

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

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

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

2. *Bargaining Over the TRC's Legacy*

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

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

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

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

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

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

2.1 *Consultations with the security police*

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

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

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

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

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

2.2 *Consultations with the generals*

More or less concurrently with the consultations with the police representatives, starting in 1998, the government conducted talks with a group of high-ranking former generals of the SADF.⁹⁴ Initially, the former chief of the SADF, General Constand Viljoen⁹⁵ was approached by one of the leading members of the ANC and government at that time, Jacob Zuma,⁹⁶ with the aim of consulting over questions of criminal

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

⁹⁰ See *supra* Chapter 2 note 297.

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

⁹² *Ibid.*

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

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

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

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

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

2.2.1 *The process of meetings*

General Geldenhuys agreed to meet with Zuma. A series of frequent meetings, negotiations and consultations ensued from 1998. The main process of consultations was conducted over four years until early 2003.¹⁰⁰ A small number of meetings, however, infrequently continued until 2004.¹⁰¹ The consultations were, like the security police consultations, generally aimed at finding a mutual solution as to how to avoid trials after the TRC through new indemnity mechanisms.¹⁰² The talks were mediated and facilitated by Johannesburg businessman Jürgen Kögl, who is closely connected to leading ANC members, especially to Jacob Zuma. All meetings took place strictly separated from the meetings with the police, which was in the interest of the generals.¹⁰³

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

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

⁹⁸ See *supra* Chapter 3(1.1.2).

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

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

¹⁰¹ *Ibid.*

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

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

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

President and later in his capacity as the President.¹⁰⁵ On the side of the generals, Jan Geldenhuys assumed a leading role. He participated along with two to four other generals belonging to their support group. Both sides were accompanied by legal advisors. The main process of consultations came to an end in or about early 2003. Only as a matter of courtesy did a few meetings continue to take place until 2004.¹⁰⁶

2.2.2 *Motivation of the government*

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

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

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

¹⁰⁷ Ibid.

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

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

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

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

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

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

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

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

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

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

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

¹¹⁶ See *TRC Report*, vol. 6, s. 4, appendix, paras. 1–43; *TRC Report*, vol. 2, chap. 7, paras. 497–551; *TRC Report*, vol. 5, chap. 6, paras. 126–29.

the Inkatha Caprivi trainees.¹¹⁷ Geldenhuys and other generals had been charged in 1995 for their alleged involvement in these Caprivi activities and the KwaMakutha massacre.¹¹⁸ The government, when approaching the generals, was mindful of the fact that the SADF had supplied the Zulu fighters with weapons on a large scale and that the locations of a number of the hidden weapons caches, which had been established in the region during the last apartheid years, remain as yet unknown.¹¹⁹ Government officials were wary that the generals could still possess knowledge of such still hidden and unknown weapons caches, established during the late 1980s and early 1990s, that they could, thus, still exercise negative influence on the peace process between IFP and ANC and that they could generally, through the possible third force networks, in some way thwart appeasement attempts or contribute to a re-ignition of the conflict.¹²⁰ These factors were allegedly a major reason for integrating the generals in any future approach to post-TRC accountability, to contain their potentially negative influence.¹²¹ Such considerations are also clearly indicated in the aforementioned speech by President Mbeki.¹²²

It was also considered that the TRC process suffered from a lack of sufficient findings on SADF activities, especially concerning those that took place in South Africa.¹²³ Very few SADF members had applied for amnesty, despite the fact that the SADF was involved in many gross human rights violations.¹²⁴ The SADF leadership practically refused

¹¹⁷ *TRC Report*, vol. 6, s. 4, appendix, para. 18.

¹¹⁸ See *supra* Chapter 1(4.).

¹¹⁹ Telephone interview with Jürgen Kögl (June 14, 2006).

¹²⁰ *Ibid.*; Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

¹²¹ *Ibid.* Whether the generals really had any potential to thwart the appeasement attempts in KZN remains unclear. Geldenhuys insists that the generals neither would engage in any kind of violent activity nor would they have any special knowledge of weapons caches or have the resources to exercise negative influence on mediation efforts in KwaZulu-Natal.

¹²² See text accompanying *supra* Chapter 3 note 81.

¹²³ Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Telephone interview with Jürgen Kögl (June 14, 2006).

¹²⁴ *TRC Report*, vol. 6, s. 3, chap. 1, para. 4.

completely to cooperate with the TRC. There were no disclosures made on the involvement in violence during the negotiation period.¹²⁵ In this regard the TRC also referred to certain networks with access to weapons and resources.¹²⁶ As it was unable to establish the extent of such networks, the TRC stated that it would be essential to investigate the involvement of the police and military in third force activities more closely.¹²⁷ The government had this in mind when it approached the generals. The aim was also to work out proposals to satisfy the generals' desire to avoid prosecutions of SADF members and to create mechanisms for cooperation and disclosures on still uncovered secret SADF activities, in order to compensate for the lack of TRC findings in this regard.¹²⁸

Another factor was the government's fear that South Africa could be exposed to claims for reparation and damages by countries, which had been attacked by the apartheid state.¹²⁹ The territorial integrity of various neighbouring countries had frequently been violated by illegal invasions of the SADF.¹³⁰ Angola, for instance, suffered enormous damages due to the war that was waged by South Africa and due to the massive support the apartheid government provided to the rebel movement UNITA.¹³¹ Apparently, during the late 1990s neighbouring governments had discussed the issue of reparation claims against South Africa concerning the activities of the SADF. The government, thus, tried not to fuel such discussions by prosecuting SADF members for

¹²⁵ *Ibid.*, s. 4, appendix, para. 7.

¹²⁶ *Ibid.*, para. 33.

¹²⁷ *Ibid.*, paras. 42–43.

¹²⁸ Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

¹²⁹ The TRC found that the military strategy of South Africa during the times of Apartheid was guided by the principles of pre-emptive interventionism and counter-revolutionary warfare (*TRC Report*, vol. 2, chap. 2, para. 6). It further for instance found that the SADF committed a great amount of gross human rights violations e.g. in its war against Angola (*TRC Report*, vol. 2, chap. 2, para. 72).

¹³⁰ *TRC Report*, vol. 2, chap. 2, para. 48.

¹³¹ *Ibid.*, paras. 70–72.

the atrocities caused in other countries.¹³² In this regard, the aim was to make sure that full-scale criminal trials did not go ahead.

Yet another aspect was that the government tried to avoid a drain of military competence and intelligence from South Africa to other African countries.¹³³ In the process of establishing an effective army for the new democratic South Africa, it was absolutely vital to ensure the support and expertise of former officers and generals of the apartheid state's SADF. Moreover, a number of other African countries were apparently very keen to engage officials of the SADF as advisors on improving their respective armies.¹³⁴ The South African government thus wished to avoid former SADF generals and military experts being driven away from South Africa, should SADF activities be investigated and tried on a large scale.¹³⁵

Furthermore, the intention was to avoid setting precedents concerning criminal liability for military operations.¹³⁶ The army of the new democratic South Africa, the SANDF, at that time had increasingly become involved in peace keeping and military operations throughout Africa. The government was concerned that trials concerning military operations of the former apartheid-state's defence force, the SADF, could negatively impact on SANDF operations, in that they might lead to legal uncertainty concerning the legality of certain measures.¹³⁷ Precedents in terms of what actions by soldiers engaged in conflict situations can lead to criminal liability were to be avoided.¹³⁸ The government wanted to ensure that the effectiveness of the South African army and its capacity to act was not tainted by any kind of legal uncertainty.¹³⁹ Thus, military operations were to be generally kept out of criminal trials. However, the notion that the SADF generals would in any way be

¹³² Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Telephone interview with Jürgen Kögl (June 14, 2006).

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

willing and capable of instigating any kind of violent uprising against the new South African state is, allegedly, completely unfounded.¹⁴⁰

The consultations generally have shown that the government is not at all keen to promote post-TRC prosecutions. Rather it has indicated its desire to leave the apartheid past behind as quickly as possible, in order to move forward towards a stable and reconciled nation and to avoid thwarting the project of nation-building by costly and extensive trials, which constantly bring up the atrocities and injustices of the past.¹⁴¹ According to Geldenhuys, Zuma underlined this quite clearly when during one of the meetings he emphasised that prosecutions were not in the interest of the government as this could destroy some of the good effects the TRC had on nation-building and reconciliation. The issue needed to be dealt with in a political manner, rather than by the NPA.¹⁴²

In summary, the government tried to work out some kind of legal mechanism, by which to generally avoid convictions, specifically concerning crimes committed in the conflict between IFP and ANC and concerning the SADF and simultaneously to create a mechanism by which to uncover more information that was not uncovered by the TRC.

2.2.3 *Interest of the generals*

Regarding the interest of the generals in the negotiations, it has often been claimed that, considering the many atrocities and criminal offences of the SADF which have not yet been dealt with properly, a general amnesty or convenient deal had been requested.¹⁴³ Yet a general amnesty was allegedly neither proposed nor discussed, especially not one that

¹⁴⁰ Ibid.; Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

¹⁴¹ Interview with Jürgen Kögl in Johannesburg (May 12, 2006); E-mail from Jürgen Kögl (June 26, 2006).

¹⁴² Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

¹⁴³ Interview with Yasmin Sooka in Pretoria (May 3, 2006); *Victims to fight amnesty* Mail & Guardian, June 7, 2002; P. Pigou *Unfinished business* Mail & Guardian, Sep 21, 2002; C. Carter *No truth for the thousands of apartheid dead* Cape Argus, April 8, 2006.

would only cover the generals.¹⁴⁴ From the outset it was rather clear that a general amnesty would not square with the TRC scheme on amnesty. A less overt and again, somehow conditional indemnity scheme was also in the generals' interest.¹⁴⁵ However, the generals were obviously interested in securing a convenient agreement in the interest of their former subordinates and in their own interest, which would diminish the chances that former SADF members would be charged for their involvement in SADF operations.¹⁴⁶ As most SADF members had been very suspicious of the TRC process, which was perceived to be biased, the generals sensed they could now take part in working out a, in their eyes, fairer procedure.¹⁴⁷ Furthermore, after the TRC, the general attitude towards the activities of the SADF was perceived to be unreasonably negative and hostile. The TRC's findings in its report were perceived to be an unjustified attack on the SADF's integrity.¹⁴⁸ When entering into consultations with the government the generals were motivated by the opportunity to correct the perceived wrong image of their activities in another forum.¹⁴⁹

2.2.4 Results

The aim of the government was to take the amnesty legislation of the TRC as a reference point and try to establish a new mechanism adapted to the previous amnesty legislation.¹⁵⁰ The mechanism had to apply to the whole of the country and could not be limited to the province of

¹⁴⁴ Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

¹⁴⁵ Telephone interview with Jürgen Kögl (June 14, 2006).

¹⁴⁶ Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

¹⁴⁷ Interview with Jan Geldenhuys in Pretoria (May 15, 2006).

¹⁴⁸ Interview with Jan Geldenhuys in Pretoria (May 10, 2006). The top commanders never made an effort to acknowledge the brutal atrocities which had been caused by the SADF. It also never properly participated in TRC hearings which would have given the SADF command an occasion to defend against perceived unjustified allegations.

