

APPENDIX A

PROSECUTING POLICY AND DIRECTIVES RELATING TO THE PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED ON OR BEFORE 11 MAY 1994

A. INTRODUCTION

1. It is recorded that:
 - (a) Not all persons who committed crimes before 11 May 1994 and which emanate from conflicts of the past applied for or were granted amnesty during the TRC process ("the designated cases").
 - (b) It is necessary to set out procedures in terms of which the designated cases can be dealt with by the prosecution authorities.
 - (c) A continuation of the amnesty process of the TRC cannot be considered as this would constitute an infringement of the Constitution, especially as it would amount to a suspension of victims' rights and would fly in the face of the objectives of the TRC process. The question as to the prosecution or not of persons, who did not take part in the TRC process, is left in the hands of the National Prosecuting Authority (NPA) as is normal practice.
 - (d) As part of the normal legal processes and in the national interest, the NPA, working with the Intelligence Agencies, will be accessible to those persons who wish to enter into agreements that are standard in the normal execution of justice and the prosecuting mandate, and which are accommodated in our legislation.
2. In view of the above, prosecuting policy, directives and guidelines are required in respect of the designated cases that reflect and attach due weight to the following:
 - (a) The Human Rights culture which underscores the Constitution and the status accorded to victims in terms of the TRC and other legislation.
 - (b) The constitutional right to life.
 - (c) The non-prescriptivity of the crime of murder.
 - (d) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

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- (e) The *dicta* of the Constitutional Court to the effect that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid. (See *The State v Wouter Basson* CCT 30/03.).
 - (f) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).
 - (g) The legal obligations placed on the NPA in terms of its enabling legislation, in particular the provisions relating to the formulation of prosecuting criteria and the right of persons affected by decisions of the NPA to make representations, and for them to be dealt with.
 - (h) The existing prosecuting policy and general directives or guidelines issued by the National Director of Public Prosecutions (NDPP) to assist prosecutors in arriving at a decision to prosecute or not.
3. The existing legislation and normal processes referred to in A1(d) above include the following:
- (a) The NPA has a general discretion not to prosecute in cases where a *prima facie* case has been established. The factors to be considered include the following:
 - (i) The fact that the victim does not desire prosecution.
 - (ii) The severity of the crime in question.
 - (iii) The strength of the case.
 - (iv) The cost of the prosecution weighed against the sentence likely to be imposed.
 - (v) The interests of the community and the public interest.

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

- (b) Section 204 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which provides that a person who is guilty of criminal conduct may testify on behalf of the State against his or her co-conspirators and if the Court trying the matter finds that he or she testified in a satisfactory manner, grant him or her indemnity from prosecution. No indemnity from private prosecution or civil liability is obtained.
- (c) Section 105A of the Criminal Procedure Act, 1977, which makes provision for a person who has committed a criminal offence to enter into a mutually

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acceptable guilty plea and sentence agreement with the NPA. No indemnity from private prosecution or civil liability is obtained.

(d) Section 179(5) of the Constitution, in terms of which the NDPP may review a decision to prosecute or not to prosecute.

4. Therefore, in light of the equality provisions in our Constitution and the equality legislation, it is important to deal with the designated cases on a rational, uniform and effective basis in terms of specifically defined prosecutorial policies, directives and guidelines.

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

The following procedure must be strictly adhered to in respect of the designated cases:

1. A person who faces possible prosecution in a designated case and who wishes to enter into arrangements with the NPA as contemplated in paragraph A3(a)-(c) above (the Applicant), must submit a written sworn affidavit or solemn affirmation to the NDPP containing such representations.
2. The NDPP must confirm receipt of the affidavit or affirmation and may request further particulars by way of a written sworn affidavit or solemn affirmation from the Applicant. The Applicant may also *mero moto* submit a further written sworn affidavit or solemn affirmation to the NDPP containing representations.
3. Subject to B6 and B7 below, the Priority Crimes Litigation Unit (PCLU) in the Office of the NDPP shall be responsible for overseeing investigations and instituting prosecutions in all designated cases.
4. The regional Directors of Public Prosecutions must refer all prosecutions in designated cases with which they are or may be seized, immediately to the Office of the NDPP.
5. The PCLU shall be assisted in the execution of its duties by a senior designated official from the Detective Division of the South African Police Service and the NPA's Directorate of Special Operations.
6. The NDPP must approve all decisions to continue an investigation or prosecution or not, or to prosecute or not to prosecute in designated cases.
7. The NDPP must also be consulted in respect of and approve any offer to an Applicant in designated cases relating to the bestowing of the status of a section 204 witness and all section 105A plea and sentence agreements.

