people who is bent to try and make something very mala fide out of all this, which I think it wasn't. So I'm not  
10 prepared to discuss it with the media, not at all.

**MR HOFSTATTER:** But I mean, are you prepared to say at least whether it was at presidential level, cabinet level?

**MR WAGENER:** It was at a substantial high level, yes.

**MR HOFSTATTER:** Okay, but it still puzzles me though that you would be phoning  
15 Anton Ackermann, to say you will receive a call.

**MR WAGENER:** I had knowledge that the arrest won't proceed. And I, you know, I had quite an open relationship with Anton Ackermann all along, even though he was on the other side of the fence. I mean, I still see him here where I'm now. He is also a resident of Hermanus here in the Western Cape where I am.

20 **MR HOFSTATTER:** I heard so, yes. So you're neighbours now.

**MR WAGENER:** I've always had open discussions with him and yes, I had that discussion with him to say to him, well, you need not bother. I've been informed that the

arrests won't proceed. That was at, I think it was also at that stage, let me just get the time frames back on this. I think that was at that stage when they were looking at that prosecutorial directives, you know, that whole thing that came out and then it was later taken to court by George Bizos and his mates to say that this is now unconstitutional and it was set aside. I think it was in the waiting of that prosecutorial, I think that's the word, right, directives that came out. I think that is the timelines that we're speaking now if I'm, you know, you take me back many years now suddenly. I think it was at that stage.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** That it wasn't in at the end when Vlok and the others were in fact prosecuted. It was I think it was some two or three years earlier if my memory serves me right. I think you should have those particulars.

**MR HOFSTATTER:** Yes, I can look up the timeline, but I think it sounds about right.

**MR WAGENER:** I was aware that they were working on that directive and that that directive could possibly serve a purpose of tying up old unfinished business of a political nature. But that never happened because as I say, we all know that was taken to court, that directive, and it was declared unconstitutional.

**MR HOFSTATTER:** Right.

**MR WAGENER:** But that was obviously, and there was nothing sinister about it. I think many people try to make something sinister out of it, I think it was not. It was a genuine effort to try and sort out how do we proceed in our country coming from basically a kind of a war situation. How are we going to proceed with the future of our country. And there were different ideas and there were different initiatives. And as I say, in the end, it came up to, I've been quoted, I think you must have read that I've been quoted, I mean, regarding the whole issue of prosecuting political offenses, there's basically three alternatives. The one alternative would be prosecute everyone. That's just in criminal law at risk. That's everyone on both sides of the conflict because it wasn't a conflict, a one-

sided conflict, it was it was a double-sided conflict. So prosecute everyone.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Prosecute everyone that is at risk. That is your one alternative. The other alternative is prosecute nobody, basically like a general amnesty.

5 **MR HOFSTATTER:** Right.

**MR WAGENER:** Prosecute nobody and then in the middle somewhere, you can get something to say, prosecute selectively, some people and some people not. I'm on record for saying that to prosecute everyone would take our country back again to right where we were in the 80s because there's murders on all sides of the conflict.

10 **MR HOFSTATTER:** Okay.

**MR WAGENER:** Many murders on the side of the present government, high-level people and if everyone is prosecuted, it will take us back right there.

**MR HOFSTATTER:** Right.

15 **MR WAGENER:** But you know, all the NGOs and people who's now championing this whole issue of prosecuting, they only look at the one side of the conflict. So they obviously don't agree with me there. But I say, if then you must prosecute everyone. The alternative is, prosecute no one. Obviously that's harsh. That's a very harsh option for true victims. But that is an option or try and prosecute selectively, which I've always think that to me, that seems to be unconstitutional because somebody sits there and says,  
20 we're going to prosecute these guys and not those guys. What's the difference? In law, they're all the same.

**MR HOFSTATTER:** Right.

**MR WAGENER:** The issue of equality then in terms of the Constitution then comes into play.

**MR HOFSTATTER:** Right.

5 **MR WAGENER:** But that is why I've been saying, prosecute no one. I was for a general amnesty like we had in Namibia.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Where we said, you know, put those, the criminalisation of those acts behind us and let's proceed. You can have other sorts of restitution or compensation systems, you can put that in place, but take the criminal aspect of that out of it.

10 **MR HOFSTATTER:** Right.

**MR WAGENER:** And there's many arguments on that score and it's been ongoing for many years. And what you called me about now was right in the middle of all of that.

15 **MR HOFSTATTER:** Right. But I mean, surely that's what the amnesty process was supposed to do. You know, you give full disclosure and we prosecute and everyone gets amnesty who gives full disclosure. But the issue was that people weren't giving full disclosure.

20 **MR WAGENER:** Well, people didn't even apply. From let's take an example, from the ANC leadership, nobody applied. A few people applied but they were chucked out because they weren't prepared to mention individual acts. So all those criminals, they're still walking around.

**MR HOFSTATTER:** Right. Okay. So that's the amnesty process, you say you couldn't fulfil that function if you would be calling for a blanket amnesty because many people didn't apply.

**MR WAGENER:** In theory, you could do it. In theory, one could argue, yes, everyone with dirty hands come to the table, say what he's done in detail and he makes a full disclosure and it is an act associated with a political motive, you know, all those criteria of the act, and then boom, they get amnesty. But in the end, very few people did that. From all sides of the conflict, and specifically from the side of the of the liberation forces.

**MR HOFSTATTER:** Right. Okay. So, that in itself, in your view means that it's impossible to have a have a, a process like that because of the liberation movement's reluctance to apply for amnesty for specific acts.

10 **MR WAGENER:** Well, you can decide for yourself. You can check the records and decide for yourself whether that's true or not

**MR HOFSTATTER:** Okay, the other case, I suppose, the instance, that came up and the context I'm asking this is again the same question that's being raised about, you know, political interference or backroom deals or whatever discussions, negotiations, whatever you want to call it, is a meeting that you had with, I don't know when it happened, it was 15 with Marjorie Jobson, one of the NGOs, I suppose you were talking about, and Adriaan Vlok and another individual at Cafe 41 a few years ago. Do you do you remember that meeting?

**MR WAGENER:** I've got a vague memory. I can't remember what was the nature 20 of the discussion. I can't even remember how it came about, but now that you remind me, I've got a vague memory of that, yes.

**MR HOFSTATTER:** Yeah, so she.

**MR WAGENER:** I think she asked for the meeting or.

**MR HOFSTATTER:** Yes, that's right.

**MR WAGENER:** I think she, yeah, she asked for the meeting.

**MR HOFSTATTER:** Yeah, she asked for the meeting.

**MR WAGENER:** But I'm quite vague on that one.

**MR HOFSTATTER:** Okay. So she asked for the meeting according to, I mean, you know, this is what she told me and I just wanted to put to you. So she told me it was a the gentleman called [inaudible], I forget his surname now, and he was looking for, you know, he was looking into some incident that involved his parents or his uncle, a relative of his. And because of what he was looking for, she had asked for a meeting with you and with the former Minister Vlok and that you know, you had met at Cafe 41. And the reason I'm raising this is that what she said was that you had said at that meeting that you know, that there was in effect a sort of unwritten agreement or a gentleman's agreement or a pact or whatever you want to call it, that people, you know, in the former security forces, the former apartheid security forces will not be prosecuted during the new dispensation and you know, they in return would not expose all the things that they know about the people in the ANC and in the current government. And I just wanted to check with you.

**MR WAGENER:** I mean, I think putting it as a pact, I think that I don't think that's the right word, but I of course, there were discussions along these lines. I mean, if you prosecute the one side, that side's going to push that the other side also be prosecuted. It's like, you know, equality before the law kind of principle. I mean, that's always been my viewpoint. And I'm not ashamed to say that. If you prosecute the one side, then you should also prosecute the other side. That is why I was very chuffed when Anton Ackermann in the Chikane matter in the High Court in Pretoria, publicly openly stated, yeah, no, he's not afraid, he's going to prosecute all sides of the conflict. Now, obviously, you know and I know nothing came of that. I think, if I remember right, that meeting, it's very vague because I've had many meetings in my life with many, many people.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** I think, wasn't it about people that went missing and she asked whether we could assist maybe with, you know, trying to pick up leads regarding missing people. Wasn't that the nature of that discussion?

**MR HOFSTATTER:** I think it could have been this, could it have been this [inaudible]  
5 uncle.

**MR WAGENER:** And then I said to her, because my memory serves me right, I said to her, but let's suppose those missing people were murdered by the security forces. I think it was at that discussion. I'm not sure. I think then I said to her that, suppose that was the case, you can't expect those people to come forward and say, we killed someone  
10 and we buried him there and there and there, if you merely want the remains because there's no legal privilege attached. I think that is what I said to her that day. You need a process where there is legal privilege. And that directive, that prosecution directive created a situation of legal privilege. But then I said to her, Mrs Job, or Dr you didn't say Dr Jobson.

15 **MR HOFSTATTER:** Dr Jobson, yes, yes.

**MR WAGENER:** Yeah, I said to her, but you people, you were the people who took that thing, to court to have it declared unconstitutional. And I think that was an opportunity missed. I remember right, I said that to her because, I mean, even not long ago, another attorney called me and he said to me, you know, he's acting for a family  
20 who's looking for someone that went missing in Transkei, I think. And I said to him, but I mean, in all seriousness, you I don't know the facts but I said to him even if there's something available, I can't make an agreement with you because he said to me, you know, we are colleagues, we are both colleagues, we are both attorneys, we can agree as colleagues that if you just show me the remains, we will leave it there. I said to him,  
25 but in all respect, you're terribly naive. I mean, if you think that would be, that will happen in our country, never ever. I mean, if there's a legal privilege attached, then you can maybe you can make some progress. And that was the idea behind that whole directive. Because everyone realised that after the TRC, there was too much unfinished business.

And you have to create a legal mechanism to deal with that. And that directive was aimed at that. But then it was the very same uh, Dr Jobson and her uh, is that isn't that Khulumani or what is it called?

**MR HOFSTATTER:** Khulumani, yes.

5 **MR WAGENER:** Foundation or something that she's that she's running. They were the people who took that thing to court and had it set aside.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** I said to her, I think you people, you've missed an opportunity in the process.

10 **MR HOFSTATTER:** Okay.

**MR WAGENER:** But in any event, that's water under the bridge, you and I, we can't do anything about that.

**MR HOFSTATTER:** No, I suppose we can't. But I suppose the point I'm raising and I and I appreciate what you're saying, but I suppose the point I'm raising here is that, you  
15 know, she was saying that you were quite explicit that, you know, if anyone dares to prosecute these old crimes now, then all the ANC's dirty linen is going to be, you know, it's going to be hung up in public and there is going to be the whole range of things.

**MR WAGENER:** As far as I can remember, I said to her, you can't expect from the groupings that I represented as a, namely the security forces of this country. You can't  
20 expect from them to merely sit back and see prosecution after prosecution on their side of the erstwhile conflict and do nothing about it.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** As far as I can remember, I said to her, then you must expect that that side of the conflict will come forward and say, now the other side must be prosecuted. And surely there is evidence and there is easy matters that can be prosecuted. And if the NPA is not prepared to prosecute, one can always go to private  
5 prosecution. I think I said something to that effect to her.

**MR HOFSTATTER:** Okay. Look, because.

**MR WAGENER:** That's logic. That's common sense.

**MR HOFSTATTER:** Right, right.

**MR WAGENER:** I mean, nobody can argue with that.

10 **MR HOFSTATTER :** No, I suppose what she was also saying is that you'd said to her that, you know, that there are the former security force members that you represent also, as because of the nature of their work, would have had secrets, I suppose, about, you know, the current ANC members and that would be aired in uh, and that would come out then.

15 **MR WAGENER:** Of course.

**MR HOFSTATTER:** And you know, so it wasn't just a prosecution, well, I suppose it's part of a prosecution process, but those secrets would come out, whether those secrets are.

**MR WAGENER:** No, that's a different subject. I think, that you're broaching now.  
20 And that is the old, question is that, I mean, we all know that the erstwhile statutory forces, they made extensive use of a system of informers. We all know that.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** We all know that because that's the only way that you can deal with what is termed an unconventional warfare kind of situation.

**MR HOFSTATTER:** Yes. Absolutely.

**MR WAGENER:** You can't really deal with that on a reactive basis. You have to be proactive and the only way to do it is by way of a very, very wide-ranging informer system. And I mean, for 25 years now, we all know, there's many people, they want to know who were these informers. Now, obviously, that's the one thing in the world of intelligence, and I think you should know this, is that you never ever drop your informers. You never do that. There was an effort on that line when you will remember when somebody made the allegation that Bulelani Nqcuca was an informer. You remember that?

**MR HOFSTATTER:** Yes, yes. The Hefer Commission.

**MR WAGENER:** The Hefer Commission was appointed to investigate that as a kind of a commission of inquiry. You remember that?

**MR HOFSTATTER:** Yes, yes, very clearly.

**MR WAGENER:** And well, I was with Judge Hefer and I said to him, because he wanted to subpoena my clients to come and say whether Nqcuca was in fact an informer or not. And I said to the judge, it's not a secret, I said to him, there's no way in the world that my clients will divulge that kind of information regarding informers. We refused to do that at the TRC, we refused to do it all along.

**MR HOFSTATTER:** Even if somebody's facing a 30-year jail sentence?

**MR WAGENER:** Well, you're not going to face a 30-year jail sentence for being an informer.

**MR HOFSTATTER:** No, no, but the suggestion is that, and this is what I'm getting from Marjorie Jobson in her discussion with you, is that there was a threat hanging over the ANC, you know, if you try and go after my clients, my clients have indicated to me that, there will be, certain informers would be exposed and some of them could be in higher positions in government.

**MR WAGENER:** No. We never said we're going to, my clients never said they would expose informers.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** What my clients said is if you go after our people in terms of prosecution, we will see that your side is also prosecuted.

**MR HOFSTATTER:** Ah, okay.

**MR WAGENER:** That's something totally different because that your side of the conflict also be prosecuted for committing crimes, not for being informers. No, the informer thing, no, I'm not aware of that. My clients have always been very strict on that regard. They won't divulge the particulars of informers.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** At the TRC or now. And we refused, my clients refused to do it. And that was not, it was on my advice amongst others. But that is something different.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** The threat that you refer to was something else. It was a vague threat. Again, I repeat myself. What I said is that you can't expect from my clients to merely sit back and see if they all get prosecuted and the other side of the conflict, there's no prosecution. Then my clients will see that there is also prosecutions for that. But the

prosecution is not for being informers or not. Prosecutions for being a criminal or not and having committed criminal offenses.