¹⁴⁹ Interview with Jan Geldenhuys in Pretoria (May 15, 2006); Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

¹⁵⁰ Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

KwaZulu-Natal. By the end of 2002, the consulting parties had agreed on a detailed proposal for the enactment of a legal mechanism practically amounting to a new amnesty law.¹⁵¹ It envisaged a legal concept according to which a special plea on amnesty would be introduced as an amendment to the Criminal Procedures Act.¹⁵² The solution on how to deal with criminal accountability in the wake of the TRC should, thus, be embedded in the normal court procedures. After the agreement was reached, the consultations were practically concluded and only continued with the participation of Zuma and Minister of Justice, Maduna, on an infrequent basis as a matter of courtesy and to conduct a rather general exchange of thoughts on the topic until 2004.¹⁵³

The solution provided that perpetrators of politically motivated offences falling within the ambit of the TRC Act should not principally be exempted from criminal liability.¹⁵⁴ In case they are criminally charged, an alleged perpetrator who had not received amnesty by the TRC could then in the criminal trial launch a special plea on amnesty. Once such a plea was launched, a special inquiry by the judge embedded in the normal public criminal trial should ensue. Should the plea for amnesty succeed, the trial needed to result in an acquittal of the accused.¹⁵⁵ The envisaged preconditions for a successful plea on amnesty were that the criminal offence in question needed to satisfy exactly the same test which was outlined as a precondition to the granting of amnesty according to the TRC Act. It, thus, had to be committed within the fixed time frame applicable for the TRC Act and had to be connected with a political objective and committed in the course of the conflicts of the past etc.¹⁵⁶ Furthermore, the alleged perpetrator would then have to make a full disclosure before the court in order to succeed with the plea.¹⁵⁷ Whether the criteria are satisfied should be

¹⁵¹ *Ibid.*; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

¹⁵² *Ibid.*

¹⁵³ Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

¹⁵⁴ *Ibid.*; Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ Telephone Interview with Jürgen Kögl (June 14, 2006).

subject to the scrutiny of the judge and other participants as is normal procedure in a criminal trial.¹⁵⁸ If the plea would not succeed, the trial would resume.¹⁵⁹

The solution that was agreed upon at the consultations of the generals and the government, thus, embodied an exact replication of the TRC amnesty scheme. The only difference was that the competence to decide on the granting of indemnity would rest with an ordinary criminal court and not with a special committee such as the Amnesty Committee of the TRC. The idea to introduce a special plea on amnesty to criminal procedure law was not at all new. Before the TRC process began, the NP launched a similar proposal aimed at extending the amnesty regime by the same means.¹⁶⁰

By late 2002 the proposal had been worked out in great detail by the Justice Department and was practically ready to be presented to Parliament for enactment.¹⁶¹ The public was neither informed of the existence of the proposal nor of details thereof. By the end of 2002, it was first put forward for the consideration of President Thabo Mbeki. The implementation of the proposal depended on the decision of President Mbeki.¹⁶² In early 2003 it was eventually rejected by President Mbeki.¹⁶³ The President apparently did not expressly communicate to the consultation group of generals and ANC government representatives that he rejected the draft law. However, his announcements in the speech at the tabling of the TRC Report in Parliament in April 2003 effectively and unmistakably signalled to the consulting parties a rejection of their proposal on another round of indemnity legislation.¹⁶⁴ As mentioned above,¹⁶⁵ Mbeki had announced that it would be up to

¹⁵⁸ Interview with Jürgen Kögl in Johannesburg (May 12, 2006); Interview with Jan Geldenhuys in Pretoria (May 10, 2006).

¹⁵⁹ Ibid.

¹⁶⁰ F. Kutz *Amnestie für politische Straftäter in Südafrika* (2001) 143.

¹⁶¹ Interview with Jürgen Kögl in Johannesburg (May 12, 2006).

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ See *supra* Chapter 3(1.3).

the NPA to pursue post-TRC prosecutions according to its normal procedures and that any approach such as general amnesty will not be considered, which of course means that the specific indemnity procedure proposed would, at least at the beginning, not be implemented. What exactly motivated Mbeki to turn away from the proposal at that stage cannot be established. However, it is implicit from his speech that he apparently did not consider such an obvious legislative introduction of another amnesty mechanism similar to that of the TRC as appropriate, since he expressly stated that any new amnesty approach, whether applied regionally or nationally, would harm the TRC process. However, elements of the consultations did, as will be shown below, reappear in later policy decisions.

3. *A Prosecution Policy for TRC-Related Cases*

It becomes clear from the consultations with the security forces that the government attempted to introduce new legal mechanisms aimed at avoiding trials directly after 1998. As has been outlined in the preceding paragraphs, the solution, which had been reached by late 2002, was in early 2003 not found fit by the President to provide a sufficient new indemnity mechanism. However, the urge to introduce a satisfactory mechanism persisted. It took until late 2004 for the government to start a new process of developing a solution. Eventually in early 2006, a new legal approach to post-TRC prosecutions was introduced. On 24 January 2006 the NPA presented a set of new guidelines to the public, which were supposed to apply specifically to prosecutions of political crimes connected with the conflicts of the apartheid past.¹⁶⁶ The so-called 'prosecution policy and directives relating to the prosecution of offences emanating from the conflicts of the past and which were

¹⁶⁶ See NPA, press statement *Amended prosecution policy and directives relating to prosecution of criminal matters arising from the conflicts of the past* (Jan 24, 2006).

generally have shown that the government is not at all keen to promote post-TRC prosecutions. Rather it has indicated its desire to leave the apartheid past behind as quickly as possible, in order to move forward towards a stable and reconciled nation and to avoid thwarting the project of nation-building by costly and extensive trials, which constantly bring up the atrocities and injustices of the past.’

But there was another crucial impetus for the ANC’s initiating what became a seven-year secret negotiations process: from the outset, President Mandela’s objective, as expressed via his team leaders – Thabo Mbeki in his capacities both as Deputy President of the country and ANC president (from 1997 onwards), and Jürgen Kögl, the ANC’s/Government’s Convenor – was explicitly a *quid pro quo*. In Marais’ words: ‘They don’t want us to be charged – and they don’t want them to be charged’¹⁰ – or, as Marais later claimed were Mbeki’s words: ‘I don’t want my President to be charged in court.’ He explained, however, that Mbeki had not meant this in the specific, as in President Nelson Mandela, but rather in the generic, in that he did not want to see *any* ANC State President facing charges.

It is a curious aspect of the negotiations that Marais’ opposite number, businessman Jürgen Kögl, hailed from South West Africa, the territory in which South Africa’s armed forces had spilled the most blood, and in which Operation Dual had performed the bulk of its grisly disposal work. When Mbeki returned from exile, he stayed in Kögl’s apartment.¹¹

A letter written by Marais to then Deputy President Jacob Zuma in early 2004, for the signature of the former Chiefs of the SADF,¹² recalled the initiation of the lengthy series of secret, high-level talks: ‘A process of communicating between the ANC initially and the government lately with the former chiefs of the SA Defence Force was initiated by the Deputy President of South Africa Mr T Mbeki when he approached General CL Viljoen in [late 1996?].

General Viljoen after consultation with the former Chiefs of the Defence Force within the structure of the SADF Contact Bureau conveyed our preparedness to communicate with Mr Mbeki in his capacity as Deputy President and President of the NEC of the ANC. A convenor, Mr J Kögl, apparently empowered by Mr Mbeki, arranged for a meeting at his house in Johannesburg [in early 1997?].

‘That meeting was in the form of discussions followed by a dinner hosted by Mr Kögl. It was attended by Mr Mbeki and various of his ministers as well as the Premier of Mpumalanga Mr M [Mathews] Phosa,’ leader of an ANC lobby arguing that its members be protected from prosecution, ‘and by us the former Chiefs of the SADF. There was enthusiastic agreement that the commenced communication should be continued and that more meetings should follow. We, the former Chiefs of the SADF, being aware of the Deputy President’s tight work schedule, suggested that he appoint one of his ministers to represent the ANC in future deliberations. Mr Mbeki expressed, however, the opinion that the process of communication that was mutually agreed to was so important to him that he preferred to remain the prime representative of the ANC in further deliberations.’

Bubenzer claims that the talks were initiated later, in 1998, at the same time as a separate series of negotiations with representatives of the police hierarchy began.¹³ He further claims that Constand Viljoen was initially approached not by Mandela but by Jacob Zuma, then a KwaZulu-Natal provincial cabinet minister, though Zuma could only have been authorised at the very highest level, ‘with the aim of consulting over questions of criminal accountability in the wake of the TRC. Viljoen, however, considered that such matters were better discussed with the group of former SADF generals who had established the support network for former soldiers and the Kontak Buro [the SADF Contact Bureau convened by Marais] who were, thus, already working intensely on amnesty issues and prosecutions. He immedi-

ately referred Zuma to the network of generals around [Jannie] Geldenhuys.’¹⁴

Bubenzer writes that Geldenhuys and Zuma proceeded to meet, both sides flanked by legal advisors: ‘The consultations were, like the security police consultations, generally aimed at finding a mutual solution as to how to avoid trials after the TRC through new indemnity mechanisms . . . All meetings took place strictly separated from the meetings with the police, which was in the interest of the generals.’¹⁵

This compartmentalisation by the ANC of talks between the SADF and SAP may have been a divide-and-rule strategy for the ANC, but, as the apex predators of the apartheid state, it likewise suited the military to separate its cause from that of their less powerful and looser-lipped police colleagues.

Marais said¹⁶ that on his side at the talks were former Defence Minister General Magnus Malan, former Chiefs of the Defence Force Generals Constand Viljoen and Jannie Geldenhuys, and former Chief of the Army General Kat Liebenberg – although sometimes they brought in other generals, such as former Surgeon-General Niël Knobel, or one of the former Chiefs of the Air Force, as required.

Although Marais said that no specific offences were ever discussed, Kat Liebenberg’s continuous presence suggests that he was monitoring any potential references to Special Forces’ black ops such as Operation Dual – though it was totally unknown by their ANC opposites at the time – while Knobel’s intermittent presence suggests he was monitoring the ANC’s limited knowledge of the Project Coast chemical and biological warfare programme.

On the ANC/government side, Marais said Mbeki’s team at the talks usually consisted of the ‘security cluster’: this would make it, initially under Mandela’s Cabinet, Minister of Defence Joe Modise, Minister of Safety and Security (Police) Sydney Mufamadi, and Minister of Justice Dullah Omar.

‘Many deliberations followed and mutual agreements were

reached,' the letter read. Marais said that the discussions towards formulating a 'Pact of Forgetting' (this author's term, not Marais') took place once every few months, 'a few times at Kögl's house, a few times at the Presidency, once in Mbeki's house, and once in Durban with Zuma' – and were 'very social'.

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.

MR WAGENER: But that is why I've been saying, prosecute no one. I was for a
5 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.

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
15 amnesty who gives full disclosure. But the issue was that people weren't giving full disclosure.

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
20 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
5 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
10 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
15 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
20 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
25 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.

MR HOFSTATTER: Okay.
15

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.

10 **MR HOFSTATTER:** Right. Okay. No, I just thought that perhaps that had to do with 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.

15 **MR WAGENER:** I am aware that I think, I'm not sure where it was given, but I think 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.

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.

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.

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.

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
20 solve unsolved business.

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 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 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.

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, 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.

10 **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.

15 **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.