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8. The NDPP may obtain the views of any private or public person or institution, our intelligence agencies and the Commissioner of the South African Police Service, and must obtain the views of any victims, as far as is reasonably possible, before arriving at a decision in terms of B6 and B7 above.
9. The NDPP must take all reasonable steps to make contact with victims and to ensure that they are legally assisted when making their representations.
10. A decision of the NDPP not to prosecute any designated case and the reasons for that decision must be made public.
11. In accordance with section 179(6) of the Constitution, the NDPP must inform the Minister for Justice & Constitutional Development of all decisions taken or intended to be taken in respect of this prosecuting policy relating to designated cases.
12. The NDPP may make public statements on any matter arising from this policy relating to conflicts of the past, where such statements are necessary in the interests of good governance and transparency, but only after informing the Minister for Justice and Constitutional Development thereof.
13. The institution of any prosecution in terms of this policy relating to conflicts of the past would not deprive the accused from making further representations to the NDPP requesting the NDPP to withdraw the charges against him or her. These representations would be considered according to the NPA prosecuting policy, directives, guidelines and established practice. The victims must, as far as reasonably possible, be consulted in any such further process and be informed, should the accused's representations be successful.
14. The NDPP may provide for any additional procedures.
15. All state agencies, in particular those dealing with the prosecution of alleged offenders and those responsible for the investigation of offences, must be requested not to use any information obtained from an alleged accused person during this process in any subsequent criminal trial against such a person. Whatever the response of such agencies may be to this request, the NPA records that its policy in this regard is not to make use of such information at any stage of the prosecuting process, especially not to present it in evidence in any subsequent criminal trial against such person.

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C. CRITERIA GOVERNING THE DECISION TO PROSECUTE OR NOT TO PROSECUTE AND TO OFFER THE STATUS OF A SECTION 204 WITNESS IN CASES RELATING TO CONFLICTS OF THE PAST

The general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, must, in a **balanced** way, be applied by the NDPP before reaching a decision contemplated in section A3(a) and A3(b) above in a designated case.

D. CRITERIA GOVERNING THE DECISION TO OFFER A S105A PLEA AND SENTENCE AGREEMENT TO PERPETRATORS OF CRIMES RELATING TO CONFLICTS OF THE PAST

Apart from the general criteria set out in paragraph 4 of the Prosecuting Policy of the NPA, the following criteria must, in a **balanced** way, be applied by the NDPP before reaching a decision whether to enter into a plea and sentence agreement in respect of a designated case:

- (a) Whether the alleged offender has made a full disclosure of all relevant facts, factors or circumstances to the alleged act, omission or offence.
- (b) Whether the alleged act, omission or offence is an act associated with a political objective committed in the course of conflicts of the past. In reaching a decision in this regard the following factors must be considered:
 - (i) The motive of the person who committed the act, omission 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

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- (bb) out of personal malice, ill-will or spite, directed against the victim of the act or offence committed.
- (c) The degree of co-operation on the part of the alleged offender, including the alleged offenders endeavours to expose—
 - (i) the truth of the conflicts of the past, including the location of the remains of victims; or
 - (ii) possible clandestine operations during the past years of conflict, including exposure of networks that operated or are operating against the people, especially if such networks still pose a real or latent danger against our democracy.
- (d) The personal circumstances of the alleged offender, in particular—
 - (i) the credibility of the alleged offender;
 - (ii) the alleged offender's sensitivity to the need for restitution;
 - (iii) the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation;
 - (iv) renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and
 - (v) the degree of indoctrination to which the alleged offender was subjected.
- (e) Whether the offence in question is serious.
- (f) The extent to which the plea and sentence agreement may contribute to, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.
- (g) Whether entering into a plea and sentence agreement may avoid further or renewed 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, it being obligatory in so far as it is reasonably possible, to obtain the views of

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the victims of the offence in relation to the proposed plea and sentence agreement.

- (j) Any further criteria, which might be deemed necessary by the prosecuting authority for reaching a decision.

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