**MR HOFSTATTER:** And presumably your clients said to you that they have evidence of these crimes.

5 **MR WAGENER:** Yes, but there's lots of evidence. Even you and I know of that many cases.

**MR HOFSTATTER:** Yes, like the landmine cases and.

**MR WAGENER:** It's not a secret. We all know. Yeah, you refer to the landmine campaign. I mean, we all know that. That would be a sitter for any prosecutor. To  
10 prosecute, I think the majority of NEC members of 1985 has now passed away, but there's still a number alive. To prosecute them, I think it would be a simple prosecution. It's not a secret.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** It's not my clients, it's not only they who are privy to these facts.  
15 I mean, anyone who has done a bit of research and investigation would come to the same conclusion.

**MR HOFSTATTER:** Okay, so we're making a clear distinction here and I'm glad we raised this because the impression I got, you know, if I'm looking at this from the outside is that the threat hanging over the ANC politicians was, we will expose the informers in  
20 your midst. But you're saying that was never part of.

**MR WAGENER:** I'm not aware of. No, Stephan, I'm not aware of that. In fact, as I say, my clients, the people who acted as handlers for informers, they've always been very consistent on that. They're not prepared to divulge identity. I mean, we've been approached a number of times to question and as I said, even that inquiry by Judge Hefer

was an effort. And that whole inquiry of his ended in as a what are the right words? A damp squib. What's the word?

**MR HOFSTATTER:** Squib, squib, yes.

**MR WAGENER:** Yeah, it came to nothing because my clients they just refused to  
5 divulge information regarding the identity of informers.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** No, I'm not aware of that. You understand the distinction that I'm  
drawing?

**MR HOFSTATTER:** Yes, no, I do. And it's a very important distinction. It's a difference  
10 between.

**MR WAGENER:** The other one is for me, as a lawyer, is quite simple to  
understand. I think having regard to the basic point of departure of equality before the law.  
And as I say, I've been on record for this many times in public, in the media, and even  
abroad. I've made this statement.

15 **MR HOFSTATTER:** Okay.

**MR WAGENER:** And I stick to that.

**MR HOFSTATTER:** Right. Okay. So I suppose flowing from that statement is the  
question of, you know, you've been accused of really because you were the defence  
attorney for so many people who, you know, were possibly thinking of applying for  
20 amnesty from the former security forces and your recommendation from what I  
understand in many instances was do not disclose anything. So that opens the door to  
the accusation against you that you were in fact blocking them from telling the truth as a  
gatekeeper, I suppose.

**MR WAGENER:** No, you are totally wrong. No, many of these people approached me and asked me whether they should apply for amnesty for certain, operations or actions and I consulted with many of these people. And in just about every case, I said, yes, go for amnesty. Go for amnesty, but you must remember if you go for amnesty, you must  
5 speak the truth because there is this qualification of making a full disclosure.

**MR HOFSTATTER:** Right.

**MR WAGENER:** No, I would be stupid if I advise my clients, go for amnesty but don't come with all the truth. I mean, that doesn't make sense because then you put yourself at risk of having amnesty denied to you. And the whole purpose of applying for  
10 amnesty is to get amnesty.

**MR HOFSTATTER:** Right. Okay.

**MR WAGENER:** No, that is totally wrong what you have just said.

**MR HOFSTATTER:** All right. It's just that so Dr Jobson's recollection of that meeting was that you had many people come to you with this discussion as you've said, and that  
15 your advice to them was to say nothing, disclose nothing.

**MR WAGENER:** The scoreboard speaks for itself. The guys who came to me, they asked for amnesty and 95% or 90, 97% of them got amnesty.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** How? I mean.

20 **MR HOFSTATTER:** Okay.

**MR WAGENER:** No, serious. No, Stephan, that can't be right. I mean why would I say that? I'm on record for advising people to go for amnesty.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** With all the relevant criteria, including having to make a full disclosure.

**MR HOFSTATTER:** Okay. So, I mean, so the impression that she got, you're saying  
5 was a misperception on her part that she felt like you were telling people not to disclose what they knew, to really just keep things to themselves.

**MR WAGENER:** I don't know what she is referring to. I mean, I can't even think of examples. What would that be?

**MR HOFSTATTER:** Yeah, I mean, what she said was, you know, that she related to  
10 you, your message to them was, don't ever disclose what you know. That was her impression.

**MR WAGENER:** What I said is, what my message to all my clients was, don't disclose the identity of informers. I mean that is something else. Yes, that I did say, and I've said that all along and I still say, but most of my clients, you need not even tell them.  
15 They all know that. This is the golden rule in the world of intelligence that you don't drop your informers.

**MR HOFSTATTER:** Right. Although you said it was your advice as well to those that perhaps were wavering a bit.

**MR WAGENER:** That is something totally different. That is not, I mean, again, as  
20 I'm saying, the fact of someone being an informer, that's not a crime. I mean, so we're not hiding a criminal offences in the process if we say we're not prepared to say who the informers were.

**MR HOFSTATTER:** Right. Okay.

**MR WAGENER:** That's not covering up any crime.

**MR HOFSTATTER:** Right. Okay. But you certainly didn't ever say to them, don't disclose what you know about criminal acts or things that were being treated as criminal acts.

5 **MR WAGENER:** No, the opposite is true. When people came to me in the days of the TRC, my first word would normally be, tell me what's happened that you think you want to apply for amnesty, but remember, you have to give me all the facts.

**MR HOFSTATTER:** Right.

10 **MR WAGENER:** Because you can't expect to come to the TRC with a half-washed story and expect amnesty. And if you are refused amnesty, you made a big fool of yourself. Because now you've put the whole incident or operation or whatever it was right on the table, and you walk away without amnesty.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Then, I mean, you've shot yourself in the foot.

15 **MR HOFSTATTER:** Right.

**MR WAGENER:** So, I said to everyone, remember, I [inaudible] whole truth. But fortunately, the people that I represented, they knew me for decades and they trusted me. So, no, I got the full facts. And those facts, in order to get amnesty, all those facts were put on the table in the TRC process.

20 **MR HOFSTATTER:** Right. Okay. So that's an important distinction then. When you were saying not to disclose something, it was about not disclosing the identity of the informers. That would be the issue.

**MR WAGENER:** Yes. But I mean, that you can talk to people internationally, all countries of the world dealing with sensitive intelligence. They will all adhere to this principle as a golden rule. Yeah, otherwise, your own credibility is right out of the window.

5 **MR HOFSTATTER:** Yeah. Okay. And you're currently representing some of the suspects in the Nokuthula Simelane case. Is that correct?

**MR WAGENER:** Yes, that's right.

**MR HOFSTATTER:** Okay. All right. Well, we're focusing on the Timol case for this particular story. So perhaps if you don't mind, I might call you again on the Simelane case.

**MR WAGENER:** Okay.

10 **MR HOFSTATTER:** But at the moment, we're just focusing on Timol, but yeah, we presumably will be looking at Simelane as well at some point.

**MR WAGENER:** For what news agency do you work?

**MR WAGENER:** It's an article I'm doing with a colleague in Amsterdam, and it's called De Volkskrant.

15 **MR HOFSTATTER:** De Volkskrant. You can find it online. It's a fairly large daily paper. And in summer, they do longer feature. So, it's normally a just a, yeah, it's a fairly well-known, big circulation daily newspaper, but they do features in summer. So, we're going to.

20 **MR WAGENER:** So all I'm asking, why I'm asking you and all I'm asking from you is please, if ever you quote me just quote me correctly, please, because I've embarrassed in my life many times by journalists who were not prepared to quote you in an honest way because maybe the answers don't suit their requirements or the drift of the story they're writing and then they try to bend what you've said. So that all I'm asking of you, please.

**MR HOFSTATTER:** Okay. No, I can guarantee that. I mean, what you've, I mean, that's why I wanted to make the distinction clear.

**MR WAGENER:** You're taping this conversation.

5 **MR HOFSTATTER:** I am, yeah. So, if there's any if there's any discrepancy, it'll be on, I'll listen to the recording, but I think it's very clear. The issue I really wanted was clarity on was the informers' issue and you've stated it very clearly. So, I can't see there being any room, but I'll check the recording if need be.

10 **MR WAGENER:** No, you must accept that from the side of the liberation forces, there's always been huge need to know who were the people were writing in their midst from low rank to up to very high-ranking people who were in fact informers of the of the security forces. And one can understand that.

**MR HOFSTATTER:** Absolutely.

**MR WAGENER:** One can understand that. I mean, from that side, it's very understandable that they would like to know.

15 **MR HOFSTATTER:** Yes.

**MR WAGENER:** Because they're sitting around a table and in meetings and, you know, who can be trusted, who can't be trusted. From where I come from, we never ever played that game.

**MR HOFSTATTER:** Okay.

20 **MR WAGENER:** Because we said that that would be unethical in the world of intelligence if you play along those lines.

**MR HOFSTATTER:** And do you know some of their names?

**MR WAGENER:** I do, yes.

**MR HOFSTATTER:** You do?

**MR WAGENER:** Yeah, I do.

**MR HOFSTATTER:** Okay. So that's, something you'll have to take to your grave  
5 because you must know some fascinating names.

**MR WAGENER:** I'll be taking many things to my grave. You must remember, I'm  
a practicing lawyer. So, whenever I consult with people, there's a legal privilege attached  
to that situation and that privilege is not the privilege of the lawyer, it is the privilege of the  
client. So I can't cross the line. The client can because the privilege belongs to him.

10 **MR HOFSTATTER:** And if the client's no longer alive?

**MR WAGENER:** Well, obviously, then the privilege is still, it's still not my privilege.  
I mean, I know there are lawyers who are prepared to write books and things like that on  
subject matter that is strictly covered by legal privilege. I'm not prepared to do that.

**MR HOFSTATTER:** Because we do see books like that these days.

15 **MR WAGENER:** I've seen books like that, yes. But I will, I'm not prepared to do it.  
I've been asked a few times in my life by people who said why don't you write a book. We  
will assist you in writing a book, that is the way people write books these days. I've never  
ever in my life. Because I'm not, prepared to. I mean, my professional integrity is still intact.  
That's the one thing that nobody can ever point a finger at me. Through very difficult times  
20 in the history of our country, my professional integrity is still intact, and I'm not prepared  
to gamble with that at all.

**MR HOFSTATTER:** Right. Even if your client's no longer around?

**MR WAGENER:** I assume, I mean, I've been asked many times what happened between me and person A, person B, person C. And I said, well, I can't tell you.

**MR HOFSTATTER:** I mean, I may as well also ask what happened between you and President Mandela and President Mbeki and President P.W. Botha, but.

5 **MR WAGENER:** Yes, I can tell you; I could have told you beautiful stories, but, because of my profession, again, that is covered by legal privilege.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** So.

10 **MR HOFSTATTER:** But I understand that I've been told that you're related to former President PW Botha. Is that correct?

**MR WAGENER:** Related?

**MR HOFSTATTER:** By family.

**MR WAGENER:** Are you joking?

**MR HOFSTATTER:** That's what I was told.

15 **MR WAGENER:** Are you joking?

**MR HOFSTATTER:** No, I'm asking.

**MR WAGENER:** No, I've heard many stories about my life, but this one says, no. No, not at all.

**MR HOFSTATTER:** No relation. Okay.

**MR WAGENER:** No, it's actually quite funny. No, seriously, no, it is not correct. No, I'm not related to any politician that I'm aware of.

**MR HOFSTATTER:** Right, but you had some interesting discussions with PW Botha.

**MR WAGENER:** Of course. I mean, it was no secret that I was the lawyer to  
5 someone like President FW de Klerk.

**MR HOFSTATTER:** Mm.

**MR WAGENER:** And many people have asked me what was discussed between the two of you. On many occasions, And I would say, you can ask him you can't ask me. And if he's not prepared to tell you, I can't say.

10 **MR HOFSTATTER:** Right.

**MR WAGENER:** Because there's a legal obligation on me as a practicing lawyer.

**MR HOFSTATTER:** Right.

**MR WAGENER:** To protect that privilege.

15 **MR HOFSTATTER:** Okay. So, then it is true to say that you're a gatekeeper for these truths, but it's not your choice to be anything but a gatekeeper as a lawyer.

**MR WAGENER:** What exactly, just help me there, what exactly is meant by gatekeeper?

**MR HOFSTATTER:** Well, so—

20 **MR WAGENER:** What would you understand the term if you say I'm a gatekeeper? What do you understand by that?

**MR HOFSTATTER:** Well, that would be, you know, if there's information that people have, I suppose it comes down to these families again, you know, people would know where the bodies are buried and the families want to know, and you you're advising people not to, you know, disclose the information. I can understand why. You've explained why.

5 **MR WAGENER:** On that specific score, I can tell you, I don't know of any bodies. I mean, Madeleine Fullard has also asked me, you know, that missing persons unit. She's asked me, can't I assist them with finding a missing body? And I said to her unequivocally, I don't have any factual knowledge. But if you give me the facts of a certain incident, maybe I can go to some of my old clients and maybe there can be someone there that  
10 does know where this missing person is.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** It's possible. I don't know.

**MR HOFSTATTER:** Right.

**MR WAGENER:** But then you have, but then we're back to square one. You have  
15 to create a legal privilege situation for that person to come forward. Otherwise, he will never, ever come forward.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Because the next moment he will be arrested and charged for murder.

20 **MR HOFSTATTER:** Yeah. Yeah. That's fair enough.

**MR WAGENER:** So, I'm not a gatekeeper in the sense that I know where all the missing people are and I'm not prepared to say.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** If that is what you mean by gatekeeper, then no, I'm not that.

**MR HOFSTATTER:** Right.

5 **MR WAGENER:** But again, I know many people. I got to meet many people in security forces. And there may be some of them around there still alive. I don't know who they are, but hypothetically, there may be some of them who would theoretically know where missing people are, or the bodies are.

**MR HOFSTATTER:** Right.

10 **MR WAGENER:** And I can approach them if you say to me, go to Captain so or Colonel so or General so he would tell you, I mean, clearly, I can do that if he's still alive, because people they know me. I've been their lawyer in many instances, and they trust me.