(with translation)

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

SECRET INTERNAL MEMORANDUM	
TO	MS BS MABANDLA, MP MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT
FROM	ADV VP PIKOLI NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS
SUBJECT	PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES
REF NO.	3/2P (PCLU)
DATE	15 FEBRUARY 2007

1. PURPOSE OF MEMORANDUM

The purpose of this memorandum is to—

- (a) inform the Minister about the National Prosecuting Authority's (NPA) understanding and interpretation of the policy and guidelines relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994;
- (b) inform the Minister about the problems the NPA is experiencing in the implementation of this policy and guidelines; and

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(b) propose a way forward.

2. BACKGROUND INFORMATION

2.1 Background relating to initial proposals

2.1.1 On 23 February 2004, a Director-General's Forum, under the chairpersonship of the former Director-General: Justice and Constitutional Development (Adv Vusi Pikoli) appointed a Task Team to consider and report on, *"the nature of the 'arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation' that the NPA and intelligence agencies may come up with in assisting persons who divulge information relating to offences committed during the conflicts of the past."*

2.1.2 In its deliberations, the Task Team took cognisance of the fact that in terms of section 179(1) and (2) of the Constitution, the NPA is an independent constitutional institution and the National Director has full discretion on whether a particular prosecution should or should not be instituted. The Task Team's recommendations should therefore be consistent with this constitutional requirement.

2.1.3 In its Report, the Task Team recommended the establishment of a Departmental Task Team comprising members of the following Departments or institutions:

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

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2.1.4 It was proposed that the functions of the proposed Task Team should, among others, be the following:

- "(a) *Before the institution of any criminal proceedings for an offence committed during the conflicts of the past, to consider the advisability of the institution of such criminal proceedings and make recommendations to the National Director of Public Prosecutions in this regard.*
- (b) *To consider applications received from convicted persons alleging that they had been convicted of political offences committed during the conflicts of the past and to make recommendations to—*
- (i) *the President, through the Minister for Justice and Constitutional Development, to pardon the alleged offender in terms of section 84(1)(k) of the Constitution;*
 - (ii) *the Commissioner of Correctional Services regarding the possible release of the applicant on parole or the conversion of the sentence to correctional supervision." (Emphasis added)*

2.2 Background relating to Amended Prosecution Policy

2.2.1 As the Minister is aware, the abovementioned recommendations were not implemented, since many held the view that the proposed functions of the Task Team could be unconstitutional in view of the provisions of section 179 of the Constitution. Subsequently, Government decided that it was important to deal with these matters on a uniform basis in terms of a specifically defined prosecutorial policy and directives.

2.2.2 Therefore, it was proposed that the National Director, with the concurrence of the Minister, should issue amended Prosecutorial Policy and Directives in terms of section 179(5)(a) of the Constitution, read with section 21 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act), and that such

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Policy and Directives should be submitted to Parliament in terms of section 21(2) of the NPA Act.

- 2.2.3 Following discussions with all the relevant stakeholders and a submission to Cabinet, the Prosecution Policy and Directives relating to the prosecution of offences emanating from conflicts of the past which were committed on or before 11 May 1994 (hereinafter referred to as the "Amended Prosecution Policy"), were approved and came into operation on 1 December 2005. The Amended Prosecution Policy was also duly tabled in Parliament and is **binding on the prosecuting authority**.

3. IMPORTANT FEATURES OF AMENDED PROSECUTION POLICY

- 3.1 For purposes of this memorandum, it is important to refer the Minister to the under-mentioned features of the Amended Prosecution Policy:¹

- (a) The Amended Prosecution Policy emanates from and is based on the statement of President Thabo Mbeki to the National Houses of Parliament and the Nation, on 15 April 2003, when he gave Government's response to the final report of the Truth and Reconciliation Commission (TRC).
- (b) The President, among others, stated that the question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.²
- (c) The President further stated that as part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearth the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.³
- (d) It is important to note that the President made it clear that—

¹ Attached hereto as Annexure "A".

² See paragraph A.1(b) of Appendix A to Amended Prosecution Policy.

³ See paragraph A.1(c) and (d) of Appendix A.

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- (i) the decision to be taken by the NPA (whether to prosecute or not) should be in accordance with the normal legal process;
- (ii) in order to reach a well-considered decision, the NPA should work together with the Intelligence Agencies, which include the NIA and the SAPS;
- (iii) the agreements entered into between the NPA and those persons who are prepared to unearth the truth of the conflicts of the past, should be in accordance with standard and normal execution of justice;
- (iv) such agreements should be in accordance with the NPA's prosecution mandate; and
- (v) such agreements should be in accordance with existing legislation.

3.2 Furthermore, it is important to note that the Amended Prosecution Policy expressly states that the prosecuting policy, directives and guidelines are required to reflect and attach due weight to, among others, the following:

- (a) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03*).⁴
- (b) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
- (c) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.
- (d) The existing prosecuting policy and general directives or guidelines issued by the National Director to assist prosecutors in arriving at a decision to prosecute or not.

⁴ See paragraph A.2 (h) to (k) of Appendix A.

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3.3 In respect of procedural arrangements, which must be adhered to in the prosecution process, the Amended Prosecution Policy provides, among others, in particular that—

- (a) the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director shall be responsible for overseeing investigations and instituting prosecutions in all such matters;
- (b) the PCLU "shall be assisted in the execution of its duties" by a senior designated official from the following State departments or other components of the NPA:
 - (i) The National Intelligence Agency.
 - (ii) The Detective Division of the South African Police Service.
 - (iii) The Department of Justice & Constitutional Development.
 - (iv) The Directorate of Special Operations.

3.4 From the above, it is clear that in relation to the relevant offences—

- (a) the decision whether to prosecute or not vests in the prosecuting authority and in terms of the Amended Prosecution Policy, in particular, the National Director;
- (b) such decision must be exercised in accordance with the Constitution and existing legislation;
- (c) the abovementioned State Departments only have a role to play insofar as they must assist the NPA in the investigation process and the gathering of information so as to assist the NPA in reaching a well-considered decision whether to prosecute or not.

4. PROBLEMS RELATING TO IMPLEMENTATION OF AMENDED PROSECUTION POLICY

4.1 Since the coming into operation of the Amended Prosecution Policy, the NPA has experienced various problems relating to the implementation thereof. These problems are hindering and obstructing the NPA in fulfilling its constitutional

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mandate, namely, to institute criminal proceedings without fear, favour or prejudice. On the one hand, the NPA is experiencing problems investigating cases to ascertain whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution, since the SAPS and NIA had not made dedicated members available to assist the NPA in this regard. This was subsequently dealt with by the setting up of a "Task Team". On the other, the NPA is now experiencing problems relating to the interpretation of the role of the other State Departments in the process. As indicated hereunder, it seems as if the SAPS and NIA hold the view that the proposals relating to the original proposed Task Team (that were rejected by Government), must be implemented and that such Task Team should play a role in the decision-making process.

- 4.2 During the middle of 2006, a meeting was held at the Office of the Presidency to attend to the abovementioned problems. The National Commissioner, the National Director, the Directors-General of Justice and NIA, and Mr Jafta of the Presidency, attended this meeting. It was agreed that a Working Committee should be established. This recommendation was taken to the Ministers in the Cluster. At a subsequent meeting attended by the Minister for Safety and Security, the Minister of Social Development and Minister Thoko Didiza (as Acting Minister for Justice and Constitutional Development), it was agreed that such Working Committee (now referred to as a Task Team), should be established to assist the NPA.
- 4.3 Following the above agreement, the National Director called a meeting at the Office of the NPA. The Heads of Department as well as representatives of all relevant State Departments to serve on the Task Team were invited. All Departments were represented at this meeting. At this meeting—
- (a) the terms of reference of the Task Team were explained and agreed to;
 - (b) it was agreed that Dr Silas Ramaite (Deputy National Director of Public Prosecutions) would chair the meetings of the Task Team.

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Furthermore, on an issue raised by the representative of NIA, the National Director was explicit in explaining that the mandate of the Task Team would not entail making any recommendations on a decision whether to prosecute or not to prosecute and that the National Director would not be dependent on receiving such a recommendation before he could make a decision. The Task Team should be responsible for overseeing that the NPA obtain the necessary information or to give inputs so as to assist and enable the National Director to reach a well-considered decision whether to institute criminal proceedings or not. Furthermore, the Task Team should deal with all relevant matters identified by the PCLU and the SAPS.

- 4.4.1 Subsequently, on 6 December 2006, the Office of the PCLU received the e-mail marked "B" from Dr PC Jacobs of the SAPS. Furthermore, the National Director received letters from the National Commissioner and the Director-General: NIA, dated 6 February 2007 and 8 February 2007, respectively. (Attached hereto as Annexures "C" and "D", respectively)
- 4.4.2 According to Dr Jacobs, his understanding is that the Task Team must submit a final recommendation to a Committee of Directors-General in respect of each case. He also points out that the National Commissioner is of the view that this procedure should be followed in respect of each investigation that has been finalised. However, he does not elaborate on the role of the Committee of Directors-General.
- 4.4.3 In his letter dated 6 February 2007, the National Commissioner points out that he has been briefed regarding the meeting of the "Task Team set up in terms of the Cabinet guidelines on the outstanding Truth and Reconciliation Commission (TRC) matters". According to the National Commissioner his understanding is that the officials designated on the Task Team "will provide recommendations to the Directors-General who will, as a collective, advise the National Prosecuting Authority as the decision maker of prosecutions". The Director-General: NIA

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indicates that he had a discussion with his representative on the Task Team and he received a copy of the National Commissioner's letter. He concurs with the views of the National Commissioner.

4.5 In the first instance, it is important to note that as far as the NPA is concerned, this Task Team was not set up in terms of the Amended Prosecution Policy, which include the guidelines on TRC matters, but in terms of internal agreement between the relevant stakeholders. Furthermore, the NPA is not aware of any agreement or arrangement in terms of which the Task Team must submit a report to a Committee of Directors-General and which Committee must advise the NPA regarding prosecution decisions. Reading the e-mail of Dr Jacobs and the letter of the National Commissioner in context, it seems as if the above process is a proposal by the National Commissioner and not an agreement reached by the Task Team. For example, Dr Jacobs points out that—

- the National Commissioner is of the opinion that it must be established what disclosures were made...";
- "the National Commissioner is of the opinion that such process need to be followed in each case...".

In the same vein, the National Commissioner writes as follows:

- "I have insisted that the complainant be consulted ...on the basis that the Directors-General will have a opportunity to provide input before a decision on prosecution is taken".
- "In my view a comprehensive report...should be discussed by the Directors-General".

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- "Although I do not insist on a meeting of the Directors-General after each meeting of our officials, I deem it necessary that the substantive reports and recommendations of the officials should be discussed by the Directors-General before a decision is made." (Emphasis added)

4.6 The NPA cannot agree to the above proposal. The effect thereof might be that the National Director would be obliged (as is suggested by the National Commissioner) to wait for the finalisation of the proposed process before he may make a decision whether to prosecute or not. If the Task Team or the Committee of Directors-General, in spite of a "reasonable prospect of a successful prosecution", unnecessarily delays the process, the National Director would be prevented from complying with the prosecuting authority's constitutional obligation. Therefore, such a process would be unconstitutional.

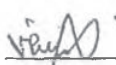
5. CONCLUSION AND WAY FORWARD

5.1 There is clearly a misunderstanding regarding the role of the Task Team and the role of the relevant State Departments referred to in the Amended Prosecution Policy. In accordance with the approved Amended Prosecution Policy⁵, the NPA is of the view that the duty of the Task Team or the relevant State Departments is to assist the NPA "in the execution of its duties". However, nothing prevents such a Task Team or Departments (whether individually or collectively) to make recommendations to the National Director, provided that the National Director should never be in a position where his constitutional duty is dependent on the recommendation of such a Task Team or relevant Department. Such a procedure would be unconstitutional.

⁵ See paragraph B.6 of Appendix A.

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- 5.2 I have now reached a point where I honestly believe that there is improper interference with my work and that I am hindered and/or obstructed from carrying out my functions on this particular matter. Legally I have reached a dead end.
- 5.3 It would appear that there is a general expectation on the part of the Department of Justice and Constitutional Development, SAPS and NIA that there will be no prosecutions and that I must play along. My conscience and oath of office that I took, does not allow that.
- 5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the "normal legal processes" and "prosecuting mandate" of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter.


15.02.2007
Adv VP Pikoli
National Director of
Public Prosecutions

Ms BS Mabandla, MP
Minister for Justice and
Constitutional Development

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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

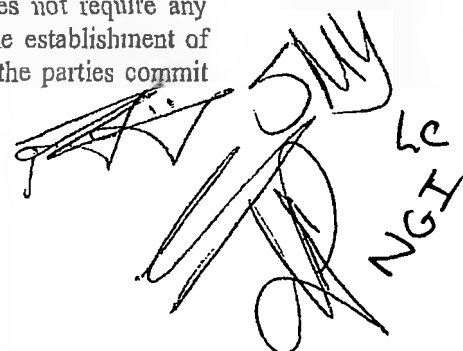
- 1.1 On 3 March 2004 the Amnesty Task Team submitted a Report to a Heads of Department Forum for consideration.
- 1.2 The Heads of Department discussed the Report with members of the Task Team, whereafter they deliberated the Task Team's proposals and recommendations *in camera*. Following these deliberations, 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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APPENDIX A**PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994****A. INTRODUCTION**

1. In his statement to the National Houses of Parliament and the Nation, on 15 April 2003, President Thabo Mbeki, among others, gave Government's response to the final report of the Truth and Reconciliation Commission (TRC). The essential features of the response for the purpose of this new policy, are the following:
 - (a) It was recognized that not all persons who qualified for amnesty availed themselves of the TRC process, for a variety of reasons, ranging from incorrect advice (legally or politically) or undue influence to a deliberate rejection of the process.
 - (b) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.
 - (c) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth of the conflicts of the past and who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in our legislation.
 - (d) Therefore, persons who had committed crimes, before 11 May 1994, which emanate from conflicts of the past, could enter into agreements with the prosecuting authority in accordance with existing legislation. This was stated in the context of the recognition of the need to gain a full understanding of the networks which operated at the relevant time since, in certain instances, these networks still operated and posed a threat to current security. Particular reference was made to un-recovered arms caches.
2. In view of the above, prosecuting policy, directives and guidelines are required to reflect and attach due weight to the following:
 - (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.
 - (b) The constitutional right to life.
 - (c) The non-prescriptivity of the crime of murder.
 - (d) The recognition that the process of transformation to democracy recognized the need to create a mechanism where persons who had committed politically motivated crimes, linked to the conflicts of the past, could receive indemnity or amnesty from prosecution.
 - (e) The *dicta* of the Constitutional Court justifying the constitutionality of the above process, inter alia, on the basis that it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. (See *Azanian Peoples Organisation v The President of the RSA, 1996 (8) BCLR 1015 CC*).
 - (f) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

- (g) Government's response to the final Report of the TRC as set out in paragraphs 1(a) to (d) above.
 - (h) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson CCT 30/03*.)
 - (i) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
 - (j) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.
 - (k) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.
 - (l) The terms and conditions under which the Amnesty Committee of the TRC could consider applications for amnesty and the criteria for granting of amnesty for gross violation of human rights.
3. Government did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process. The existing legislation and normal process referred to by the President, include the following:
- (a) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution.
 - (b) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually acceptable guilty plea and sentence agreement with the NPA.
 - (c) Section 179(5) of the Constitution in terms of which the NDPP, among others—
 - (i) must determine, in consultation with the Minister and after consultation with the Directors of Public Prosecutions, prosecution policy to be observed in the prosecution process;
 - (ii) must issue policy directives to be observed in the prosecution process; and
 - (iii) may review a decision to prosecute or not to prosecute.
 - (d) The above process would not indemnify such a person from private prosecution or civil liability.
4. The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established and where it is of the view that such a prosecution would not be in the public interest. The factors to be considered include the following:
- (a) The fact that the victim does not desire prosecution.
 - (b) The severity of the crime in question.
 - (c) The strength of the case.

(d) The cost of the prosecution weighed against the sentence likely to be imposed.

(e) The interests of the community and the public interest.

In the event of the NPA declining to prosecute in such an instance, such a person is not protected against a private prosecution.

5. Therefore, following Government's response, and the equality provisions in our Constitution and the equality legislation, and taking into account the above factors regarding the handling of cases arising from conflicts of the past, which were committed prior to 11 May 1994, it is important to deal with these matters on a rational, uniform, effective and reconciliatory basis in terms of specifically defined prosecutorial policies, directives and guidelines.

B. PROCEDURAL ARRANGEMENTS WHICH MUST BE ADHERED TO IN THE PROSECUTION PROCESS IN RESPECT OF CRIMES ARISING FROM CONFLICTS OF THE PAST

The following procedure must be strictly adhered to in respect of persons wanting to make representations to the NDPP, and in respect of those cases already received by the Office of the NDPP, relating to alleged offences arising from conflicts of the past and which were committed before 11 May 1994:

1. A person who faces possible prosecution and who wishes to enter into arrangements with the NPA, as contemplated in paragraph A1 above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.
2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.
3. All such representations must contain a full disclosure of all the facts, factors or circumstances surrounding the commission of the alleged offence, including all information which may uncover any network, person or thing, which posed a threat to our security at any stage or may pose a threat to our current security.
4. The Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all such matters.
5. The regional Directors of Public Prosecutions must refer all prosecutions arising from the conflicts of the past, which were committed before 11 May 1994, and with which they are or may be seized, immediately to the Office of the NDPP.
6. The PCLU shall be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:
 - (a) The National Intelligence Agency.
 - (b) The Detective Division of the South African Police Service.
 - (c) The Department of Justice & Constitutional Development.
 - (d) The Directorate of Special Operations.
7. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute.

8. The NDPP must also be consulted in respect of and approve any offer to a perpetrator relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.
9. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision.
10. A decision of the NDPP not to prosecute and the reasons for that decision must be made public.
11. In accordance with section 179 (6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to conflicts of the past.
12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.
13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.
14. The NDPP may provide for any additional procedures.
15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE IN CASES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria are determined for the prosecution of cases arising from conflicts of the past:

1. The alleged offence must have been committed on or before 11 May 1994.
2. Whether a prosecution can be instituted on the strength of adequate evidence after applying the general criteria set out in paragraph 4 of the said Prosecuting Policy of the NPA.
3. If the answers to paragraphs 1 and 2 above are in the affirmative, then the further criteria in paragraphs (a) to (j) hereunder, must, **in a balanced way**, be applied by the NDPP before reaching a decision whether to prosecute or not:
 - (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.
 - (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:

- (i) The motive of the person who committed the act, commission or offence.
- (ii) The object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals.
- (iii) Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, agent or a supporter.
- (iv) The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed—
 - (aa) for personal gain; or
 - (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.
- (c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—
 - (i) the truth of the conflicts of the past, including the location of the remains of victims; or
 - (ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.
- (d) The personal circumstances of the alleged offender, in particular—
 - (i) whether the ill-health of or other humanitarian consideration relating to the alleged offender may justify the non-prosecution of the case;
 - (ii) the credibility of the alleged offender;
 - (iii) the alleged offender's sensitivity to the need for restitution;
 - (iv) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;
 - (v) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and
 - (vi) the degree of indoctrination to which the alleged offender was subjected.
- (e) Whether the offence in question is serious.
- (f) The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.
- (g) Whether the prosecution may lead to the further or renewed 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.

<http://www.pmg.org.za/docs/2005/060117advnel.doc>

do so. The first complaint levelled by government functionaries against the NPA was that Ackermann was seen as a loose cannon.

222 Pikoli, in his affidavit in *Nkadimeng 2* (TNZ at p 170) (FA22), records that in early 2006, SAPS Commissioner Jackie Selebi objected to Ackermann's participation in the TRC cases claiming that he intended to prosecute the leadership of the ANC. This was notwithstanding Pikoli's denial that any such plans were in place. Pikoli reminded Selebi that Ackermann was appointed as PCLU head under Presidential proclamation, and it was not for the SAPS to dictate who should discharge the mandate given to the PCLU.

223 Pikoli then approached the Presidency in order to seek the collaboration of the role-players in the ITT to support the TRC cases. A meeting was arranged in mid-2006 by Reverend Frank Chikane, who was then Director General in the Presidency. Coincidentally this was the same Chikane who was the victim of poisoning by the SB in 1989. The meeting was attended by Chikane, the Directors General of Justice and the NIA, Selebi, the Secretary of the Defence Secretariat, Mr. Loyiso Jafta, Chief Director in the Presidency and Pikoli. Selebi again complained about Ackermann's involvement in the process.

224 Later in 2006, Pikoli was summoned to a meeting which was convened at the home of Minister Zola Skweyiya, then Minister of Social Development. The meeting was attended by the Minister of Police Charles Nqakula, Minister of Defence Mosiuoa Lekota, Thoko Didiza, Acting Minister of Justice (representing Minister Brigitte Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza. Pikoli was advised that the meeting was going to deal with the prosecution in the Chikane matter.

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

THEMBISILE PHUMELELE NKADIMENG

Applicant

And

NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS

First Respondent

THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE

Second Respondent

THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

Third Respondent

THE NATIONAL MINISTER OF POLICE

Fourth Respondent

WILLEM HELM COETZEE

Fifth Respondent

ANTON PRETORIUS

Sixth Respondent

FREDERICK BARNARD MONG

Seventh Respondent

MSEBENZI TIMOTHY RADEBE

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WILLEM SCHOON

Ninth Respondent

SUPPORTING AFFIDAVIT

I, the undersigned

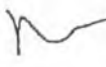
VUSUMZI PATRICK PIKOLI

state under oath as follows:

INTRODUCTION

1. I am an advocate of the High Court of South Africa and a former National Director of Public Prosecutions.
2. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge and belief both true and correct.
3. I depose to this affidavit at the request of the applicant's legal representatives and in order to ensure that all the relevant facts are placed before this Court.