**MR HOFSTATTER:** Right. But if—

**MR WAGENER:** But if they don't tell me the facts, I don't know.

15 **MR HOFSTATTER:** Right. Okay.

**MR WAGENER:** I don't know. I have no personal knowledge if that is what you mean. So, gatekeeper to me doesn't sound the correct word.

20 **MR HOFSTATTER:** Well, I suppose it's also about giving them advice not to disclose things that's going to open them up to prosecution. I mean, I look, I understand that that's a logical thing to do, but yeah, I mean, definitely some of the people you know would know where the bodies are buried or would know certain facts that are of relevance to current society.

**MR WAGENER:** I was present at a number of situations where they told me where the bodies were buried and we went there with the TRC people, and they did excavations were done and the remains were taken from deep down.

**MR HOFSTATTER:** Right.

5 **MR WAGENER:** Yes, I was present at a number of those excavations.

**MR HOFSTATTER:** Exhumations.

**MR WAGENER:** Exhumations, sorry, wrong word

**MR HOFSTATTER:** Right.

10 **MR WAGENER:** But I said to them, you have, but those were matters where they asked for amnesty at the TRC. And I said to them, you will have to make a full disclosure. And a full disclosure would include telling exactly, if you killed someone, where did you bury him.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And they did tell me that.

15 **MR HOFSTATTER:** Right.

**MR WAGENER:** And I got the investigation people from the TRC and we went there.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And I sat there and I watched them doing the exhumation.

20 **MR HOFSTATTER:** Right. Okay. And was—

**MR WAGENER:** So that's not a gatekeeper because I mean, I thought I was facilitating the process of the whole TRC process.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And a number of those family members of some of those  
5 deceased people, they came to me afterwards and they thanked me.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Because they got the remains of their loved ones.

**MR HOFSTATTER:** Right, and was Eugene de Kock one of your clients? I don't, I just don't recall if he was.

10 **MR WAGENER:** No. I did represent him in some matters, but it's in the early, early days long before the TRC, but in the latter years, he wasn't my client. Not in his criminal case, not at the TRC.

**MR HOFSTATTER:** Right.

15 **MR WAGENER:** No. I did a few matters way back when I was still in the State Attorney's office.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Where he was he was involved, but those were not that important stuff. So, I think for all for your purpose, you can accept that I was not representing him.

20 **MR HOFSTATTER:** Right, because he also, while he was in prison, as I understand it, pointed out some of the burial sites.

**MR WAGENER:** I'm not aware.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** I'm not aware. I think he tried to, but I'm not aware that he did in fact, but it's possible. I'm not aware of that.

**MR HOFSTATTER:** Okay. No, it's just something I've heard.

5 **MR WAGENER:** It's not impossible that I think, why would he do that when he was already in prison. I think if he had knowledge of those things, he would have done so at the TRC in order to get amnesty. I would imagine, but I'm not his lawyer, so I can't speak on his behalf.

**MR HOFSTATTER:** Right. Okay. No, I just thought that perhaps that had to do with  
10 why he was released early or something.

**MR WAGENER:** No, I don't know. I'm not aware of what sites he pointed out. I'm not aware.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** I am aware that I think, I'm not sure where it was given, but I think  
15 there was one, burial site that was pointed out to the missing people unit of Anton Ackermann and these people, and where allegedly three terrorists were buried, I think men. Then Anton Ackerman called me once and said they've got a problem because they've made exhumations, but the remains is one of them is a woman.

**MR HOFSTATTER:** Oh.

20 **MR WAGENER:** Can't we sort of, my clients change the story to say one of the people that died was a woman. I said, obviously you can't. I mean, you're barking up the wrong tree here and I think, I'm not sure, but I think that was one of the situations where de Kock was involved, but I'm not sure.

**MR HOFSTATTER:** Could have been. Okay, I can confirm that. All right. Well, thanks, very much for the chat. I really appreciate it, a lot of this is quite contested, but I think there's some important distinctions to be made that—

5 **MR WAGENER:** That the point. I mean, if you read what interested people have got to say about this, of course, people come from specific perspectives.

**MR HOFSTATTER:** Mm.

10 **MR WAGENER:** To say what they wish to say. I mean, Dr Jobson and them, they are very much for victims, but again, they're only for victims from one side of the conflict, as far as I'm aware. I'm not aware that they've ever represented victims on the other side of the conflict. So, everything that they do is basically one-sided.

**MR HOFSTATTER:** Okay.

15 **MR WAGENER:** I've seen that. That's life. I assume they're entitled to do that. But they are quite taken aback when they have a discussion with me and I say, okay, I hear everything that you say, but let's now have a look at the other side of the coin. And they're not prepared to do that.

**MR HOFSTATTER:** And the other side of the coin is that this was a conflict with crimes committed on both sides.

**MR WAGENER:** Of course.

**MR HOFSTATTER:** Okay.

20 **MR WAGENER:** I mean let's take an example, the security police didn't decide on one day let's go and have a go at members of the of the ANC who is conducting certain undercover operations. I mean certain people, it comes from somewhere. It comes from somewhere. There's another side. There's another side to all of this.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** I mean, why were people arrested? Why were people, of course, and I've said that many times in my life, that from the side of the security forces, many crimes were committed. Many unacceptable things were done. Of course.

5 **MR HOFSTATTER:** Excessive force, torture that leads to death.

**MR WAGENER:** We all know that.

**MR HOFSTATTER:** Assassinations.

**MR WAGENER:** Of course. Yes. It's not a secret. But again, if you look at the perspective of that, very few innocent people were killed, if we take the example of killing, were killed by the let's say the security police.

10

**MR HOFSTATTER:** Okay.

**MR WAGENER:** I mean, if you take the example, what's a good example, that zero-hand grenade incident. You know that? You know about that one?

**MR HOFSTATTER:** Which one?

15 **MR WAGENER:** That's what we call the zero-hand grenade incident.

**MR HOFSTATTER:** No, I'm not familiar.

**MR WAGENER:** You can read about that, what they call it the zero-zero hand grenade. You can read in the record where the security police got evidence of a number of guys coming to our country. We, my clients used to call them terrorists and they were going to attack the houses of black policemen, killing those policemen and their families because they were regarded as collaborators with the with the apartheid regime

20

**MR HOFSTATTER:** Okay.

**MR WAGENER:** And obviously, that intelligence came to my clients and they said, well, what are we going to do about this. Because if we now act upon this information that we got, our very, sensitively placed informant is going to be dead within a week. And his  
5 family will be dead as well. So, what they did is they took the hand grenade, and they changed the timing mechanism from what is it, eight, nine seconds to zero seconds.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And on a specific night there on the East Rand, at an outside the houses of a number of black policemen, there were explosions where people tried to  
10 throw hand grenades into the into the houses of sleeping policemen, murdering them.

**MR HOFSTATTER:** Right.

**MR WAGENER:** What happened is that the hand grenade exploded immediately.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And killing, I think there were six or seven guys killed and five or  
15 six ended up with an arm amputated.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Now, my clients asked for amnesty for that incident.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** But again, I mean, it's not innocent people who got killed. It's  
20 people who were in the process of killing someone else or trying to kill someone else. It's not innocent people.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And this is what, that's what I'm saying, if you take all these things into perspective, I'm not justifying what the security forces did, never have. I'm not justifying, but all I'm saying is just have a bit of perspective on it, have a bit of perspective  
5 on the two sides, of where the two sides are coming from.

**MR HOFSTATTER:** Yeah, but you realize—

**MR WAGENER:** It's not that simple. It's not that simple at all. But again, the popular media, they very seldom are prepared to go this way because it's not a popular, it's not a popular route to go for a journalist.

10 **MR HOFSTATTER:** Yeah, well, binary narratives are always the curse. But the issue, I mean, if we're saying it's not simple, we could also take it to another dimension. I mean, you know, there was a just war and an unjust war. I mean, apartheid was declared a crime against humanity. It's you know, it's considered unjust and they were fighting a just cause. So, if you're fighting a just cause, it's not the same as, you know—

15 **MR WAGENER:** But is terrorism, is terrorism part of a just cause?

**MR HOFSTATTER:** Well, that's I mean the ANC—

**MR WAGENER:** What can you do? What can you do if you say I'm fighting a just, I'm fighting a just, I'm defending a just cause?

20 **MR HOFSTATTER:** Well, the ANC would argue it had no other option. I mean, Nelson Mandela was authorising the armed struggle.

**MR WAGENER:** And then my clients will say that they but, exactly, but what my clients say is the opposite side. They say this is normal terrorism in terms of all definitions of the concept of terrorism all over the world. It's nothing else but terrorism. Now, as I say,

those are exactly the two sides of the coin.

**MR HOFSTATTER:** Right. But what they will argue is that they were fighting for a just cause. I mean, there was a racially oppressive system that denied people basic rights. I mean, the most the most basic rights and they were fighting that system and that was a just fight to be fighting. So, they were reacting against the violence of that system and they were killed—

**MR WAGENER:** By committing terrorism against innocent people. You see, these are you, can cross a line somewhere and whether I mean, you can argue your just cause, that's what my clients say. You can argue your just cause just to a certain point, but after that you cross the line. You went too far.

**MR HOFSTATTER:** Right. I mean, if you're deliberately targeting civilians, but mostly they were targeting security, I mean, the example you used yourself was policemen. They went to attack policemen. Members of the security forces.

**MR WAGENER:** There is so many cases where innocent people were targeted. It's just not true. If you search, if you do your research, you will you will see that for yourself. There are hundreds of incidents where totally, totally innocent people were targeted.

**MR HOFSTATTER:** Okay, but in this instance with the policemen, they were members of the security forces.

**MR WAGENER:** That is, yeah, in that example, yes. In that example, yes. Yes. And that is why, that is why I said to my clients, you can argue that this was this was this was self-defence, but I think it was murder. Therefore, I think you have to ask for amnesty. And they asked for amnesty and they got amnesty.

**MR HOFSTATTER:** Right. Okay. So that's a—

**MR WAGENER:** So that is what I'm saying. I'm not I'm not denying that that was a crime committed by the security forces. It was murder.

**MR HOFSTATTER:** Right. Okay.

**MR WAGENER:** It was murder.

5 **MR HOFSTATTER:** But there was murder on both sides, you're saying.

**MR WAGENER:** That was murder, but I'm not, please, don't misunderstand me.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** Those zero hand grenade guys who got killed when they tried to throw the hand grenades and were killed themselves, from the side of my client, that was  
10 murder.

**MR HOFSTATTER:** Right. There was no judicial process. They didn't go to court and get sentenced to death and then got hanged. They were killed without any process.

**MR WAGENER:** No, they asked for amnesty, and they got amnesty.

**MR HOFSTATTER:** Right. But I'm saying the people who they killed, it was murder, it  
15 wasn't a judicial process that they landed up being executed.

**MR WAGENER:** Yeah, if you want to say that, yes.

**MR HOFSTATTER:** Right. But you're saying it wasn't innocent people that were killed, then what about somebody like Ahmed Timol? I mean, he was not planting, he was not throwing hand grenades or anything. I mean, he had a couple of Communist Party  
20 pamphlets in his boot.

**MR WAGENER:** Yeah, I'm not that knowledgeable of the Timol matter. That is an

early case. I was a youngster then.

**MR HOFSTATTER:** Yeah.

**MR WAGENER:** So, and also the matter is pending at present. I assume, Rodrigues or what is the guy's name, he's got a legal defence or not. I'm not sure about  
5 that. I don't want to discuss the detail of that matter because I'm not involved at all. I've seen something. But one can assume that he committed suicide. One can assume that Judge what's his [inaudible] was correct, he was murdered. The trial court will now, I assume, decide on that. So—

**MR HOFSTATTER:** Well, the court's decided that it wasn't suicide, so—

10 **MR WAGENER:** Yes, but there's many, there's many legal experts debating the quality of that judgment and the quality of that whole process. That is why I'm saying there's a there's a criminal court who will now sit as a criminal court and judge whether this was murder or not and whether this guy is innocent or guilty. I think it would be, I think we would be pre-judging this issue if we try to take that subject too far now. And in any  
15 event, I'm not in a position to do so.

**MR HOFSTATTER:** Okay, I mean, that's fair enough, but I suppose I'll just make a comment to say, you know, you were talking about these were not innocent people who were killed, and that's true in the case that you mentioned earlier, but in Timol's case, I mean, all the facts suggest he was merely caught with some communist pamphlets in his  
20 boot. And then, okay, did he commit suicide or not, the court has now ruled that he did not commit suicide. You say there are debates around that, but let's say he did not, then there was an innocent person who was killed. I mean, look, it was against the law at the time to have communist pamphlets, but he wasn't going around killing people.

**MR WAGENER:** What I mean by innocent is that, as the law stood at the time, or  
25 what Timol did was he put himself in the category of people drawing the attention of the security forces. I'm not I'm not referring to that. I say innocent people would be people

sitting in a Wimpy Bar having a cold drink or sitting in a church or sitting in a pub having a drink and then get killed for it. With no political connection whatsoever. That is what I'm trying to say. And there's many instances in the history of our country where people like that were brutally murdered by the liberation forces. And again, if you go to the acceptable  
5 universal definitions of terrorism, that's terrorism.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** And you can call them freedom fighters, you can call them just cause, whatever you want to, but if you really go to the facts of that, of many situations, it's terrorism and nothing else. But again, that is that is the interesting thing about politics,  
10 I assume. That old saying is that one guy's freedom fighter is another guy's terrorist, you know, you must have heard that many times before.

**MR HOFSTATTER:** Yeah.

**MR WAGENER:** And that all depends on where you where you are coming from.

**MR HOFSTATTER:** Right.

15 **MR WAGENER:** Where you're coming from. And of course, there were innocent people, also killed by the security forces. I mean, that horrible incident of where they sent the letter bomb and those people, I mean, it's one of the most stupid things that I've ever heard in my life, where they sent it to that guy called Marius Schoon, you remember that one?

20 **MR HOFSTATTER:** Yeah.

**MR WAGENER:** And it killed his wife and his little girl. I mean, it's a little girl, I think she was four or five years old, a small little girl. I mean, of course, it is horrible.

**MR HOFSTATTER:** And the raids into, you know, into a hut, everyone is killed, three

of them are children.

**MR WAGENER:** Yes, no, that's what I'm saying. You can't say there were there were no innocent people, but all I'm saying is that the operations of the security forces were, with a very few exceptions, directed at what are, at people that were regarded as  
5 opponents or as members of the liberation forces.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** And I don't think the liberation forces can say the same. They want to say the same, of course, and they've been saying that at times, but I think the scoreboard shows different.

10 **MR HOFSTATTER:** Okay. All right. Well, let me, I mean, as I say, we're starting with Timol, but we're perhaps looking into other cases, so perhaps we could start looking at that as well. I mean, you're talking, for example, at the landmine campaign is one example of the scoreboards looking different, if I understand you correctly.

15 **MR WAGENER:** I, just the last thing, are you are you going to write that I'm a gatekeeper? The word gatekeeper, gatekeeper worries me a bit because, the way I understand gatekeeper is like defeating the ends of justice kind of thing.

**MR HOFSTATTER:** Well, what—

**MR WAGENER:** And if you're going to write that about me, I would object to that. If you understand the gatekeeper in that kind of thing.

20 **MR HOFSTATTER:** Well, what I want plan to write and why I put that to you is that Dr Jobson said to me at the meeting she had with you, and in fact, she referred to two meetings or two interactions, perhaps there were many more, I don't know, the other one related to one of your current, the current case which we weren't really looking at, was that you, were acting in a way, and I think, let me see here, yes, that's the word she uses,

as a gatekeeper preventing people from applying for amnesty because you wanted to keep them from spilling the beans on, you know, more senior people. So that is what she has told me was her impression from you from those, we only spoke about two incidents, maybe there were others that that gave her that impression.

5 **MR WAGENER:** Then she must give the facts because that can really be correct. I mean, the facts are clearly right the opposite. That can never, ever, ever be correct.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** I don't know where, then she must tell us to what instance is she referring to.

10 **MR HOFSTATTER:** Okay.

**MR WAGENER:** Because I'm really, I object to that. And again, if that is understood by the term gatekeeper, that you sort of defeating the ends of justice, I object to that.

**MR HOFSTATTER:** Okay. Well—

15 **MR WAGENER:** In fact, I would say my track record is basically the opposite. If you talk to many people, I think it is even in the final report of the TRC, I think they acknowledged my, the role I played by bringing people to the process.

**MR HOFSTATTER:** Okay.

20 **MR WAGENER:** Encouraging people to come to the process and ask for amnesty but remembering in the process you have to you have to make a full disclosure.

**MR HOFSTATTER:** Yeah. Okay. Well, what I'll do is I will clarify that point with her and if something hinges on it for our article after I've clarified it with her, I'll call you again

if that's okay, just to confirm. But at the moment, I'll just clarify that point with her. I mean, the main point I wanted to clarify with you was this issue of, you know, what we spoke about at length about whether or not you were advising your clients, preventing your clients from disclosing informer's names. I suppose that's in a nutshell, and I think we've  
5 covered that and that's clear.

**MR WAGENER:** But you understand the reasoning behind that.

**MR HOFSTATTER:** Yes, yeah. I'm going to, yeah, I understand that clearly. Yes. I'm just saying that on this gatekeeper question because you're raising it now, I'm not too sure if it's going to feature in the article, but I'll check with her and then if something does turn  
10 on it in the article, after I've clarified with her, I'll put it to you again. Is that acceptable?

**MR WAGENER:** Yeah. Okay.

**MR HOFSTATTER:** Okay, and then, this is a landline. Do you normally just operate through the landline or should I take your—

**MR WAGENER:** No, I was quite surprised that you called me on my landline.  
15 These days, you know—

**MR HOFSTATTER:** No one uses landlines anymore.

**MR WAGENER:** This is a very old house. It's an old holiday house that we stay in Hermanus, and this is my landline, and we obviously need the landline for internet purposes. No, people call me on my cell phone.

20 **MR HOFSTATTER:** Okay. Good.

**MR WAGENER:** I was quite surprised when you when you called me on this line.

**MR HOFSTATTER:** Right. Okay. Could I get your mobile number and your email

address then?

**MR WAGENER:** 082.

**MR HOFSTATTER:** 082.

**MR WAGENER:** 41.

5 **MR HOFSTATTER:** 41.

**MR WAGENER:** 660.

**MR HOFSTATTER:** 660.

**MR WAGENER:** 41.

**MR HOFSTATTER:** 41.

10 **MR WAGENER:** Yeah.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** Where did you get my landline? Because very few people phone me on my landline.

**MR HOFSTATTER:** From Dr Jobson, who I just spoke to.

15 **MR HOFSTATTER:** Okay.

**MR WAGENER:** Yeah, she only had your landline.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** Yeah, this is we stay in Hermanus, and this is the landline number, but it's been the number of this house for 50 years, I think.

**MR HOFSTATTER:** Right. Okay.

**MR WAGENER:** My email address is my name and my surname, Jan Wagener.

5 **MR HOFSTATTER:** Jan—

**MR WAGENER:** And the digit one.

**MR HOFSTATTER:** I just want to make sure I have the correct spelling of your surname. Is it with one A or two A's?

**MR WAGENER:** W A G E N E R.

10 **MR HOFSTATTER:** N E R. Okay.

**MR WAGENER:** Yeah.

**MR HOFSTATTER:** And then—

**MR WAGENER:** janwagener1@gmail.com.

**MR HOFSTATTER:** Okay. janwagener1@gmail.com.

15 **MR WAGENER:** Yeah, that one is a digit. Yeah.

**MR HOFSTATTER:** Yeah.

**MR WAGENER:** Jan Wagener een, janwagener1@gmail.com.

**MR HOFSTATTER:** Great. Well, thank you so much for your time.

**MR WAGENER:** Okay.

**MR HOFSTATTER:** Appreciate it.

**MR WAGENER:** Okay, Stephan. Cheers.

**MR HOFSTATTER:** All right. Take care. Bye.

5

\*duplicated spoken words and phrases were omitted from the transcript.

**HOFSTATTER // WAGENER TELEPHONE INTERVIEW 10 JULY 2020**

**MR HOFSTATTER:** Hello, I'd like to speak to Mr Wagener, please.

**SPEAKER:** Can I say who's speaking?

**MR HOFSTATTER:** Yes, it's Stephan Hofstatter.

5 **SPEAKER:** Just hold on a minute, please.

**MR HOFSTATTER:** Thank you.

**MR WAGENER:** Jan Wagener.

**MR HOFSTATTER:** Hi, Mr Wagener. It's Stephan Hofstatter.

**MR WAGENER:** Yes.

10 **MR HOFSTATTER:** We spoke a couple of weeks ago, about a month ago.

**MR WAGENER:** Yes, I remember.

**MR HOFSTATTER:** Yes, we're just busy finalizing our article and I came across something I wanted to ask you about. Is this a good time?

**MR WAGENER:** Yes.

15 **MR HOFSTATTER:** Yeah, so it was actually a book by a German academic called Ole Bubenzer, I don't know if you recall an interview you did with him. I think he cited it as 2006.

**MR WAGENER:** The German guy. Yeah.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** Yeah, the young German guy.

**MR HOFSTATTER:** I don't know him. I've just found parts of his book which relates to sort of what I'm researching.

5 **MR WAGENER:** He's a nice guy. Very nice guy. Young guy.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** Yeah.

**MR HOFSTATTER:** Is he in South Africa or was he just—

10 **MR WAGENER:** Yeah, he was in South Africa for a year or two doing research, I think for a doctorate.

**MR HOFSTATTER:** Ah, okay.

**MR WAGENER:** I think he was at a university in Berlin.

**MR HOFSTATTER:** Yes, the Humboldt, I think.

15 **MR WAGENER:** No, I haven't made contact with him, it must be about 10 years or what, where are we now. But I remember him. Yeah.

**MR HOFSTATTER:** Right. Okay. Yeah, so the reason I'm asking about him is he mentions an interview with you that relates directly to the case we were discussing, when I phoned you, which is the Chikane case.

**MR WAGENER:** Yeah.

**MR HOFSTATTER:** And, that incident when you know, the PCLU, I think, informed you that your clients were about to be arrested and the events that unfolded from there, that you know, you and I discussed. And I just thought it was quite interesting, in his book, he says that, basically after his discussion with you, the halting of those particular prosecutions was as a result of a political settlement behind the scenes. And then he goes on to say that, once you were informed of the imminent arrests, you took immediate steps to stop this happening, and you interviewed, you intervened at the office of the president, and you pressed for the suspension of the arrests and that according to you, it was President Mbeki who then decided that the proceedings should be put on hold. So I just wanted to check with you that this is accurate, the way he's put it here.

**MR WAGENER:** I'm just trying to say, as far as I can remember, there was, I'm putting my mind back in that time frame. As far as I can remember, there was that second little amnesty process that was sort of envisaged in that directive, and that was in the process.

15 **MR HOFSTATTER:** Yes.

**MR WAGENER:** Okay and I was aware of that thing, that thing was in the making.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And then, and as far as I can remember, in the middle of that, I was informed that they wanted to arrest my people.

20 **MR HOFSTATTER:** Right.

**MR WAGENER:** My clients, if I'm correct.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** I didn't speak to the presidency. I didn't contact the presidency

myself. I contacted people who apparently did.

**MR HOFSTATTER:** I see, okay.

**MR WAGENER:** And said, look, let's stop this. Let's see this other process through first.

5 **MR HOFSTATTER:** Okay.

**MR WAGENER:** That's how I remember it.

**MR HOFSTATTER:** Okay, okay.

**MR WAGENER:** But, as far as I can remember, it was taken up with the presidency, yes, but not by myself. I never personally made contact with, I know what the president then was Mbeki.  
10

**MR HOFSTATTER:** Mbeki, that's right, yeah.

**MR WAGENER:** I actually, I've never met Mr Mbeki personally.

**MR HOFSTATTER:** But did you not contact somebody in the presidency to have a discussion about this? Because according to Bubenzer, he says you intervened at the office of the presidency.  
15

**MR WAGENER:** Well, I made contact with the people who I assume did make contact with the people in the presidency.

**MR HOFSTATTER:** Oh, I see okay.

**MR WAGENER:** And that was my assumption.

20 **MR HOFSTATTER:** Right, right.

**MR WAGENER:** In my earlier days in the old South Africa, I had access to the office of the presidency. Yes, that's common knowledge.

**MR HOFSTATTER:** Mm.

5 **MR WAGENER:** Because I was a lawyer for Botha and was very much for De Klerk.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** But, after 1994, I was still in the state attorney's office till the end of 1995.

**MR HOFSTATTER:** Okay.

10 **MR WAGENER:** I only left at the end of 1995 so in those 18 months, I had some contact personally with Mr Mandela, but that was not, you know, strictly as a state attorney because I was still in the state attorney's office then.

**MR HOFSTATTER:** Right, okay.

15 **MR WAGENER:** But once I've left the state attorney's office at the end of 1995, and the person, the people that I personally knew in the office of the presidency, they were not there anymore.

**MR HOFSTATTER:** Right.

**MR WAGENER:** That was in the old regime. I had contact with the presidency, you know.

20 **MR HOFSTATTER:** Right okay. So I mean in your opinion you contacted people who you assume contacted President Mbeki. I mean, in your opinion, he must have intervened then.

**MR WAGENER:** It was, because I was told that the arrests won't proceed.

**MR HOFSTATTER:** So, I mean, you're saying he's not being inaccurate. I mean, is it your opinion that the president decided the proceeding should be put on hold?

5 **MR WAGENER:** Yes, that it was done at that level. That is the impression that I got.

**MR HOFSTATTER:** Okay, okay.

**MR WAGENER:** But it wasn't me personally, you know what I'm saying. It wasn't me personally.

**MR HOFSTATTER:** Right, right. Okay. All right.

10 **MR WAGENER:** It was all because of that, I think I said to you last time that there was unfinished business after the TRC.

**MR HOFSTATTER:** Mm-hmm.

**MR WAGENER:** And, how should that be dealt with. And you know, things were certain, certain situations were left hanging in the air.

15 **MR HOFSTATTER:** Yes.

**MR WAGENER:** And that was where there was discussion of that, how can that be sort of solved or tied up. And that is where the idea came from that's how I understood it. That's where this idea came from to have a policy directive of the prosecuting authority to where my people could come to the NPA on a privileged basis and, you know, try to solve unsolved business.

20

**MR HOFSTATTER:** Yes, yes. That was the backdrop, the context of this particular event.

**MR WAGENER:** That is how I remember it, yeah.

**MR HOFSTATTER:** Right.

**MR WAGENER:** But again, that thing didn't, we didn't go far because it was taken to court and the court found it to be unconstitutional and so on.

5 **MR HOFSTATTER:** Yes, I remember that. We just, I looked into all of that, yes.

**MR WAGENER:** Yeah.

**MR HOFSTATTER:** Okay. Yeah, so I mean, it looks like Bubenzer did quite a lot of detailed research while he was here, I was just looking through what he wrote.

10 **MR WAGENER:** Bubenzer, yes. He was a very thorough guy. He was a young chap. He was very young but a clever guy.

**MR HOFSTATTER:** Mm-hmm.

**MR WAGENER:** And he was very interested in the South African situation. So, he was around in our country for, I think for, for quite a long time period.

**MR HOFSTATTER:** Mm-hmm.

15 **MR WAGENER:** And he did, you know lots of research. And I think that the book you're referring to, isn't that basically his doctorate thesis, I think.

**MR HOFSTATTER:** I think so, yeah. It looks like that. It looks like a thesis turned into a book. I mean, it was, it is a book, but it's academic.

20 **MR WAGENER:** It's a doctorate degree from a university in Berlin or something, yeah.

**MR HOFSTATTER:** Right, and then I was also just wondering if you had any knowledge, I'm trying to fact check something that, a claim that people have made that, you know, there's a list that they put up, I don't know who put this up, but it's in the South African History Archives and there's a list of 30, 73 acknowledged deaths of political detainees from 1963 to 1990. There's a list that gets put up everywhere. Are you familiar with that list?

**MR WAGENER:** No.

**MR HOFSTATTER:** Okay.

**MR WAGENER:** Is it people that died in detention?

10 **MR HOFSTATTER:** Political detainees that died in detention, yes.

**MR WAGENER:** Have you seen the list? I mean, is it...

15 **MR HOFSTATTER:** Yes, it's on the Foundation for Human Rights website and it's on the TRC. So, the question is that I'm trying to, you know, verify, I suppose, is people are saying that of the people, of the deaths on that list of that 73, and that includes Timol and Neil Aggett and, you know, some well-known cases and others which I'm not familiar with. The claim is being made that none of the security officials involved, or no security officials involved were prosecuted as a result of any of these deaths and I just wondered if you're familiar with that at all.