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PROFESSIONAL EXPERIENCE

4. Prior to 1990 I was a member of Umkhonto weSizwe and I worked for the ANC's legal and constitutional affairs department in exile.
5. Between 1991 and 1994 I worked as a legal adviser with the Munich Reinsurance Company of Africa Limited Group. From 1994 until 1997 I was the Special Advisor to the then Minister of Justice, Mr. Abdullah Omar. My specific mandate was to help restructure the Department of Justice. At the time, there were eleven departments countrywide and I was tasked with amalgamating those departments into one central department.
6. From 1997 to 1999, I served as Deputy-Director General of the Department of Justice. In 1999, I was appointed Director General of the Department of Justice and Constitutional Development and worked in that role until 2005.
7. On 1 February 2005, I was appointed the National Director of Public Prosecutions ("NDPP") by the President in terms of Section 10 of the National Prosecuting Authority Act 32 of 1998 ("NPA Act") as read with Section 179 of the Constitution. My appointment was for a 10 year term as contemplated in Section 12(1) of the NPA Act.
8. As a result of my decision to authorize the prosecution of a former commissioner of police on corruption charges I was suspended from duty

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by the then President, Mr. T. Mbeki on 23 September 2007. I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the Truth and Reconciliation Commission ("TRC") contributed to the decision of President Mbeki to suspend me. The President suspended me from office in terms of section 12(6) of the NPA Act and ordered an Enquiry into my fitness to hold office as the NDPP.

9. During 2008, a commission of enquiry into my fitness to hold office, led Dr. F. Glinwala, found that the Government had failed to substantiate the reasons for my suspension and that I was a fit and proper person to hold the position of National Director of Public Prosecutions. She further recommended that I be restored to the office of the NDPP. Notwithstanding this finding and recommendation, acting President Mr. K. Mofemane dismissed me from my post. In 2009 I obtained an order from the High Court restraining President Zuma from appointing a successor to my position. Later that year I accepted a monetary out-of-court settlement from the government.
10. Between 2010 and 2012 I was a partner at Sizwe Ntsaluba Gobodo and the director of its Forensic Investigations department.
11. Between 2012 and 2014 I served as a commissioner of the Khayelitsha

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Commission, which investigated allegations of police inefficiency in Khayelitsha as well as allegations of a breakdown in relations between the community of Khayelitsha and the Police. In December 2014 I was appointed as the Western Cape's first police ombudsman.

12. I am a former trustee of the Constitutional Court Trust, a former member of the Magistrate's Commission and a founding member of the International Association of Anti-Corruption Authorities. I am currently an independent director on the board of Cricket South Africa, where I chair the social and ethics committee. Amongst my awards, I was conferred the International Association of Prosecutors Award in 2008.

CONFIRMATION

13. I confirm the contents of the founding affidavit of Thembsile Phumelele Nkadimeng ("the applicant") and the supporting affidavit of Anton Ackermann SC ("Ackermann"), insofar as they relate to me.
14. In particular, I confirm the contents of the applicant's affidavit under the heading "Political constraints". I confirm that there was political interference that effectively barred or delayed the investigation and possible prosecution of the cases recommended for prosecution by the TRC, including the kidnapping, assault and murder of Nokuthula Aurelia Simelane, ("Nokuthula") in the case: Priority Investigation: JV Plein: 1469/02/1996

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("the TRC cases").

15. In this affidavit I set out evidence that reflects such political interference. I also set out the serious impact that such Interference had on the pursuit of the TRC cases by the National Prosecuting Authority (NPA).

THE INDEPENDENCE OF THE NPA

16. The Office of the NDPP was created on 1 August 1998 in terms of section 179 (1) of the Constitution. The NDPP is the head of the NPA, and manages the directors of public prosecutions, investigating directors, special directors, and other members of the prosecuting authority either appointed or assigned. During my tenure I was duty bound to carry out the responsibilities set out in the NPA Act as well as the Constitution of the Republic of South Africa.
17. As NDPP I strongly believed in the independence of the NPA. I maintained that prosecutors were required to conduct themselves independently, objectively and professionally in making decisions whether to prosecute or not. This view is underscored by section 179(4) of the Constitution and section 32 of the National Prosecuting Authority Act 32 of 1998 ("the NPA Act") which both impose a duty on prosecutors to act "*without fear, favour or prejudice*". These provisions provide both a constitutional and statutory guarantee of independence to the NPA.

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THE TRC CASES

18. In April 2003 President Mbeki received the final TRC report. The President announced in Parliament that the prosecution of persons who did not take part in the TRC process was to be left in the hands of the NPA as part of the "normal legal processes". He also said that those perpetrators who were prepared to unearth the truth would be welcome to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and are accommodated in existing legislation. Former President Mbeki's statement to the national houses of Parliament dated 15 April 2003 is annexed hereto marked "VPP1". Regrettably what was to follow in relation to the TRC cases was anything but the "normal legal processes."
19. In my former capacity as Director General ("DG") of the Department of Justice and Constitutional Development ("DoJ") I had previously been involved in the formulation of a policy to deal with the TRC cases, which were regarded as politically sensitive. On 23 February 2004, I had chaired a Director-General's Forum which appointed a Task Team to report on a mechanism to give effect to the President's objectives.

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20. It is important to note that the recommendation of the Task Team of a two stage process which would have required a recommendation from an inter-departmental task team before the NDPP could institute any criminal proceedings in the political cases was rejected. This was because such a process would have been a violation of prosecutorial independence enshrined in Section 179 of the Constitution.
21. Some of these developments have been highlighted in the extracts from my affidavit filed before the Ginwala Commission in May 2008, which have been annexed to the founding affidavit. For the sake of completeness I highlight some of these facts in this affidavit.
22. In relation to the steps taken by the NPA with regard to the TRC cases prior to my appointment as NDPP on 1 February 2005 I refer to the affidavit of Anton Ackermann SC filed evenly herewith. On my appointment as NDPP, the Priority Crimes Litigation Unit (PCLU), a sub-unit within the NPA, had already been tasked with handling the TRC cases. The PCLU was headed by Special Director Advocate Anton Ackermann.
23. The decision to prosecute those implicated in the attempted murder, through poisoning, of former church leader and head of the South African Council of Churches, the Reverend Frank Chikane, on 23 April 1989 at the then Jan Smuts Airport, Kempton Park (the Chikane matter), saw the

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unravelling of the attempts by the NPA to hold apartheid-era perpetrators accountable for their crimes.

24. The initial decision to prosecute three Security Branch members, former Colonel C L Smith, and former Captains G J L H Otto and H J Van Staden, was taken prior to my appointment as NDPP. This decision was taken in November 2004 by Dr. Silas Ramaite SC in his capacity as Acting National Director of Public Prosecutions. However, he instructed that this matter, and all other TRC cases, be held over pending the development of the guidelines to deal with the TRC cases that were to be incorporated into the Prosecution Policy.

Developments since 2005

25. Following the approval by the Minister of Justice, and after consultation with the Directors of Public Prosecutions as required by the NPA Act, the amendments to the Prosecution Policy were tabled in Parliament and became effective on 1 December 2005. The amendments to the Prosecution Policy were titled: "PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994" ("the Prosecution Policy Guidelines" or "the Guidelines"). A copy of the said amendments is annexed to the founding affidavit marked "TN30".

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26. In terms of paragraph B6 of the amended Prosecution Policy it was stipulated that that the PCLU should be assisted in the execution of its duties by a senior designated official from the following State departments or other components of the NPA:

- 26.1. The National Intelligence Agency ("NIA");
- 26.2. The Detective Division of the South African Police Service ("SAPS");
- 26.3. The Department of Justice and Constitutional Development; and
- 26.4. The Directorate of Special Operations ("DSO").

27. When the Prosecution Policy became effective in December 2005 I reviewed the available evidence implicating the three suspects in the Chikane matter, which, in my opinion, was clearly sufficient to justify a prosecution. None had applied for amnesty for this offence. I therefore gave the initial instruction to proceed with the prosecution in February 2006.

28. In response to the said notification the three suspects made representations to me in terms of the Guidelines in support of their contention that they should not be subject to prosecution. These representations were reviewed by a team within the NPA under the

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leadership of Advocate T. Pretorius who reported to me that the representations did not comply with the requirements set out in the Guidelines, insofar as the suspects declined to disclose the full truth. After reviewing the report and the underlying documentation I wrote to the legal representative of the suspects in July 2006 informing him of my intention not to accede to the representations and to pursue the prosecution.

29. Meanwhile in early 2006 I had approached the then Commissioner of Police, the DG of Justice, and the heads of the NIA and the DSO (also known as 'the Scorpions') requesting them to nominate senior officials to assist the PCLU in accordance with the Prosecution Policy guidelines. Unfortunately the SAPS and the NIA never provided the PCLU with the necessary support to conduct its investigations adequately.
30. In early 2006, then Commissioner of Police, Mr. J Selebi, objected to Advocate Ackermann's participation claiming that Ackermann intended to prosecute the leadership of the ANC. This is notwithstanding the formal denial by the NPA that no such plans were in place. I advised Mr. Selebi that Ackermann was appointed as the head of the PCLU under Presidential proclamation and it was not for the SAPS to determine who should discharge the mandate given to the PCLU.
31. I then approached the Presidency in order to secure the necessary

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collaboration of the parties to apply the Prosecution Policy Guidelines. A meeting was arranged in mid-2006 by Reverend Frank Chikane, the then Director General in the Presidency. The meeting was attended by himself, the DGs of Justice and the NIA, Mr. Selebi, the Secretary of the Defence Secretariat, Mr. Jafta from the Presidency and I, Mr. Selebi again complained about Advocate Ackermann's Involvement in the process.

32. Later in 2006 I was summoned to a meeting which was convened at the home of Minister Skweyiya, the then Minister of Social Development. The meeting was attended by the Ministers of Safety and Security and Defence, Minister Thoko Didiza (Acting Minister of Justice and Constitutional Development representing Minister Mabandla who was indisposed) and Mr. Jafta. The meeting was called by Acting Minister Didiza and I was advised that it related to the prosecution in the Chikane matter.
33. At this meeting it became clear that there was a fear that cases like the Chikane matter could open the door to prosecutions of ANC members. I quote hereunder from my affidavit filed before the Ginwala Commission as to what transpired at this meeting:

"The Minister of Safety and Security was concerned about the decision to proceed with the prosecution and with Advocate Ackermann's involvement in the process and the issue of whether it was Advocate Ackermann or me who was behind the decision to

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prosecute.

The Minister of Social Development was concerned about the impact of the decision to prosecute on the ranks of ANC cadres who were worried that a decision to prosecute in the Chikane matter would then give rise to a call for prosecution of the ANC cadres themselves arising out of their activities pre-1994.

The Minister of Defence had concerns about where the decision to prosecute rested – did it rest with me or did it rest with Advocate Ackermann.

I explained to the Ministers that the decision to proceed with the prosecution rested with me as did all other decisions in regard to post-TRC prosecutions being considered by the PCLU. I assured them that no prosecution would be undertaken without my specific direction and reiterated my concern about the delay in the process particularly in view of the requirement that I report to parliament on these matters.

...The Minister of Defence appeared satisfied with my explanation that I would exercise the decision as to whether there was a prosecution or not. The Minister of Safety and Security appeared to continue to be worried about the involvement of Advocate Ackermann. I have no recollection of a particular position adopted by the Acting Minister of Justice."

34. Also in 2006 a further meeting took place at the office of the Presidency. My recollection of this meeting is that it was decided that the working committee or Task Team would not make recommendations on a decision

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as to whether to prosecute or not, but would be responsible for ensuring that I received all the necessary inputs and information from the various departments so as to assist me to make a well-considered decision.

35. At this meeting I proposed that Dr Silas Ramaite, the Deputy National Director of Prosecutions, should chair the Task Team. I suggested this in order to counter the complaints in regard to Advocate Ackermann and to get the Task Team working. The proposal was accepted.
36. Subsequent to this meeting there was a further meeting of Ministers in the security cluster at the office of the Minister of Safety and Security. This was attended by the Minister for Safety and Security, the Minister of Social Development, Acting Minister Dldiza, Mr. Selebi, various DGs and Mr. Jafta. The proposal for the establishment of a working group was put to the Ministers and accepted.
37. After this meeting, in early October 2006 I again sent letters to the various Directors General, Mr. Selebi and the DSO inviting them each to nominate a senior official to perform the functions set out in paragraph B6 of the Guidelines.
38. The Task Team met for the first time on 12 October 2006. I attended the opening session of the first meeting together with Ms. Kalyani Pillay (my

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adviser), the Directors General of the NIA and Justice and Mr. Jafta from the Presidency. Aside from this meeting, I did not participate further in the activities of the Task Team. I received reports from time to time on their activities. These reports led me to believe that the committee was functioning and securing the requisite co-operation from the other agencies which had previously been missing.

39. Meanwhile I had received further representations from the suspects in the Chikane matter contending that they had received indemnity in respect of the threatened prosecution in terms of the original Indemnity Act of 1990. I sought an independent opinion from senior counsel concerning the validity of this claim of indemnity. The opinion was received in November 2006 and concluded that the claimed indemnities were no bar to prosecution and that the said law had been repealed in 1995.
40. Dr Silas Ramaite reported to me that at the Task Team meeting on 25 October 2006 had received an audit report from Advocate Ackermann on all cases in the possession of the PCLU. Dr. Ramaite reported to me further that the Chikane matter was discussed by Task Team for the first time at its meeting on 6 November 2006. Mr. J Lekalakala of the SAPS stated that the National Commissioner believed that Rev. Chikane was not interested in a prosecution. Advocate Ackermann however indicated that Rev. Chikane had left the matter in the hands of the NPA.

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41. In early December 2006 I was informed by Dr Ramaite of the renewed contention by Mr. Selebi that Reverend Chikane had not been consulted. Reverend Chikane had in fact been extensively consulted in relation to the proposed prosecution. I personally held discussions with him during the course of interactions during 2006 and 2007. I also met with him separately. Reverend Chikane's advised me that while he may have forgiven his perpetrators, insofar as the application of the laws of the land was concerned, the matter must take its ordinary course. If a decision was made by the prosecuting authorities he would accept that.
42. Although I knew that Ackermann had discussed the matter with Rev. Chikane as far back as 2004, in December 2006 I instructed Advocate Ackermann to once again visit Rev Chikane to confirm his position.
43. However, towards the end of 2006 it became clear to me that powerful elements within government structures were determined to impose their will on my prosecutorial decisions. In this regard I quote from my affidavit filed before the Ginwala Commission:

"In December 2006 Dr Ramaite reported to me in regard to the contention raised by Mr. Selebi through Commissioner Jacobs that it was the function of the Task Team that it should make a final recommendation to a body identified as the "Committee of Directors

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General" which would in turn make recommendations to me. In essence the proposal made by Mr. Selebi and subsequently supported by the Directors General of Justice and NIA amounted to a reversion to a two stage process in which my decision on any prosecution would be dependent upon a prior recommendation by an Intervening committee of directors general which would be subject to the same constitutional challenge as had led to the rejection of this proposal in 2004.

It became clear to me that there was a material misunderstanding in regard to the role of the Task Team and that unless this was resolved, I would not be able to carry out my functions within the contemplation of the relevant legislation and as envisaged by the Government."

Developments from 2007

44. In early 2007, as a result of the differences in approach that had developed between the NPA and the SAPS, NIA and DoJ I informed Mr. Selebi and the Directors General that there was a serious misunderstanding. I resolved to approach the Minister of Justice and request her guidance. Pending such response the functioning of the Task Team was compromised by the uncertainty and it held no further meetings until 8 August 2007.

45. Towards the end of January 2007 Advocate Ackermann and Advocate Mthunzi Mhaga (also of the PCLU) reported to me that they had met with

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Reverend Chikane on 22 January 2007 and that he had reaffirmed his attitude, namely that he was not against a prosecution and that the matter should take its ordinary course. In the light of this confirmation I wrote to the legal representatives of Messrs. Otto, Smith and van Staden on 25 January 2007 and informed them that the matter would now proceed and I instructed the PCLU to act accordingly.

46. Around this time, the former Minister of Police, Adriaan Vlok and the former Commissioner of Police, General Johann van der Merwe, had both made representations to me as contemplated in the Guidelines. They both admitted to authorising the murder of Reverend Chikane and requested me not to prosecute them in the light of this disclosure. However, they declined to make full disclosure in response to requests for information. I accordingly declined to accede to their request that they be given immunity from prosecution in terms of the Guidelines.
47. On 6 February 2007 I had a meeting with the Minister of Justice and Constitutional Development, Mrs. B S Mabandla. During this meeting it appears that she had gained the impression that I had agreed not to pursue the TRC cases. On 8 February 2007, she addressed a letter to me titled "TRC MATTERS", a copy of which is annexed hereto marked "VPP2" in which she stated the following:

"I must advise you at the outset that the media articles alleging that

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the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not go ahead with prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty."

48. An example of one of the articles in the press is from the Beeld newspaper titled "Cops up for apartheid crimes" which was published on 7 February 2007. A copy of this article is annexed hereto marked "VPP3".
49. I am at a loss to explain how the Minister reached such a conclusion. Her letter disclosed an assumption that the TRC matters will not be prosecuted. I found this to be a disturbing development as it appeared that at a political level there was an expectation that I would not prosecute the TRC cases. I regarded such an expectation as unwarranted interference in my constitutional duty to prosecute without fear, favour or prejudice.
50. It is most likely that I would have clarified my position with the Minister, either through a meeting or a telephone discussion. I would have confirmed to the Minister that it was not my intention to drop the TRC cases.
51. I decided to prepare a detailed memorandum for the Minister to set out the history behind the policy to the TRC cases and to inform the Minister of the

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problems experienced in implementing this policy. This memorandum is titled 'PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST; INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES' and was dated 15 February 2007. This memorandum was annexed to my affidavit before the Ginwala Commission marked as "TRC1".

52. In this memorandum I concluded that there had been improper interference in relation to the TRC cases and that I had been obstructed from taking them forward. I complained that such interference impinged upon my conscience and my oath of office. I indicated that I was unable to deal with these cases in terms of the normal legal processes and sought guidance on the way forward.
53. As I had marked this memorandum as an "*internal secret memorandum*" I have not attached it to this affidavit. I have attached it to an *in camera* affidavit which will be filed separately and which will not be made available to the public, unless this honorable Court authorizes such release. In this regard I make the following submissions:
- 53.1. The issues and complaints raised in the memorandum have already been discussed in the body of my affidavit filed before the Ginwala Commission, which has been part of the public record

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since 7 May 2008, and which was also part of the court record in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others* (TPD case no 32709/07).

- 53.2. In my view, there is nothing in the memorandum that implicates or impairs national security.
- 53.3. Since the memorandum points to unlawful and unconstitutional conduct it would be in the public interest for this memorandum to be released.
- 53.4. The public interest in the disclosure of the memorandum far outweighs any possible contemplated harm, inconvenience or embarrassment.
54. I never received any response from the Minister to this memorandum. Given the serious issues I was raising in the memorandum, and given that the NPA Act criminalizes obstruction of the work of the prosecuting authority, I would have expected an immediate response from the Minister. The failure or refusal of the Minister to respond to my memorandum suggested to me that she preferred for the deadlock between the NPA and the SAPS, NIA and DoJ to remain in place.

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55. During the course of the next few months the legal representative of Messrs. Otto, Smith and van Staden, Vlok and van der Merwe, held detailed negotiations with Advocate Ackermann and members of the PCLU in regard to a plea and sentencing agreement.
56. The negotiation of the plea and sentencing agreements with the five accused was an extended process and was only concluded in early July 2007. On 10 July 2007 I sent a memorandum to the Minister informing her of the fact that the prosecution had been set down for hearing on 17 August 2007 and that all accused had indicated their intention to plead guilty to a charge of attempting to murder Reverend Chikane by means of poisoning. The memorandum informed her of the fact that plea and sentencing agreements had been entered into. To the best of my recollection the Minister did not respond to this memorandum.
57. On or about 10 July 2007 I went off on compassionate leave because of the illness and subsequent death of my mother. In my absence, on 17 July 2007, Dr Ramaite and Advocate Ackermann were summoned to a meeting with the Minister and reported to her on these developments.
58. In August 2007, those implicated in the Chikane case pleaded guilty to the charges in exchange for suspended sentences as per Section 105A of the Criminal Procedure Act, 1977. Vlok and Van der Merwe were sentenced to

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ten years in prison suspended for five years, while the other three received five year prison sentences, suspended for five years.

59. I would have preferred a full prosecution in this case because Adriaan Vlok and Johan van der Merwe only made limited disclosure. They largely confined their disclosure to facts that were already in the public domain. They declined to disclose detailed information in relation to the compiling of the hit list and who was behind such compilation. They did not reveal the other names on the list; the *modus operandi* of the other hits or the identities of the other masterminds and perpetrators.
60. A full prosecution in the Chikane case would have produced greater truth and accountability. However there was strong political resistance to this prosecution and the pursuit of the other political cases. It was clear to me that the government, and in particular the then Minister of Justice, did not want the NPA to prosecute those implicated in the Chikane case. This was due to their fear of opening the door to prosecutions of ANC members, including government officials. Moreover I could not rely on the police to investigate this case, and the other political cases, thoroughly. Therefore, a plea and sentence bargain was in my view the most appropriate compromise in the circumstances.
61. Shortly after the plea and sentence agreement had been confirmed in court

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a newspaper article appeared in the Rapport newspaper of 19 August 2007 in which it was claimed that the NPA was preparing to prosecute ANC leaders. The claim was made on the basis of a fabricated document. A copy of this newspaper article is annexed hereto marked "VPP4". The NPA responded to this article by way of a press statement dated 21 August 2007 in which the allegations made in the Rapport article were denied. A copy of this press statement is annexed hereto marked "VPP5".

62. After the newspaper article was published, I was summoned to a meeting of the of the subcommittee of the Justice, Crime Prevention and Security (JCPS) Cabinet Committee on Post TRC matters, which was held on 23 August 2007. This meeting was attended by several cabinet ministers, directors-general and Mr. Selebi. Cabinet Ministers included the Minister for National Intelligence Services, Mr. Ronnie Kasrils, Minister Mabandla, Minister Skweylya amongst others.
63. During the meeting, Mr. Selebi said to me that the *'gloves are now off'* and that he was *'declaring war'* on me. In response I told him: *"for once in your life can you tell the truth and shame the devil"*.
64. Those at the meeting demanded answers from me about TRC prosecutions. They were also particularly concerned that I was instituting an investigation into certain members of the South African Police Service.