No.

20 **MR HOFSTATTER:** It's a bit of a difficult one to verify, but I just wondered if you'd considered that point before.

**MR WAGENER:** Whether in fact nobody was ever prosecuted?

**MR HOFSTATTER:** Yeah, I mean, most of them were, I'll just look at the list quickly. You know, almost all of them on this list are either, you know, shot by police, you know, the official cause given in the inquest, shot by police while trying to escape or suicide by hanging, like in Timol's case, suicide by jumping out the window. So almost all of them, and they're either in prison or in police cells. There's a couple of died by natural causes. So these are all the inquest findings. So presumably if those are the inquest findings, it means that there was no prosecution of anyone.

**MR WAGENER:** Yeah, you know how that works. When someone dies of an unnatural death, they can either do a direct prosecution, you know if the evidence is clear that someone should be held accountable in terms of criminal law, or if not, then the act prescribes that there should be an inquest.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** And the inquest can be either informal, like the docket only goes to the magistrate in chambers and the magistrate makes a finding on the papers only or it can be a formal inquest, you know, a court procedure where the parties come to court before the magistrate presiding and evidence is led and, you know, cross-examination, legal representation, the whole thing. And then, you make a finding whether someone can be held accountable, criminally accountable, and then after that, there would be a criminal case.

**MR HOFSTATTER:** Right, as is, as has happened now with Rodrigues.

**MR WAGENER:** I can't tell you, you know it may or may not be correct. I can't quickly remember.

**MR HOFSTATTER:** Yeah, because what it says is official or alleged cause. So I guess if they were all official—

**MR WAGENER:** You're talking about people in detention, because I can

remember from my days in the state attorney's office, I can remember a case or two where, but that was during the unrest, you know, during the state of emergency days from between 1985 and 1990, that, you know, in unrest situations, where people were killed by the security forces in an unrest situation that got out of hand and there was shots fired and people died. I can remember there might have been cases in that regard where policemen and army people were in fact charged, but that's not in detention.

**MR HOFSTATTER:** Right, these are all in detention.

**MR WAGENER:** These are people already in detention. They're already arrested and they're in detention.

10 **MR HOFSTATTER:** Correct. Yes, exactly.

**MR WAGENER:** Yeah. I can't remember. It may be correct because I can't quickly remember of a case, you know, the first case that I was involved in of this nature was in 1977 when I was a rookie article clerk to my principal who represented the state in the Biko inquest in Pretoria.

15 **MR HOFSTATTER:** Okay.

**MR WAGENER:** And it was, that was a formal inquest for instance. It was a long hearing for days and days and at the end the magistrate said that nobody was to be held criminally accountable for Biko's death.

**MR HOFSTATTER:** Right.

20 **MR WAGENER:** These are situations like that.

**MR HOFSTATTER:** Yes, exactly. Those are the ones. So, they had drawn up a list of 73 of those.

**MR WAGENER:** Well, I assume if someone who had access to records and I think it's factually correct. I can't really say.

**MR HOFSTATTER:** Yeah, it's difficult to pin down.

**MR WAGENER:** I can't really say now. No because I can't remember offhand a  
5 matter where someone died in detention already. Yeah, it may be correct.

**MR HOFSTATTER:** Okay, and then the other thing I wanted to ask, we spoke briefly  
about, you know, whether you'd represented various people and the one person we spoke  
about, you said you'd represented, not in a post, TRC case sense, but in a different case  
was Eugene de Kock, and I've actually found, I don't know if you're familiar with the  
10 O'Malley archive.

**MR WAGENER:** Yes.

**MR HOFSTATTER:** I think you also were interviewed by O'Malley many years ago. I  
found there that you—

**MR WAGENER:** The Irishman who was, he was a professor of law in Boston.

15 **MR HOFSTATTER:** Okay.

**MR WAGENER:** He held a position there at the university in Boston in the USA.  
He was an Irishman and he also came to South Africa for some years and he interviewed  
people during the whole process of, you know, changing from the old to the new South  
Africa. And he conducted very interesting interviews, specifically with people, you know,  
20 he would conduct with the same person three, four, five interviews as things changed, a  
very interesting read.

**MR HOFSTATTER:** Yes.

**MR HOFSTATTER:** You can, yeah. If you're interested in the history of that change in South Africa it is quite a useful source, I think.

**MR HOFSTATTER:** Yes. I've been looking at those interviews and that's why I came across yours as well. There's a lot of material there and he seems to record very long interviews. There's a lot of ground covered and then he comes back to certain points to clarify. I thought it was pretty informative.

**MR WAGENER:** Because he was, I think students of history should read that because, you know, he interviewed people from all sides if I remember correctly.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** You know, often people came to South Africa, international people and they would only interview one side of the conflict and I had some clients at that time because I said to people, you know, that's not the way to do your research. But he was quite, O'Malley, he actually spoke to people from all sides.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** So, I was, I remember, seeing him and he interviewed me, I think once or twice and he, you know, he was, he was quite objective.

**MR HOFSTATTER:** Okay. Yeah. So, what he raised and presumably this was much closer to the time because when you and I spoke you were trying to recall in what capacity you had acted for De Kock, and he mentioned that you said to him that you'd actually defended De Kock for the ambush of a minibus when the occupants were murdered.

**MR WAGENER:** That's right. That's a Nelspruit case. That's a Nelspruit incident. That was the one situation where De Kock afterwards did not get amnesty for.

**MR HOFSTATTER:** Right.

**MR WAGENER:** That's the case that he actually spent his years in prison for, because what happened, and I was mad in that when it came out, later on at the TRC, when the truth came out, I was very unhappy because they took me for a huge ride there.

**MR HOFSTATTER:** Mm.

5 **MR WAGENER:** They gave a version to me and, you know, I'm an attorney I can't read minds, often wish that I could, but you know, they gave me a version and I asked the questions as far as I could in my office, but they stuck to a version and I remember I'm briefing junior counsel in that matter and we went to court on that and, got a positive result in terms of the criminal procedure.

10 **MR HOFSTATTER:** Mm-hm.

**MR WAGENER:** But then some years later, the TRC happened, and he was then with a different lawyer and then he and other guys, the guys involved in that incident, they then came forward with the truth, and it was quite a different version.

**MR HOFSTATTER:** Mm.

15 **MR WAGENER:** And I can remember I was not pleased with that at all because you know for me as a lawyer, I would be disturbed if a client said to me the truth are A, B and C, but let's go to court and do X, Y and Z. I mean, that is, if that is done, that is downright stupid for a lawyer to try and do that, you put your whole professional integrity at stake.

20 **MR HOFSTATTER:** Mm-hmm. Yeah, I mean, that's the thing, if somebody lies to you—

**MR WAGENER:** But if they lie to you, in hindsight, I must accept that there were cases where I was taken for a ride.

**MR HOFSTATTER:** Yeah, no I was just checking that particular case.

**MR WAGENER:** The Harms Commission is one.

**MR HOFSTATTER:** Right.

**MR WAGENER:** I mean, I was involved in the Harms Commission in 1990.

5 **MR HOFSTATTER:** Right.

**MR WAGENER:** A number of policemen came to me and they under oath gave evidence and they stuck to their versions and we as lawyers, we had to accept that those versions and brief through the whole process. And as I say, years later at the TRC, it all changed, right. 180 degrees.

10 **MR HOFSTATTER:** So was that quite a shock to you when you saw these changes?

**MR WAGENER:** Of course. You see, I always wanted to say that, you know, my integrity is foremost in my mind and I go to court on what people tell me. Except if it is clearly impossible, then I would put it to them and, then if they still want to stick to that, I would walk away. I did that in certain cases but if they stick to a version which is in a  
15 certain sense plausible, I can't compel them to, if I haven't got facts. Yes, there's a number of cases where I was very much unhappy, you know, I think me and my wife also, my wife often said to me, I can't believe it, you know, but the Harms Commission is a good example of that kind of situation.

**MR HOFSTATTER:** Right.

20 **MR WAGENER:** You see what a number of policemen, what evidence they gave at the Harms Commission.

**MR HOFSTATTER:** Yeah.

**MR WAGENER:** And then the same guy, what evidence they gave at the TRC at the amnesty process.

**MR HOFSTATTER:** Right and it's completely different.

**MR WAGENER:** It's 180 degrees around.

5 **MR HOFSTATTER:** Yeah. Okay, and I just wanted to make sure, because we'd spoken about the De Kock case, so I just wanted to double check that. And then the last one was, I'm trying to, I've been racking my brain. I've been talking to some people who, you know, studied this type of thing and about people from the former security forces who actually spent time in jail after '94. So I'm not talking about the cases, you know, like the  
10 Trust Feed massacre guys and the, not the people who managed to get acquitted before spending time or like your clients, who were, you know, got suspended sentences, but I'm trying to figure out apart from Eugene De Kock and Ferdi Barnard, offhand, and I'm just asking you this because you might remember this.

**MR WAGENER:** Ferdi Barnard was never, he wasn't a policeman at any stage.

15 **MR HOFSTATTER:** Right, but he was CCB, wasn't he?

**MR WAGENER:** Yes.

**MR HOFSTATTER:** So he was military. So I mean, I'm just thinking about the security forces as a whole.

**MR WAGENER:** Yeah, Ferdi Barnard. Yes.

20 **MR HOFSTATTER:** Yeah, apart from the two of them, who else actually spent time in jail?

**MR WAGENER:** For political offences?

**MR HOFSTATTER:** Yes, not you know, unrelated, but for—

**MR WAGENER:** What about that Mitchell guy?

**MR HOFSTATTER:** That was pre-'94, the Trust Feed massacre guy.

**MR WAGENER:** Yes, in KwaZulu Natal.

5 **MR HOFSTATTER:** Yeah, that was 90—

**MR WAGENER:** Was that before 94?

**MR HOFSTATTER:** Yes, and then he got amnesty. He's a, yeah, he's quite prominent now.

**MR WAGENER:** I think, he was, yeah, that's right. He got, yeah.

10 **MR HOFSTATTER:** I did look into that. Yeah, it was, I'm really trying to think about, you know, let's say '94 comes along, then there's the TRC process, then there's all these issues that we discussed a long time.

**MR WAGENER:** I think the case, the Chikane matter where the guys got prison sentences, but it was suspended sentences. Vlok, Van Der Merwe and the other guys.  
15 Yeah, but the sentences were wholly suspended.

**MR HOFSTATTER:** Yes, exactly. And you represented Gideon Nieuwoudt and he also didn't end up spending time in jail.

**MR WAGENER:** Yeah, I did not represent Gideon Nieuwoudt initially.

**MR HOFSTATTER:** Okay.

20 **MR WAGENER:** He came to me afterwards. He had different lawyers in the

amnesty process.

**MR HOFSTATTER:** Right.

**MR WAGENER:** Those Eastern Cape security policemen, they had other lawyers there and then they were unsuccessful in a number of amnesty hearings in the Eastern Cape. You know, the Goniwe matter, the Motherwell matter, the Pebco matter, things like  
5 that. And but after that, some of them came to me and said, you know, they are now in trouble because amnesty was refused.

**MR HOFSTATTER:** Right.

**MR WAGENER:** And then some of them became my clients, including Gideon  
10 Nieuwoudt, yes.

**MR HOFSTATTER:** But he didn't spend time in jail before he died, did he?

**MR WAGENER:** No, he was never convicted of anything.

**MR HOFSTATTER:** Yeah.

**MR WAGENER:** As far as I can remember. They were convicted in the Motherwell  
15 matter, hey? But—

**MR HOFSTATTER:** There were convictions, but they, my recollection...

**MR WAGENER:** Yeah, but the amnesty process intervened.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** Yes, that's right.

**MR HOFSTATTER:** And he was very ill towards the end and he—  
20

**MR WAGENER:** I think the short answer is that, no, they didn't spend time physically in prison or something.

**MR HOFSTATTER:** So can you think of anyone else apart from De Kock and Barnard? But perhaps if it comes to you, you could drop me an email or something, but  
5 it's just something that—

**MR WAGENER:** I can't think of anyone now.

**MR HOFSTATTER:** At the moment I'm being told that this is a fact. I just want to, I'm just sounding people out with knowledge who might say, no, you've forgotten about this person or that person.

10 **MR WAGENER:** I can't think of anyone. Nofomela, that was pre-94. I mean, well, Nofomela, but Nofomela, he was before 1990, before the Harms Commission.

**MR HOFSTATTER:** Mm.

**MR WAGENER:** He was in prison. That can be the position. I think you're right.

**MR HOFSTATTER:** Okay.

15 **MR WAGENER:** But I can't remember now anyone spending time in prison. I assume if you read some literature and statements by people who did their research, I would assume that can be true.

**MR HOFSTATTER:** Yeah, I've just, I, so far, nothing has contradicted that so, I just thought if you might have personal knowledge and say, oh, but you've forgotten about  
20 this case or that case.

**MR WAGENER:** I can't think, that might also be true. I can't think of anyone now. If I do remember, but I can't think. And you know, it would be something that one would

remember.

**MR HOFSTATTER:** Yes.

**MR WAGENER:** It would be, it would be quite unusual.

**MR HOFSTATTER:** Exactly.

5 **MR WAGENER:** You know, it might very well could be correct.

**MR HOFSTATTER:** Yeah, okay, well thanks. I just wanted to check those points with you. So, yeah, that's, what I wanted to double check. So thanks, I appreciate your time.

**MR WAGENER:** Okay.

**MR HOFSTATTER:** All right. Thanks very much and have a good weekend.

10 **MR WAGENER:** Cheers.

**MR HOFSTATTER:** Take care. Bye.

\*duplicated spoken words and phrases were omitted from the transcript.

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**REPORT  
AMNESTY TASK TEAM**

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**Secret****REPORT: AMNESTY TASK TEAM**

1. Background
  - 1.1 A Director-General's Forum, under the chairpersonship of the Director-General, Justice and Constitutional Development on 23 February 2004, appointed a Task Team to consider and report on the following:
    - "1. Consideration of 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. Consideration of a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past
    3. Bearing the above-mentioned in mind, whether legislative enactments are required."
  - 1.2 The Task Team comprises the following members:
 

Deon Rudman (Chairperson):	Department of Justice and Constitutional Development
Yvonne Mabule :	National Intelligence Agency
Vincent Mogotlane :	National Intelligence Agency
Gerhard Nel	National Prosecuting Authority
Lungisa Dyosi	National Prosecuting Authority
Ray Lalla :	South African Police Service
Joy Rathebe	Department of Defence
  - 1.3 The Task Team was requested to submit its report to the Director-General's Forum by close of business on 1 March 2004. The Task Team met for the first time on 26 February 2004 and again on 1 March

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2004. Commissioner Ray Lalla could unfortunately not attend the first meeting. He did, however, submit his proposals to the Task Team for its consideration.