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This was in relation to my investigation into who was behind the fabrication of the letter purportedly written by Ackermann SC. Minister Mabandla told me to stop this investigation as we could not be seen to be taking each other to court. I advised the Minister that I would not stop the investigation.

65. I explained that:

65.1. the NPA was bound by law to continue with prosecutions of individuals who did not apply for or who were refused amnesty.

65.2. the NPA was actively preparing for those prosecutions and that we should not be stopped from doing our job.

65.3. It was my role as the NDPP to decide who would be charged.

66. On 28 August 2007 I received a faxed letter from the Minister of Justice, Ms. B S Mabandla. A copy of this letter is annexed hereto marked "VPP6". She referred to the meeting held on 23 August 2007. She noted that the National Commissioner of Police and I had different views on the Rapport article regarding the alleged forgery of certain NPA documents. She noted that I had initiated an investigation into the alleged forgery but she complained that she had not been advised of this decision or the basis thereof. Paragraphs 4 and 5 of the Minister's letter are particularly

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revealing:

4. *In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.*

5. *It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above. (Emphasis added).*

67. The Minister's letter was further indication of the view held at ministerial level that I should not enjoy actual discretion to make prosecutorial decisions in relation to the so-called political cases arising from the conflicts of the past.

68. I responded to the Minister's letter by way of a letter dated 29 August 2007, a copy of which is annexed hereto marked "VPP7". My copy of this letter is not on an NPA letterhead, but I confirm that the contents thereof were transmitted to the Minister.

69. In this letter I referred to the 23 August 2007 meeting:

"...which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members."

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70. I confirmed that there was no investigation by the NPA *"against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police"*.

71. In relation to paragraph 4 of the Minister's letter I noted that it is:

"...clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored."

72. I reminded the Minister that my predecessor had satisfied himself that there was no basis for the leadership of the ANC to be investigated and he had then briefed the then Minister of Justice, as well as the President. I also advised the Minister that all the dockets relating to the TRC cases, which had been stored at the Office of the Director of Public Prosecutions (DPP) in Pretoria, had been handed over to the SAPS in early and mid-2004. In my capacity as then DG of Justice I was actually present in the office of the DPP when representatives from the SAPS collected the said dockets.

73. I concluded my letter by requesting an urgent meeting with the Minister and myself and my Deputies. I also requested an opportunity to appear before the National Security Council *"to give a true account of this issue"*.

74. The Minister did not respond to my requests and these meetings never

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took place. On 23 September 2007 I was suspended from office by President Mbeki. Shortly after my suspension I learned that Advocate Ackermann had been relieved of his duties in relation to the TRC cases.

CONCLUSION

75. I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matter since my suspension and the removal of the TRC cases from Advocate Ackermann.
76. The political interference or meddling that I have set out in this affidavit is deeply offensive to the rule of law and any notion of independent prosecutions under the Constitution. It explains why the TRC cases have not been pursued. It also explains why the disappearance and murder of Nokuthula Simelane was never investigated with any vigour and why the pleas of her family and her representatives were ignored.


VUSUMZI PATRICK PIKOLI

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I hereby certify that the deponent has acknowledge that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at CAPE TOWN on this the 6th day of MAY 2011 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Andrew Lehloyo Dorcky Mohohlo
 Commissioner of Oaths
 Practising Attorney
 2nd Floor, Leadership House, 40 Shortmarket Str
 Greenmarket Square, Cape Town, 2011

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We walked among their ranks saying that none among them should predicate a better future for themselves on the basis of the impoverishment of those who had prospered at their expense. We said to them that on the day of liberation, there would be no looting. There would be celebrations and no chaos.

We said that as the majority, we had a responsibility to make our day of liberation an unforgettable moment of joy, with none condemned to remember it forever as a day of bitter tears.

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

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

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

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

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

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

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

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

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

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

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

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

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

Honourable Members;

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

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"...the Constitution of the Republic of South Africa, 1993 provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex;

"...the Constitution states that the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society;

"...It is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future;

"...the Constitution states that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".

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

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

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

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

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

It had to help us to promote understanding and avoid vengeance, to extend reparation to those who had been harmed and discourage retaliation, to rely on the spirit of ubuntu as a deterrent against victimisation.

The TRC has done its work as was required. As stipulated in the TRC Act, we are here to make various recommendations to our national parliament, arising out of the work of the TRC.

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

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

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

The first of these is the matter of reparations.

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

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

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

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

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

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

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

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

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

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

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

Let us start off by reiterating that there shall be no general amnesty. Any such approach, whether applied to specific categories of people or regions of the country, would fly in the face of the TRC process and subtract from the principle of accountability which is vital not only in dealing with the past,

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but also in the creation of a new ethos within our society.

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

This reality cannot be avoided.

Government is of the firm conviction that we cannot resolve this matter by setting up yet another amnesty process, which in effect would mean suspending constitutional rights of those who were at the receiving end of gross human right violations.

We have therefore left this matter in the hands of the National Directorate of Public Prosecutions, for it to pursue any cases that, as is normal practice, it believes deserve prosecution and can be prosecuted. This work is continuing.

However, as part of this process and in the national interest, the National Directorate of Public Prosecutions, working with our intelligence agencies, will leave its doors open for those who are prepared to divulge information at their disposal and to co-operate in unearthing the truth, for them to enter into arrangements that are standard in the normal execution of justice, and which are accommodated in our legislation.

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

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

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

Thirdly, in each instance where any legal arrangements are entered into between the NDPP and particular perpetrators as proposed above, the involvement of the victims will be crucial in determining the appropriate course of action.

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

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

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

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

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

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

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

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

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

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

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

Madame Speaker;

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

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

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

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

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

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

What we have identified today, arising out of the report of the TRC, forms part of the panoply of programmes that define the first steps in a journey that has truly begun. South African society is changing for the better. The tide has turned and the people's contract for a better tomorrow is taking shape.

The goals we defined for ourselves a decade ago, as we adopted the Interim Constitution, to pursue national unity, to secure peace and the well-being of all South African citizens, to achieve national reconciliation and the reconstruction of our society, have not fully been realised, despite the progress we have made.

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

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

We have to ask ourselves and honestly answer simple questions.

Have we succeeded to create a non-racial society? The answer to this question is no!

Have we succeeded to build a non-sexist society? The answer to that question is no!

Have we succeeded to eradicate poverty? Once more the answer to that question is no!

Have we succeeded fully to address the needs of the most vulnerable in our society, the children, the youth, people with disabilities and the elderly? Once again the answer to this question is no!

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

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

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

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

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

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

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

Thank you.

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MINISTRY OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT
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Adv Vusi Pikoli
National Director of Public Prosecutions
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6 February 2007

Dear Adv Pikoli

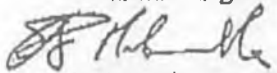
RE: TRO MATTERS

Our discussion in the above matter on Tuesday 6 February 2007 refers.

I must advise you at the outset that the media articles alleging that the National Prosecuting Authority will go ahead with prosecutions have caught me by surprise. In our discussions you briefly mentioned to me that the NPA will not be going ahead with the prosecutions. As you had undertaken to advise me in writing, I will appreciate it if you could advise me urgently on the matter so that there can be certainty.

I trust that you find the above in order.

With warm regards


MRS B S MABANDLA
MINISTER



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Cops up for apartheid crimes

<http://www.news24.com/SouthAfrica/News/Cops-up-for-apartheid...>

VPP B



Cops up for apartheid crimes

2007-02-07 07:15

Jan-Jan Joubert and Willem Jordaan

Cape Town - The national prosecuting authority (NPA) has informed three security policemen that they are to be prosecuted for apartheid crimes.

These will be the first prosecutions since the Truth and Reconciliation Commission (TRC).

The case is related to attempts to poison the Rev Frank Chikane, who is now the director-general of the presidency.

Beeld has the names of the three security police officers and has established that they have been informed by their legal representative that the NPA intends to go ahead with prosecutions.

The move paves the way for prosecution of former minister of law and order Adriaan Vlok and former chief of police General Johan van der Merwe, who are both fully aware of, and prepared for, what will follow, according to sources.

Address to the nation

The NPA did not want to confirm or deny that the prosecutions were to begin.

In political circles, speculation is rife that the planned prosecutions could open a hornet's nest in the week of President Thabo Mbeki's address to the nation.

The question of prosecuting apartheid-era crimes is politically loaded, as some believe that they're necessary to conclude the TRC process, while others feel they could destroy reconciliation.

It appears that members of the latter group could use high-level political pressure to try to prevent prosecutions.

In terms of policy and the constitution, the decision to prosecute lies with the national director of prosecutions, advocate Vusi Pikoll, and not with the government.

Questions already have been asked in high circles about the equanimity of the NPA, and if well-known African National Congress figures who did not get amnesty, would be prosecuted.

One of the ANC members whose amnesty application was turned down was Thabo Mbeki, who applied with a number of other ANC members.

Vlok was in the news recently when he washed Chikane's feet to atone for the attempt to poison him while he was general secretary of the South African Council of Churches.

The three security policemen were connected to the same plot to kill Chikane.

Vlok's step was lauded last year by Mbeki, who added that South Africans should learn to listen more closely to each other across the boundaries of apartheid.

Vlok did not want to respond to rumours that he could be prosecuted. Van der Merwe also remained silent.

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Cops up for apartheid... <http://www.news24.com/SouthAfrica/News/Cops-up-for-apartheid...>

Don't Wegener, legal representative of the three security policemen, said the NPA informed him of their decision at the end of last month.

He did not want to comment on any particulars.

The latest events follow the tabling in parliament last January of a new prosecution policy on apartheid crimes, among other things.

The victim has a say

It includes a clause that gives the NPA discretion on whether or not to prosecute, if it is not in "the national interest".

One of the factors that must be taken into account is whether the apartheid victim wants the prosecution to go ahead.

In Chikane's case, he has indicated that he is not interested in prosecution, but that he wants full disclosure on the attempt on his life.

He has also indicated that the government is not interested in time-consuming prosecutions.

The NPA has indicated, nevertheless, that prosecution will go ahead.

Beeld

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Dossiere oor leiers se vergrype lê al jare in kluis ANC-lêers 'verdwyn'

Sonja CarstensPretoria

Die polisie het nog niks gedoen om meer bewyse en getuïenis te kry vir die moontlike vervolging van 37 destydse leiers van die ANC aan wie amnestie vir apartheidsmisdade geweer is nie.

Rapport het die afgelope week uit onberispelike bronne verneem die polisie-dossiere wat twee afgetrede polisielede vroeër saamgestel het, is al jare toegesluit by die hoofkantoor van die polisie se speurdienste. Die bronne se name word op versoek verswyg weens die sensitiwiteit wat hulle beklee.

Volgens die bronne is geen verdere ondersoekwerk na die inligting in die dossiere gedoen nie. Die dossiere is vroeër verwyder uit 'n kluis in die kantore van die direkteur van openbare vervolgings (DOV) in Pretoria waar adv. Paul Fick, SC, hoof van die vervolgingsspan wat die vermeende Boeremagdele aankla, die hoof was van 'n span wat verder ondersoek ingestel het met die oog op moontlike vervolging.

Die nasionale vervolgingsgesag (NV) het die ondersoek jare gelede weggeneem van Fick. Hy wou die afgelope week glad nie op vrae reageer nie.