**2. Terms of reference**

2.1 At the outset the Task Team discussed its terms of reference in detail. It came to the conclusion that it had to perform its task within the framework laid down by the President in his statement to the National Houses of Parliament and the Nation on the occasion of the Tabling of the Report of the Truth and Reconciliation Commission on 15 April 2003. The President provided the following guidelines:

- (a) There shall be no general amnesty, because it would fly in the face of the TRC process and detract from the principle of accountability which is vital, not only in dealing with the past, but also in the creation of a new ethos within our society.
- (b) Yet we also have to deal with the reality that many of the participants in the conflicts 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 who 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;
  - others who expected the political leadership of the state institutions to which they belonged to provide the overall context against which they could present their cases, which did not happen.

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- (c) "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."
- (d) "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."
- (e) "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."
- (f) "This is not a desire for vengeance; nor would it compromise the rights of citizens who may wish to seek justice in our courts."
- (g) "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."
- (h) "This approach leaves open the possibility for individual citizens to take up any grievance related to human rights violations with the courts."

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- (i) "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."
- (j) "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."
- (k) "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."

2.2 Paragraph 1 of the Task Team's terms of reference relates directly to the abovementioned framework determined by the President. Paragraphs 2 and 3 were added to the Task Team's terms of reference in order to enable it to pursue alternative routes in order to address the concerns expressed by the President should the Task Team deem it necessary.

3. Discussion

3.1 In its deliberations the Task Team also took cognisance of the following factors:

- (a) In terms of section 179(1) and (2) of the Constitution the National Prosecuting Authority (NPA) is an independent constitutional institution and the National Director of Public Prosecutions (NDPP) has full discretion on whether a particular

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prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

- (b) Any recommendations relating to the granting or refusing of amnesty should be in line with the TRC process which was constitutionally entrenched as a trade-off between the individual's right to seek justice in a court of law, on the one hand, and the imperatives of reconciliation and reparation, on the other.

### 3.2 Ad paragraph 1 of terms of reference

3.2.1 In order to give effect to the "arrangements" contemplated in the President's statement as reflected in paragraph 1 of the Task Team's terms of reference, it is recommended that a Departmental Task Team be appointed comprising members of the following Departments or institutions:

- The Department of Justice and Constitutional Development
- The Intelligence Agencies
- The South African National Defence Force
- The South African Police Service
- Correctional Services
- The National Prosecuting Authority
- Office of the President

3.2.2 The functions of the proposed Task Team should 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.

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- (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.
- (c) To—
- receive information or representations from victims, perpetrators, legal representatives or any other person or institution regarding any specific matter;
  - gather intelligence information;
  - investigate the matter;
  - consult victims.
- (d) To consider the following factors when carrying out its mandate:
- (i) The general criteria governing a decision to prosecute as determined by the NDPP in the Policy Manual attached hereto as Annexure "A".
  - (ii) The following specific criteria:
    - o Whether the alleged offence is associated with a political objective committed in the course of the conflicts of the past.

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- o Whether a prosecution can be instituted on the strength of adequate evidence.
- o Whether the case, geographically and politically, reflects the aims and objectives set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and is not in conflict with the requirements of objectivity in prosecutions specified in the Constitution.
- o Whether the offence in question is serious
- o Whether the ill health of or other humanitarian consideration relating to the accused may justify the non-prosecution of the case.
- o Whether the prosecution will lead to the traumatising of victims and conflicts in areas where reconciliation has already taken place.
- o The degree of co-operation on the part of the alleged offender.
- o The credibility of the alleged offender.
- o The alleged offender's sensitivity to the need for restitution.
- o The alleged offender's further endeavours to expose possible further clandestine operations during the past years of conflict.
- o The degree of remorse shown by the alleged offender and his or her attitude towards reconciliation
- o The degree of indoctrination to which the alleged offender was subjected
- o The extent to which the alleged offender carried out instructions or perceived instructions.
- o The disclosure of organisations/individuals, if any, under whose instructions the alleged offender operated.

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- o The alleged offender's role during the TRC process – co-operation, full disclosure and assisting the process in general (if relevant).
- o Renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender.
- o Whether the alleged offender fully disclosed the alleged offences.
- o The views of the NPA.
- o If the accused is in custody, the views of the presiding judge or magistrate.
- o Any other criteria for deciding whether a political offence was committed as set out in the TRC Act.
- o Any further criteria, which the Task Team might deem necessary.

(e) To consider—

- (i) the provisions of section 105A of the Criminal Procedure Act, 1977 (Act 51 of 1977), relating to plea and sentence agreements and the directives issued by the NDPP in terms of section 105A(11) of the said Act;
- (ii) the provisions of sections 7 of the Criminal Procedure Act relating to the issuing of a *nolle prosequi* certificate and the right of a private person to institute criminal proceedings in terms of the section 8 of the said Act;
- (iii) the provisions of section 18 of the Criminal Procedure Act relating to the lapsing of the right to institute a prosecution for any offence after the expiration of a period of 20 years from the time when the offence was committed, other than the offences of murder; treason committed when the Republic is in a state of war; robbery, if aggravating circumstances were present; kidnapping; child stealing; rape; or the crime of genocide, crimes

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against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002.

- (iv) the possibility of diversion in the case of juvenile offenders;
- (v) possible arrangements settling the matter out of court;
- (vi) the provisions of section 204(2) of the Criminal Procedure Act relating to the discharge of the alleged offender from prosecution for the alleged offence if such offender testified as a state witness and answered all questions frankly and honestly.

3.2.3 If the above proposals are acceptable, it is recommended that the President announces the proposed process and invites full participation by those who may benefit from the process.

3.2.4 The Task Team realises that the proposed process will have the following shortcomings/concerns:

- (a) A possible negation of the constitutional rights of victims, the public at large and alleged offenders.
- (b) The possibility of the institution of private prosecutions.
- (c) The absence of any guarantee that alleged offenders will not be prosecuted. This might mean that they will be reluctant to approach the Task Team and make full disclosure. The concerns relating to persons who have disappeared, the arms caches that have not yet been discovered and the Kwazulu-Natal problem will not be solved.

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(d) Public perception regarding the participation in a further amnesty process by the security services as the public may regard them as perpetrators in the conflicts of the past.

3.3 Ad paragraph 2 of terms of reference

3.3.1 The Task Team is of the view that the only way to address the above concerns adequately would be to provide for a further amnesty process similar to that of the TRC process. This possibility elicited much debate within the Task Team. On the one hand, there were those who rejected this possibility out of hand. They argued that such a process would undermine and discredit the TRC process, further undermine the reconciliation process and not necessarily achieve the desired objectives. They argued that there is no reason why offenders who previously refused to participate in the TRC process will now all of a sudden decide otherwise. Some members of the Task Team, however, placed emphasis on the need to create a further effective opportunity for full disclosure in order to address the concerns referred to in paragraph 3.2.4(c) above. They argued that a substantial number of those individuals who were in the past misled by their leadership and others who expected their political leadership to provide the overall context against which they could present their cases, may make use of a further amnesty process.

3.3.2 In the light of the views expressed by the President regarding a further amnesty process, the Task Team decided not to make a recommendation in this regard and to leave this decision in the hands of Government. Should Government, however, decide to proceed with such a further process, a draft Indemnity Bill is attached as Annexure "B" for consideration.

3.4 Ad paragraph 3 of terms of reference

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The recommendations under paragraph 1 of the terms of reference do not require any legislation. Should Government, however, decide on a further amnesty process as discussed in paragraph 3.3, legislation will be required since the mechanisms and procedures of the TRC Act have run their course and can no longer be applied. If it is decided to follow the latter route, an amendment of the Constitution is also proposed in order to enable such legislation being adopted and to pass muster in the Constitutional Court.

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# AMNESTY TASK TEAM

## FURTHER REPORT

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## FURTHER REPORT: AMNESTY TASK TEAM

## 1. Background Information

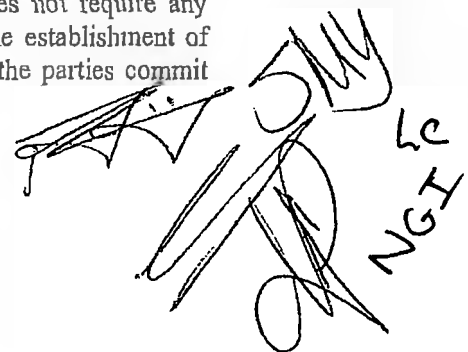
- 1.1 On 3 March 2004 the Amnesty Task Team submitted a Report to a Heads of Department Forum for consideration.
- 1.2 The Heads of Department discussed the Report with members of the Task Team, whereafter they deliberated the Task Team's proposals and recommendations *in camera*. Following these deliberations, the Heads of Department indicated that they prefer the Task Team's recommendations relating to the establishment of a Departmental Task Team (hereinafter referred to as Option 1). They, however, requested the Task Team to give further consideration to the following aspects relating to Option 1:
  - (a) Parallel structures in order to assist the proposed Departmental Task Team, are not acceptable. In performing its functions the proposed Task Team must make use of existing structures.
  - (b) Consider whether there is a way in which private prosecution and civil litigation can be eliminated if the National Director of Public Prosecutions decides not to prosecute? Investigate the possibility and desirability of legislation, if required.
  - (c) The proposed Task Team should work under the direct supervision of an Inter-Ministerial Committee.
  - (d) It is important that the proposed Task Team, the Inter-Ministerial Committee and the National Director, in performing their functions and reaching decisions, should take national interest into account.
  - (e) Advise the Forum on whether a person who is aggrieved by a decision of the National Director may approach the International Criminal Court.
  - (f) Advise the Forum on a time line for the completion of the work of the proposed Task Team. Twelve months was mentioned as a possibility.

## 2. Discussion

## 2.1 The establishment of a Departmental Task Team

Before discussing the above aspects, the Task Team once again considered the question whether legislation is required to establish the proposed Departmental Task Team. The Task Team met with two senior State Law Advisers of the Office of the Chief State Law Adviser. They confirmed the Task Team's conclusion in paragraph 3.4 of its Report, namely, that the recommendations pertaining to the establishment of a Departmental Task Team is an administrative process and does not require any legislation. They, however, recommended that the process and the establishment of the proposed Task Team be put into writing and suggested that the parties commit

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themselves to the process in a Memorandum of Understanding. The Task Team supports this proposal of the State Law Advisers

**2.2 Ad paragraph 1.2(a): The involvement of existing structures**

The Task Team supports this proposal of the Forum. However, in order to ensure the effective cooperation of such existing structures it is important that the existing structures, prior to the implementation of the proposed structure, commit themselves and give their full support and cooperation to the proposed process. It is proposed that such existing structures should be parties to the Memorandum of Understanding contemplated in paragraph 2.1 *supra*.

**2.3 Ad paragraph 1.2(b): Consider the possibility and desirability of eliminating private prosecution and civil litigation in cases of no prosecution**

2.3.1 The question whether it is possible or desirable to eliminate private prosecution and civil litigation elicited much debate within the Task Team. The Task Team obtained a written legal opinion from Adv JH Bruwer (attached hereto as Annexure "A") and also discussed the question with the two State Law Advisers referred to in paragraph 2.1 above. They are all in agreement that any legislation eliminating private prosecution and civil litigation will at least affect a person's right to equality (section 9(1) of the Constitution) and the right of access to courts (section 34). They also indicated that it is doubtful whether the motivation for such legislation would meet the requirements of section 36 (limitation clause) of the Constitution, and in case of the enactment of such legislation, an amendment of the Constitution would be required.

2.3.2 The State Law Advisers referred to in paragraph 2.1 above, indicated that they would advise against the enactment of any further legislation, since it would limit the rights of the victims or other interested parties. They further agreed with the Task Team that the proposed legislation, eliminating private prosecution and civil litigation, might be seen as a further amnesty process, which would be inconsistent with the Heads of the Department's view that Option 2 (a further amnesty process) is not an option at all.

2.3.3 In the final instance we wish to draw the Forum's attention to an article in *Rapport* of 7 March 2004 relating to the question of amnesty. During an interview with Archbishop Desmond Tutu, he expressed the view that every person who has not received amnesty through the TRC-process may be prosecuted and any new agreement to stop prosecutions is undesirable, since it will, among others, have the effect of negating the amnesty process of the TRC.

2.3.4 In the light of the above, the Task Team is of the view that private prosecution and civil litigation can only be eliminated by way of legislation and a Constitutional amendment. The Task Team is of the view that such a step would not be desirable.

**2.4 Ad paragraph 2.1(c): The establishment of an Inter-Ministerial Committee**

The Task Team supports this proposal. However, it wishes to point out that the State Law Advisers are of the view that the establishment of such a further structure may constitute a cumbersome process and increase the possibility of conflicting views

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between the various role-players and structures. Furthermore, they pointed out that the process might be seen as an attempt by the Government to put undue pressure on the National Director of Public Prosecutions in reaching an independent decision.

**2.5 Ad paragraph 2.1(d): National interest should be the paramount objective**

The Task Team wholeheartedly agrees with this viewpoint of the Forum.

**2.6 Ad paragraph 2.1(e): The involvement of the International Criminal Court**

This question was also referred to Adv JH Bruwer for his advice. In paragraph 3 of Annexure "A" he comes to the conclusion that, taking into account the provisions of section 5(1), read with section 5(6) and the definitions of the relevant crimes of the Rome Statute of the International Criminal Court Act, 2002 (Act No. 27 of 2002), "it is not inconceivable that a complainant who is prohibited by legislation contemplated in paragraph 1(a) from instituting a private prosecution in the national court may approach the International Criminal Court for relief". The Task Team agrees with this viewpoint.