Rapport verneem sedert dit uit Fick se kantoor verwyder is, is dit toevertrou aan 'n span by die NV wat dit verder moes ondersoek, maar wat welig aan die ondersoek gedoen het.

Hierin is adv. Anton Ackermann, SC, in Junie 2003 aangestel as hoof van 'n eenheid wat onder meer misdade teen die staat moes ondersoek. Ackermann was die aanklaer in die Vlok-Van der Merwe-verhoor.

Genl. Johan van der Merwe, voormalige polisiehoof, het Vrydag gesê "oorgenoeg getuïenis" bestaan teen die ANC-leierskorps oor hul betrokkenheid by die landmynontploffing in 1995 waarin verskeie lede van die Van Eck- en De Necker-gesin gesterf het.

In Junie 2004 het mnr. Siphon Ngwema, destydse woordvoerder van die NV, gesê nie een van die 37 leiers, onder wie pres. Thabo Mbeki, mnr. Jacob Zuma, komm. Jackie Selebi, polisiehoof, mnr. Linda Mti, vorige kommissaris van korrekte diens, en min. Essop Pahad kan vervolgt word nie omdat "daar eenvoudig nie genoeg getuïenis is om 'n klagstaat op te stel nie".

Ngwema het destyds gesê die NV weet nie wé het wát gedoen of wie die opdragte gegee het nie. "Indien die NV dit met die getuïenis tot sy beskikking sou doen, is dit net so goed die vervolger besluit oudpres. PW Botha of oudpres. FW de Klerk moet teregstaan weens voorvalle in die apartheidsjare waarvoor niemand anders verantwoordelikheid aanvaar het nie," was Ngwema se woorde.

Mnr. Dirk van Eck het reeds aangedul hy is gereed om 'n klag in te dien teen ANC-leiers wat nie amnestie ontvang het nie vir die aanval wat meer as die helfte van sy gesin uitgewis het.

Die politieke omstredeheid oor vervolgings vir misdade uit die verlede sal uitbrel as die NV 'n vervolging instel teen genl. Basie Smit, 'n voormalige hoof van die polisie se speur- en veiligheidsstak. Een van die klousules in Vlok en Van der Merwe se pleitooreenkoms dwing hulle om in 'n moontlike verhoor teen Smit te getuig.

Rapport verneem Ackermann het vroeër skriftelik opdrag gegee dat die polisie nog getuïenis in die ondersoek na die ANC-leiers moet versamel met die oog op moontlike vervolging. Maar die afgelope week het die polisie geweer om te sê of die opdrag nagekom is en wat die vordering daarmee is.

Dir. Sally de Beer, Selebi se woordvoerder, het navrae na dir. Phuti Setati, woordvoerder van nasionale speurdienste, verwys.

"Die polisie wil sy kommentaar oor die saak voorbehou," het Setati gesê.

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scarstenss@rapport.co.za

) Vlok en Van der Merwe vra Mbeki en De Klerk om in te gryp – bl. 14

Google translate:

Dossiers on leaders' abuses lay for years in safe ANC files' disappear'
Sonja Carstens Pretoria

The police have done nothing to get more evidence and testimony for the possible prosecution of 37 former leaders of the ANC who amnesty for apartheid crimes were refused.

Report this week from impeccable sources learned that the police dockets that two retired police officers have made earlier, for years locked up at the headquarters of the police's detective services. The sources' names are withheld at the request because of the sensitive positions that they hold. According to the sources, no further investigation into the information taken in the case files.

The dossiers were earlier removed from a safe in the office of the Director of Public Prosecutions (DPP) in Pretoria Advocate. Paul Fick, SC, head of the prosecution team who accuse the alleged Boer force members, the head of a team that further investigation instituted with a view to possible prosecution.

The National Prosecuting Authority (NPA) has taken the examinations years ago Fick. He wanted the past week did not respond at all to questions.

Butchery since it was removed from Fick's office, it was entrusted to a team at the NA that it had investigated further, but that did little to investigations.

After this, Adv. Anton Ackermann, SC, was appointed in June 2003 as head of a unit that had investigated include crimes against the state. Ackermann was the prosecutor in the Vlok Van der Merwe trial.

Gen. Johan van der Merwe, a former police chief, said Friday "ample evidence" exists against the ANC leadership over their involvement in the landmine explosion in 1995 in which several members of the Van Eck- and the Necker family died.

In June 2004, Mr. Sipho Ngwema former spokesperson of the NPA, said none of the 37 leaders, including President. Thabo Mbeki, Mr. Jacob Zuma, Comm. Jackie Selebi, the police chief, Mr. Linda Mti, former commissioner of correctional services, and more. Essop Pahad can be prosecuted because "there is simply not enough evidence for an indictment to prepare,".

Ngwema said then that the NPA do not know who has what or who did not give the orders.

"If the SA would do this with the evidence at its disposal, it is as well the prosecutor decides former president. PW Botha or former president. FW de Klerk arraigned because of incidents in the apartheid years for which no one has accepted responsibility," was Ngwema's words.

Mr. Dirk van Eck has indicated he is ready to file a complaint against ANC leaders not yet received amnesty for the attack that wiped out more than half of his family.

The political controversy over prosecutions for crimes of the past will expand as the NPA a prosecution against Gen. Institute. Basle Smit, a former head of the police detective and security branch. One of the clauses of Vlok and Van der Merwe's plea agreement forcing them into a possible trial to testify against Smith.

Butchery Ackermann had earlier instructed in writing that the police have evidence in the investigation of the ANC leaders have gathered with a view to possible prosecution. But last week, the police refused to say whether the assignment is carried out and the progress it.

Dir. Sally de Beer, Selebi's spokesperson, referred questions to Dir. Phuti RAF spokesman national detective refers.

"The police want his comments on the case reserved," the RAF said.

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) Vlok and Van der Merwe asked Mbeki and De Klerk to intervene - p. 14

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<http://www.gov.za/national-prosecuting-authority-rapport-article-ackermann>

National Prosecuting Authority on Rapport article on A Ackermann

21 Aug 2007

Response to article in rapport
21 August 2007

With reference to the statements attributed to Anton Ackermann SC in the rapport of 19 August 2007, the National Prosecuting Authority (NPA) wishes to place on record the following:

- * In May 2004, Bulelani Ngcuka, the then National Director of Public Prosecutions, declined to prosecute the African National Congress (ANC) leadership in connection with the conflicts of the past. A press statement confirming this was released on 15 May 2004.
- * Since that press release the National Prosecuting Authority and in particular Ackermann has not directed any further investigation into this matter.
- * Subsequent to the media report by the Rapport on 19 August 2007, and on request by the National Prosecuting Authority, the South African Police Service (SAPS) provided a copy of letter purporting to be written by Ackermann on 26 June 2006, to the National Prosecuting Authority. The NPA regards this letter as a forgery and has authorised an immediate investigation into the matter.

Contact person:
Tlali Tlali
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28-AUG-2007 16:49 FROM DEPT OF JUSTICE

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Our ref: 27/0
Enq: Adv. M Simlana

Adv V P Pikoi
National Director of Public Prosecutions
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Dear Adv Pikoi

MEETING OF THE SUB COMMITTEE OF THE JCPS CABINET COMMITTEE ON
POST TRC MATTERS

1. I refer to the discussions in the above meeting of 23 August 2007.
2. You will recall that both you and the National Commissioner, Mr. J Selebi, provided the sub-committee with different facts on the Rapport article regarding an alleged forgery of certain NPA documents.
3. You further confirmed that you have instituted a thorough investigation into the alleged forgery. I was however not advised of this decision and the basis thereof.
4. In the course of the discussion, it became clear that Mr. J Selebi was of the view that there is no truth in the Rapport article, and he produced documents to support his argument that indeed there is an investigation by the NPA on certain political office bearers.
5. It was suggested at the meeting then that it would be useful if you could respond to the allegation that there is an investigation as mentioned above.

Your urgent response would be highly appreciated. Any information that could shed light to the issues will also be welcome.

I trust that you find this above in order.

Yours sincerely

MS S MABANDLA, MP
Minister for Justice and Constitutional Development
Date: 28.08.07



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Ref: NDPP/kp

Minister B. Mabandla
 Minister of Justice and Constitutional Development
 Momentum Building
 cnr Prinsloo and Pretorius Streets
 PRETORIA

29 August 2007

Dear Minister

**MEETING OF THE SUB-COMMITTEE OF THE JCPS CABINET
 COMMITTEE ON POST TRC MATTERS**

1. I refer to your fax of 28 August 2007.
2. I refer to the meeting of the sub-committee of 23 August 2007, which I considered to be most unpleasant. Despite the information I put before the committee, I am both surprised and disappointed to see that I now stand accused of misleading alternatively having lied to the sub-committee members.
3. I confirm that I stand by what I said about the National Commissioner of Police and the South African Police Service (SAPS).
4. I confirm and repeat the following:
 - 4.1 That I have instructed that an investigation be carried out in respect of the forgery of the memo by Adv. Ackermann SC.
 - 4.2 As borne by the attached annexure and the numerous communications to the Minister, there is no investigation by the NPA or any of its officials against the 37 ANC leaders including the President of this country, contrary to the assertions of the National Commissioner of Police, I give the

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Minister the assurance that no investigations or decisions to prosecute in these matters are done without my express authorization as per the prosecution guidelines as they pertain to the post TRC matters.

5. While I am not certain as to what the meaning of paragraph 4 of your letter is, it is, however, clear that my account of the position as it relates to the NPA's handling of the post TRC matters has been completely ignored.
6. Arising from allegations made by two police officers, as well as a threat by a lawyer representing former Security Branch members who were facing prosecution, my predecessor had the material relating to the ANC leadership perused and satisfied himself that there was no basis for the leadership to be investigated. He also briefed your predecessor, as well as members of the Office of the Presidency to this effect. In my presence and in my capacity as the then Director General of the Department of Justice & Constitutional Development, all the police dockets stored at the Office of the Director of Prosecutions: Pretoria were handed over to the police. These events all took place in early and mid-2004. I confirm as well that the Minister was made aware of all these facts as far back as December 2004 and I am surprised that this issue is now resurfacing.
7. In view of all that is transpiring now, I request an urgent meeting with the Minister, my Deputies and myself. Further, I request an opportunity to appear before the National Security Council to give a true account of this issue.

Kind regards

Adv. VP Pikoli
National Director of Public Prosecutions
Date:

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TRC COMMITTEE MEMBERS

NAME	DEPT.	CONTACT No.	EMAIL	
Anton Ackermann	NPA (PCLU)	012-845 6474	arackermann@npa.gov.za	
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AT Mngwenwe	NPA(DSO)	012-845 6470	atmngwenwe@npa.gov.za	
NVE Ngidi	NPA(DSO)	012-845 6401	nvengidi@npa.gov.za	
		<u>PRINCIPAL</u>		
		<u>S</u>		
Adv Vusi Pikoli	NPA(NDPP)	012-845 6758		
Kalyani Pillay	NPA	012-845 6749		
Loyiso Jafta	Presidency	012-300 5458		
M Simelane	DG justice	012-315 1730		
MF Manzi	NIA			

MINUTES OF TRC COMMITTEE MEETING 12 October 2006Members Present:

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

Apologies : none — National Commissioner.

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

R.R.

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

Committee Meeting

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

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

[Handwritten signatures]