**2.7 Ad paragraph 2.1(e): Setting a time line for the Task Team to complete its work**

The Task Team is hesitant to propose a specific time line at the stage when the process is to be announced. The setting of a time line in respect of the TRC process led to expectations and the subsequent extension of the TRC process, although justified and unavoidable, led to fierce criticism. It is proposed that the President should rather indicate that it is expected that the Task Team will finalise its work within a specified period and that such period will be determined taking into account the extent to which its objectives are achieved.

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guide decisions on whether to investigate matters further or to make recommendations for prosecution. Bulelani said he was obliged by law to prosecute where there was enough evidence to make a case, but at the same time part of him asked if it was worth it.”

And I am just going to pause there, we will come back to the paragraph a bit later but the criteria that the HRIU drew up, are you, I do not know whether you and your team are aware, whether that is currently before this Commission, is there a list of criteria that we can refer to?

ADV NGCUKA: No, I cannot.

ADV VARNEY: Okay.

ADV NGCUKA: I cannot recall that, I am sorry.

ADV VARNEY: All right and I do not think we are aware of that. We will of course ask the evidence leaders if they can try and track down those criteria but since the HRIU did develop criteria to guide decisions which I am assuming that you, do you agree with those criteria?

ADV NGCUKA: Ja, certainly.

20 ADV VARNEY: Okay.

ADV NGCUKA: Otherwise I would have said no.

ADV VARNEY: Right, so if they developed those guidelines or criteria, was there really any need for the subsequent Amnesty Task Team which was established to propose new criteria which ultimately saw their way into the amended prosecution policy? And I know

these guys [indistinct] years after you left, but what is your response to that?

ADV NGCUKA: No, maybe let us deal with it now.

ADV VARNEY: Okay.

ADV NGCUKA: Because my representatives went to that meeting, attended the meeting, came back and briefed me, and we discussed it and then we decided that it was, for us, there was no point in us continuing to participate in that process. We did not agree that that is what should happen, but also we can explain in that we were just  
10 concerned that some of the people in that meeting were concerned about what came to be known as the, those 37 cases of the ANC.

And that whole participation in that process would have compromised us, because we would have had to take decisions whether to prosecute or not to prosecute them. And so we felt that it was not necessary for us to participate, in fact it would not have been wise for us to participate in that process, hence my instruction was let us pull out of it, and we did.

ADV VARNEY: And can you recall approximately and I know this is going back many years and I am sorry to put you on the spot, I mean  
20 you have to recollect after so many years but approximately when did you did you give that instruction?

ADV NGCUKA: No, after the first meeting, whenever the first meeting was, probably it was, I think it was in 2003. So after that meeting when they came back to report what had transpired in that meeting, what had happened and so we discussed it and we felt no, it

is not a good idea for us to participate in that forum.

ADV VARNEY: Okay. All right, I think well it was after the first meeting and we should be able to give you a [indistinct]...[intervenes]

ADV NGCUKA: If you can find when the first meeting was, because that is the meeting that was convened by Mr Pikoli.

ADV VARNEY: Oh, so I am advised that the first meeting was on the 26 February 2004 and that comes from the report of the Amnesty Task Team which is at page 201 of that bundle.

ADV NGCUKA: Whatever the timing is, if that was the meeting, that  
10 was the meeting that we attended if that was the first meeting.

ADV VARNEY: Okay.

ADV NGCUKA: I cannot contest that.

ADV VARNEY: So you then say you pulled your representatives from the process?

ADV NGCUKA: Ja.

ADV VARNEY: And I will have to ask my colleagues to check whether in fact the NPA was no longer represented in those meetings, I will...[intervenes]

ADV NGCUKA: During my time.

20 ADV VARNEY: During your time, yes.

ADV NGCUKA: That is correct.

ADV VARNEY: Yes, no we will only deal with...[intervenes]

ADV NGCUKA: Ja.

ADV VARNEY: I suppose from February 2004...[intervenes]

ADV NGCUKA: Until August 2004.

# Prosecution Policy Amendments for Criminal Matters arising from Pre-1994 Conflicts: briefing

## Meeting Summary

*A summary of this committee meeting is not yet available.*

### SUMMARY

The National Prosecution Authority (NPA) briefed the Committee on its proposals to amend its Prosecution Policy, which will allow it to decide whether or not to prosecute cases arising from conflicts of the past and which were committed before 11 May 1994. The President had made it clear that there would be no general amnesty as this would fly in the face of the Truth and Reconciliation Commission process. The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NPA emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. The NPA recommended that policy be determined in terms of section 179(5)(a) of the Constitution.

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which had noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. The amended Prosecution Policy came into effect on the 1<sup>st</sup> of December 2005.

Members of the Committee asked how a prosecution could be triggered if the NPA had an idea of how many cases were pending and what the effect of the amendments would be on the budget of the NPA.

### MINUTES

Adv G Nel, the Deputy Director of Public Prosecutions, said that according to section 179(5)(a) and (b) of the Constitution, the National Director of Public Prosecution with the concurrence with the Minister must determine Prosecution Policy. Any amendments to this policy were to be included in the report referred to in section 35(2)(a) of the National Prosecution Authority Act. As a matter of public interest, the amendments in question were tabled before Parliament.

Adv Nel said that in his statement to Parliament on the tabling of the Report of the Truth and Reconciliation Commission (TRC) on the 25<sup>th</sup> of April 2003, the President had made it clear that there would be no general amnesty as this would fly in the face of the TRC process. The President said that the matter could not be resolved by setting up another amnesty process which would mean suspending the constitutional rights of those on the receiving end of gross human rights violations. Thus, any amnesty process, whether general, individualised or in any other form, had been categorically excluded by Government as an option, not least because it was unconstitutional.

The President's proposal was to leave the matter in the hands of the National Directorate of Public Prosecutions (NDPP) to pursue any cases that, as is normal practice, it believed deserved prosecution and could be prosecuted. The NDPP would leave its doors open, for those willing to divulge information at their disposal and to co-operate in unearthing the truth, to enter into arrangements that were standard in the normal execution of justice, and which were accommodated in legislation. Adv Nel emphasised that all their proposals were within current legislation such as the Criminal Procedure Act. The President also said that the involvement

of victims was crucial in determining the appropriate course of action.

Section 179(1) of the Constitution stated that there was a single prosecuting authority, and section 179(2) gave the prosecuting authority the power to institute criminal proceedings on behalf of the state and any functions incidental to this. Thus the NPA was an independent constitutional institution. In determining whether or not to prosecute, the NDPP had issued general criteria governing such a decision. In deciding whether some matters of the past were prosecutable, the guidelines were insufficient and required specific policy guidelines. Adv Nel recommended that policy be determined in terms of section 179(5)(a).

The amendments proposed by the NDPP were submitted and approved by the Minister of Justice and Constitutional Development, who also submitted them to Cabinet which noted the amended Prosecution Policy. All the Directors of Public Prosecutions also supported the amendments. All the cases were centralised in the office of the NDPP to ensure consistency in decision-making especially given the complexities in some of these cases. The Priority Crimes Litigation Unit (PCLU) was responsible for overseeing the investigations and instituting prosecutions. Since this task team was based in Pretoria, it was desirable that the cases be centralised in the office of the NDPP.

The Prosecution Policy was amended by the insertion of a new paragraph 8A. This gave the NDPP power to supplement or amend the Prosecution Policy so as to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest. In line with this amendment, the NDPP determined the criteria in Appendix A relating to the prosecution of cases arising from conflicts of the past and were committed before 11 May 1994. Appendix A had three parts. Paragraph A was an introduction and paragraph B set out the procedural arrangements which must be adhered to in the prosecution process in respect of crimes arising from conflicts of the past. Paragraph C set out the criteria governing the decision to prosecute or not. This amended Prosecution Policy came into effect on the 1<sup>st</sup> of December 2005.

### **Discussion**

Ms S Camerer (DA) asked how a prosecution could be triggered. Now that the guidelines were in place, would the workload of the PCLU greatly increase, and how many people were involved?

Adv Nel replied that a prosecution could be triggered firstly by a complaint being lodged by a victim. The PCLU had already looked at some of the cases from the TRC where amnesty had not been given. Some matters could be brought by the intelligence agency as well as the police. Thus there was a pro-active aspect to the triggering of prosecutions. It was not necessary at present to appoint new personnel given their current workload, but it may become necessary later on. It was hard to predict.

Mr G Solomon (ANC) asked what would happen where the victims did not want to prosecute an accused as the crime may have occurred many years ago.

Adv Nel said that the NDPP looked at all the circumstances of the case, such as the seriousness of the case, and whether there had been full disclosure for instance. It was for the NDPP to decide whether or not it would prosecute, not the victim.

Mr L Joubert (IFP) asked if the NPA had an idea of how many cases were pending. Also, in the case of a private prosecution, what was the situation regarding *locus standi*?

Adv Nel replied that at present it was impossible to know exactly how many cases were pending especially as the amendments were new. With regards to *locus standi*, anyone with an interest in the matter could bring an action.

Adv C Johnson (NNP) asked if looking at the circumstances of the accused created a loophole in the system, for example where they claimed to be too old or infirm to stand trial. Could the NDPP be taken on review by an unsatisfied victim if they decided not to prosecute?

Adv Nel replied that it was important to consider things like the health of the accused. The Chairperson added that there was no hierarchy of criteria. Each case had to be decided on its merits. The whole basket of criteria had to be examined in making the determination of whether or not to prosecute. The NDPP could be taken on review.

Mr B Magwanishe (ANC) asked what the effect of the amendments would be on the budget of the NPA.

Adv Nel said that he did not see a major effect on the NPA's budget given the number of cases they were dealing with now. It was hard to predict how many more people would come forward and how this would affect their budget.

The meeting was adjourned.

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Appendix A

## PREFACE

Crime cannot be allowed to undermine the constitutional democracy in South Africa. The efforts of the Prosecuting Authority should therefore be directed at reducing pervasive criminal activities. An efficient Prosecuting Authority will also enhance public confidence in the criminal justice system.

Prosecutors are the gatekeepers of the criminal law. They represent the public interest in the criminal justice process.

Effective and swift prosecution is essential to the maintenance of law and order within a human rights culture.

Offenders must know that they will be arrested, charged, detained where necessary, prosecuted, convicted and sentenced.

The Prosecution Policy is aimed at promoting the considered exercise of authority by prosecutors and contributing to the fair and even-handed administration of the criminal laws.

This Policy is the end result of a process of intense consultation amongst all prosecutors in the country. It has also been circulated to a number of criminal justice organizations, government departments, academic institutions and community organizations.

The wealth of their combined knowledge and experience has helped significantly to shape the contents of this document.

## 1. INTRODUCTION

The Constitution of the Republic of South Africa provides for a single National Prosecuting Authority, consisting of—

- the National Director of Public Prosecutions, who is the head of the Prosecuting Authority,
- Deputy National Directors,
- Directors,
- Deputy Directors, and
- Prosecutors.

As an organ of state the Prosecuting Authority must give effect to the laws of the country; as an instrument of justice it must exercise its functions without fear, favour or prejudice.

The Prosecuting Authority has the power and responsibility to institute and conduct criminal proceedings on behalf of the State and to carry out any necessary functions incidental thereto.

The Constitution requires the National Director of Public Prosecutions to determine, with the agreement of the Minister of Justice and after consulting the Directors of Public Prosecutions, a "*prosecution policy which must be observed in the prosecution process*".

This Prosecution Policy must be tabled in Parliament and is binding on the Prosecuting Authority. The *National Prosecuting Authority Act* also requires that the *United Nations Guidelines on the Role of Prosecutors* should be observed.

The Prosecuting Authority is accountable to Parliament and ultimately to the people it serves. Every prosecutor is accountable to the National Director who, in turn, is responsible for the performance of the Prosecuting Authority.

The law gives a discretion to the Prosecuting Authority and individual prosecutors with regard to how they perform their functions, exercise their powers and carry out their duties. This discretion must, however, be exercised according to the law and within the spirit of the Constitution.

## 2. PURPOSE OF POLICY PROVISIONS

The aim of this Prosecution Policy is to set out, with due regard to the law, the way in which the Prosecuting Authority and individual prosecutors should exercise their discretion.

The purpose of this Prosecution Policy is, therefore, to guide prosecutors in the way they perform their functions, exercise their powers and carry out their duties. This will serve to make the prosecution process more fair, transparent, consistent and predictable.

By promoting greater consistency in prosecutorial practices nationally, these policy provisions will contribute to better training of prosecutors and better coordination of investigative and prosecutorial processes between departments.

Since the Prosecution Policy is a public document, it will also inform the public about the principles governing the prosecution process and so enhance public confidence.

These principles have been written in general terms to give direction rather than to prescribe. They are meant to ensure consistency by preventing unnecessary disparity, without sacrificing the flexibility that is often required to respond fairly and effectively to local conditions.

### 3. THE ROLE OF THE PROSECUTOR

Prosecutors must at all times act in the interest of the community and not necessarily in accordance with the wishes of the community.

The prosecutor's primary function is to assist the court in arriving at a just verdict and, in the event of a conviction, a fair sentence based upon the evidence presented. At the same time, prosecutors represent the community in criminal trials. In this capacity, they should ensure that the interests of victims and witnesses are promoted, without negating their obligation to act in a balanced and honest manner.

The prosecutor has a discretion to make decisions which affect the criminal process. This discretion can be exercised at specific stages of the process, for example:

- the decision whether or not to institute criminal proceedings against an accused;
- the decision whether or not to withdraw charges or stop the prosecution;
- the decision whether or not to oppose an application for bail or release by an accused who is in custody following arrest;
- the decision about which crimes to charge an accused with and in which court the trial should proceed;
- the decision whether or not to accept a plea of guilty tendered by an accused;
- the decision about which evidence to present during the trial;
- the decision about which evidence to present during sentence proceedings, in the event of a conviction; and
- the decision whether or not to appeal to a higher court in connection with a question of law, an inappropriate sentence or the improper granting of bail, or to seek review of proceedings.

Members of the Prosecuting Authority must act impartially and in good faith. They should not allow their judgement to be influenced by factors such as their personal views regarding the nature of the offence or the race, ethnic or national origin, sex, religious beliefs, status, political views or sexual orientation of the victim, witnesses or the offender. Prosecutors must be courteous and professional when dealing with members of the public or other people working in the criminal justice system.

#### 4. CRITERIA GOVERNING THE DECISION TO PROSECUTE

##### (a) General

The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. This often happens after the suspect has been arrested. The case needs to be studied to make sure that it is properly investigated.

The prosecutor should consider whether to—

- request the police to investigate the case further;
- institute a prosecution;
- decline to prosecute and to opt for pre-trial diversion or other non-criminal resolution; or
- decline to prosecute without taking any other action.

The decision whether or not to prosecute must be taken with care, because it may have profound consequences for victims, witnesses, accused and their families. A wrong decision may also undermine the community's confidence in the prosecution system.

Resources should not be wasted pursuing inappropriate cases, but must be used to act vigorously in those cases worthy of prosecution.

In deciding whether or not to institute criminal proceedings against an accused, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued.

This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements.

Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made.

This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made.

This may occur after having heard and considered the version of the accused and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

**(b) Factors to be considered when evaluating evidence**

When evaluating the evidence prosecutors should take into account all relevant factors, including—

*How strong is the case for the State?*

- Is the evidence strong enough to prove all the elements of an offence?
- Is the evidential material sufficient to meet other issues in dispute?

*Will the evidence be admissible?*

- Will the evidence be excluded because of the way in which it was acquired or because it is irrelevant or because of some other reason?

*Will the state witnesses be credible?*

- What sort of impression is the witness likely to make?
- Are there any matters, which might properly be put by the defence to attack the credibility of the witness?
- If there are contradictions in the accounts of witnesses, do they go beyond the ordinary and expected, thus materially weakening the prosecution case?

*Will the evidence be reliable?*

- If, for example, the identity of the alleged offender is likely to be an issue, will the evidence of those who purport to identify him or her be regarded as honest and reliable?

*Is the evidence available?*

- Are the necessary witnesses available, competent, willing and, if necessary, compellable to testify, including those who are out of the country?

*How strong is the case for the defence?*

- Is the probable defence of the accused likely to lead to his or her acquittal in the light of the facts of the case?

**(c) Prosecution in the public interest**

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.

There is no rule in law, which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice.

When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

*The nature and seriousness of the offence:*

- The seriousness of the offence, taking into account the effect of the crime on the victim, the manner in which it was committed, the motivation for the act and the relationship between the accused and the victim.
- The nature of the offence, its prevalence and recurrence, and its effect on public order and morale.
- The economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public.
- The likely outcome in the event of a conviction, having regard to sentencing options available to the court.

*The interests of the victim and the broader community:*

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.
- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

*The circumstances of the offender:*

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.
- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the*

*accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).*

- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.
- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.

It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

## 5. CASE REVIEW

### (a) Stopping of proceedings

Criminal proceedings may sometimes be stopped after a plea has already been entered. This would normally only occur when it becomes clear during the course of the trial that it would be impossible for the State to prove its case or where other exceptional circumstances have arisen which make the continuation of the prosecution undesirable.

If a prosecution is stopped, an accused will be acquitted and may not be charged again on the same set of facts. A prosecutor may therefore not stop a prosecution, unless the Director of Public Prosecutions or his or her delegate has consented thereto. Such decisions should therefore be made with circumspection.

### (b) Restarting a prosecution

People should be able to rely on and accept decisions made by members of the Prosecuting Authority. Normally, when a suspect or an accused is informed that there will not be a prosecution or that charges have been withdrawn, that should be the end of the matter.

There may, however, be special reasons why a prosecutor will review a particular case and restart the prosecution. These include:

- an indication that the initial decision was clearly wrong and should not be allowed to stand;
- an instance where a case has not been proceeded with in order to allow the police to gather and collate more evidence, in which case the prosecutor should normally have informed the accused that the prosecution might well start again; and

- a situation where a prosecution has not been proceeded with due to the lack of evidence, but where sufficient incriminating evidence has since come to light.

A number of statutes provide that a prosecution for an offence under a particular law cannot be commenced or proceeded with unless the consent of a Director of Public Prosecutions has been obtained.

The inclusion of such requirements in legislation is intended to ensure that prosecutions are not brought in inappropriate circumstances.

Other reasons for these requirements may involve the use of the criminal law in sensitive or controversial areas where important considerations of public policy should be taken into account.

Similarly, rules of practice require that certain matters be referred to a Director of Public Prosecutions before a prosecution is proceeded with.

As a matter of policy, it is important that certain decisions are made at the appropriate level of responsibility to ensure consistency and accountability in decision-making.

## 6. FORUM OF TRIAL, DETERMINATION OF CHARGES AND ACCEPTANCE OF PLEAS

### (a) Forum of trial

The law directs and policy considerations suggest that certain types of prosecutions sometimes be conducted at specified jurisdictional levels.

In practice this results in certain types of cases being heard in the District Court, some in the Regional Court and others in the High Court.

In terms of certain legislation and rules of practice, the instruction of a Director of Public Prosecutions is required to determine the forum in which the trial should proceed.

In determining whether or not a case is appropriate for hearing in the High Court, the following factors, *inter alia*, should be taken into account:

- the nature and complexity of the case and its seriousness in the circumstances;
- the adequacy of sentencing provisions in the lower courts and whether a conviction in the High Court carries a greater deterrent effect;
- any specific legal provision on, or any implied legislative preference for, a particular forum of trial;
- any delay, cost or adverse effect that witnesses may have to incur if the case is heard in the High Court; and
- the desirability of a speedy resolution and disposal of some prosecutions in available lower courts, aimed at reducing widespread criminal activity.

The decision regarding the court in which to prosecute an accused is determined by the complexity and seriousness of an offence, and the need for the Prosecuting Authority to guard against making decisions that will bring the law into disrepute.

**(b) Determination of charges**

The process by which charges are selected must be compatible with the interests of justice.

Prosecutors should decide upon, and draw up charges based on, available evidence which will—

- reflect adequately the nature, extent and seriousness of the criminal conduct and which can reasonably be expected to result in a conviction;
- provide the court with an appropriate basis for sentence; and
- enable the case to be presented in a clear and simple way.

This means that prosecutors may not necessarily proceed with the most serious charge possible.

Additional or alternative charges may be justified by the amount of evidence and where such charges will significantly enhance the likelihood of a conviction of an accused or co-accused.

However, the bringing of unnecessary charges should, in principle, be avoided because it may not only complicate or prolong trials, but also amount to an excessive and potentially unfair exercise of power.

Prosecutors should therefore not formulate more charges than are necessary just to encourage an accused to plead guilty to some. Similarly, a more serious charge should not be proceeded with as part of a strategy to obtain a guilty plea on a less serious one.

**(c) Acceptance of pleas**

An offer by the defence of a plea of guilty on fewer charges or on a lesser charge may be acceptable, provided that -

- the charges to be proceeded with readily reflect the seriousness and extent of the criminal conduct of an accused;
- the plea to be accepted is compatible with the evidential strength of the prosecution case;
- those charges provide an adequate basis for a suitable sentence, taking into account all the circumstances of the case; and
- where appropriate, the views of the complainant and the police as well as the interests of justice, including the need to avoid a protracted trial, have been taken into account.

## 7. THE TRIAL PROCESS AND RELATED MATTERS

Prosecutors work in an adversarial context and seek to have the prosecution sustained. Cases should therefore be presented fearlessly, vigorously and skilfully.

At the same time, prosecutors should present the facts of a case to a court fairly. They should disclose information favourable to the defence (*even though it may be adverse to the prosecution case*) and, where necessary, assist in putting the version of an unrepresented accused before court.

This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. On the other hand, the prosecutor should not oppose the release from custody of an accused if the interests of justice permit.

Prosecutors should show sensitivity and understanding to victims and witnesses and should assist in providing them with protection where necessary. In suitable cases the prosecutor should advise the victim of the possibility of being compensated for the harm suffered as a result of the crime.

As far as it is practicable and necessary, prosecutors should consult with victims and witnesses before the trial begins. They should assist them by giving them appropriate and useful information on the trial process and reasons for postponements and findings of the court, where necessary.

Prosecutors are not allowed to participate in public discussion of cases still before the court because this may infringe the rule against comment on pending cases and may violate the privacy of those involved.

During the sentencing phase of a criminal case, prosecutors should assist the court by ensuring that the relevant facts are fully and accurately brought to its attention.

They should also make appropriate recommendations with a view to realizing the general purposes of sentence. These include the need for retribution, the deterrence of further criminal conduct, the protection of the public from dangerous criminals and the rehabilitation of offenders.

The Prosecuting Authority should give special attention to the effective and speedy disposal of cases identified as priority matters.

Prosecutors should specialize in the prosecution of certain offences where desirable and practicable.

The Prosecuting Authority should, as far as possible, make its senior trial prosecutors available to conduct the most difficult cases.

## 8. CO-OPERATION AND INTERACTION WITH POLICE AND OTHER CONSTITUENT AGENCIES

Effective co-operation with the police and other investigating agencies from the outset is essential to the efficacy of the prosecution process. If a case is not efficiently prepared initially, it will less likely lead to a prosecution or result in a conviction.

The decision to start an investigation into possible or alleged criminal conduct ordinarily rests with the police. The Prosecuting Authority is usually not involved in such decisions although it may be called upon to provide legal advice and policy guidance.

In major or very complex investigations, such an involvement may occur at an early stage and be of a fairly continuous nature. If necessary, specific instructions should be issued to the police with which they must comply.

In practice, prosecutors sometimes refer complaints of criminal conduct to the police for investigation. In such instances, they will supervise, direct and co-ordinate criminal investigations.

Provision is made for Investigating Directors of the Prosecuting Authority to hold inquiries or preparatory investigations in respect of the commission of certain offences brought to their attention.

Prosecutors have the responsibility under the *National Prosecuting Authority Act* to determine whether a prosecution, once started, should proceed.

Such decisions are made independently, but prosecutors should consult the police and other interest groups where required.

It is therefore desirable, wherever practicable, that matters be referred to prosecutors by the police before a prosecution is instituted. In most cases suspected offenders are arrested and charged before the police can consult with prosecutors.

However, in cases where difficult questions of fact or law are likely to arise, it is desirable that the police consult the prosecutors before arresting suspected persons.

With regard to the investigation and prosecution of crime, the relationship between prosecutors and police officials should be one of efficient and close co-operation, with mutual respect for the distinct functions and operational independence of each profession.

Prosecutors should work together with other departments and agencies such as Correctional Services, Welfare, lawyers' organizations, non-governmental organisations and other public institutions, to streamline procedures and to enhance the quality of service provided to the criminal justice system.

## 8A. PROSECUTORIAL POLICY AND DIRECTIVES RELATING TO SPECIFIED MATTERS

The National Director may supplement or amend this Policy to determine prosecutorial policy and directives in respect of specific matters, for example, in respect of new legislation and matters of national interest.

The Prosecutorial Policy and Directives, in Appendix A, relating to the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, are hereby determined in terms of section 179(5) of the Constitution, with effect from 1 December 2005.

## 9. CONCLUSION

The Prosecuting Authority is a public, representative service, which should be effective and respected. Prosecutors should adhere to the highest ethical and professional standards in prosecuting crime and should conduct themselves in a manner which will maintain, promote and defend the interests of justice.

This Prosecution Policy is designed to make sure that everyone knows the principles that prosecutors apply when they do their work.

Applying these principles consistently will help those involved in the criminal justice system to treat victims fairly and prosecute offenders effectively.

The Prosecution Policy is not an end in itself.

The challenge which faces the Prosecuting Authority is to implement this Policy in a manner that will increase the sense of security of all people in South Africa.

APPENDIX APROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994A. INTRODUCTION

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:

(a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.

(b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.

(c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.

(d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.

2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:

(a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.

(b) The constitutional right to life.

- (c) The non-prescriptivity of the crime of murder.
- (d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.
- (e) The dicta of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See *Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC*).
- (f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.
- (g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.
- (h) The dicta of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03.*).
- (i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
- (j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.
- (k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.
- (l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights. *on dit te vesting*
3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:
- (a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court

trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.

- (b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.
- (c) Section 179(5) of the Constitution in terms of which the NDPP, among others—
- (i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;
- (ii) must issue policy directives to be observed in the prosecution process; and
- (iii) may review a decision to prosecute or not to prosecute.
- (d) The above process would not indemnify such a person from private prosecution or civil liability.

4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:

- (a) The fact that the victim does not desire prosecution.
- (b) The severity of the crime in question.
- (c) The strength of the case.
- (d) The cost of the prosecution weighed against the sentence likely to be imposed.
- (e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

*Transparency*

**B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST**

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.
2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.
3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.
4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.
5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.
6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:
  - (a) The National Intelligence Agency.
  - (b) The Detective Division of the South African Police Service.
  - (c) The Department of Justice & Constitutional Development.
  - (d) The Directorate of Special Operations.
7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.
9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.
10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.
11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.
12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.
13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.
14. The NDPP may provide for any additional procedures.
15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.
2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.
3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (i) hereunder, must, in a balanced way, be applied by the NDPP before reaching a decision whether to prosecute or not:
  - (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.
  - (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:
    - (i) The motive of the person who committed the act, commission or offence.
    - (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.
    - (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.
    - (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—
      - (aa) for personal gain; or
      - (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.

- (c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—
- (i) the truth of the conflicts of the past, including the location of the remains of victims: or
  - (ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.
- (d) The personal circumstances of the alleged offender, in particular—
- (i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;
  - (ii) the credibility of the alleged offender;
  - (iii) the alleged offender's sensitivity to the need for restitution;
  - (iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;
  - (v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and
  - (vi) the degree of indoctrination to which the alleged offender was subjected.
- (e) Whether the offence in question is serious.
- (f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.
- (g) Whether the prosecution may lead to the further or renewed traumatising of victims and conflicts in areas where reconciliation has already taken place.
- (h) If relevant, the alleged offender's role during the TRC process, namely, in respect of co-operation, full disclosure and assisting the process in general.
- (i) Consideration of any views obtained for purposes of reaching a decision.
- (j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

**REPORT OF THE PORTFOLIO COMMITTEE ON JUSTICE AND  
CONSTITUTIONAL DEVELOPMENT ON THE AMENDED PROSECUTION  
POLICY WHICH COMMENCED ON 1 DECEMBER 2005**

The Portfolio Committee on Justice and Constitutional Development on 17 January 2006 received a briefing on the contents of the amendments to the Prosecution Policy, which amendments relate to the prosecution of criminal matters arising from conflicts of the past. These amendments were tabled in Parliament by the Minister for Justice and Constitutional Development in terms of section 35(2)(a) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998).

The Committee notes the relevant amendments to the Prosecution Policy.