IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS REGARDING EFFORTS OR ATTEMPTS TO STOP THE INVESTIGATION OR PROSECUTION OF TRUTH AND RECONCILIATION COMMISSION CASES (TRC CASES INQUIRY)

AFFIDAVIT OF ADV SYBRAND GERHARDUS NEL (5018175031087)

I, the undersigned, Sybrand Gerhardus Nel (known as Gerhard Nel), hereby state under oath as follows:

1. I am an adult male person residing at Kingfisher Road No 30, Monte Christo, Hartenbos, Mossel Bay.

2. The facts stated in this affidavit are within my personal knowledge unless the context states otherwise and are both true and correct.

3. I was employed as a Deputy Director of Public Prosecutions in the office of the National Director of Public Prosecutions (NDPP) from 2002 until my retirement at the end of December in 2015. In the National Prosecuting Authority (NPA), I was responsible for, among others, legislative drafting and the provision of legal opinions. Prior to that, I served as Chief Director in the Department of Justice up to 1997, and was involved in legislative drafting and assist the Parliamentary Committees in the discussion and promotion of Bills.

4. The purpose of this affidavit is to address matters that involve my participation and involvement with the Amnesty Task Team (ATT). I have been referred to the founding affidavit deposed to Mr Matthwes Calata in the High Court matter and that my name appears in documents relating to the ATT, a Task Team established in 2004 to consider matters arising from the TRC process. I have been requested by the Commission of Inquiry into Allegations Regarding Efforts or Attempts to Stop the Investigation or Prosecution of Truth and Reconciliation Cases ("the Commission") in its mandate under the Terms of Reference. I also confirm that I received a notice in terms of Rule 3.3 of the Commission's Rules and this affidavit will address issues raised in the notice.

5. As a starting point, I would like to state that I have no independent recollection of attending any meetings of the Task Team. After I received the rule 3.3 notice, I reviewed my personal notes and folders, and could find no agendas, minutes, or correspondence confirming my attendance at any ATT meetings. However, I accept that if the official records indicate my attendance at such meetings it is probable that I did attend. From my recollection, the ATT was established on 23 February 2004, with meetings reportedly held on 26 February and 1 March 2004. Thus, the lifespan of the Task Team was very short, approximately only four days. This makes it very difficult to recollect whether I had any participation in the discussions of such an Amnesty Committee.

6. The ATT was tasked with considering the President's speech of 15 April 2003 which emphasized that there would be no general amnesty and that prosecutions should proceed according to normal legal processes. The Task Team's main responsibility was the drafting of policy directives for the prosecution of TRC-related cases. This process was not supposed to stop investigations or prosecutions.

7. I did not participate in the drafting of the ATT's reports or further reports, nor was I involved in the legal opinions referenced in those documents.

8. I confirm that I was involved in drafting a Cabinet Memorandum for the signature of the National Director (then Adv Vusi Pikoli) regarding the submission of the prosecution guidelines to Parliament. A copy of the draft Cabinet Memorandum is attached hereto and marked "**TRC Guidelines(CAB MEMO.11.03.2005)**" Please note, that this is not the signed Cabinet Memorandum.

9. I also drafted an office note to Adv Pikoli regarding the submission of the Prosecution Guidelines to the Portfolio Committee on Justice and Constitutional Development. In these notes I indicated that when I submitted the "Presentation Document" to the Chairperson of the Portfolio Committee on Justice and Constitutional Development for her consideration before the distribution thereof to Members of the Committee, she affected changes to make it clear that Cabinet did not "approve" the Amended Policy **but it was merely submitted to Cabinet so as to note the Amended Policy.** Thereby emphasising that the NDPP acts

independently in determining the Prosecution Policy and the only requirements are that you must determine the Policy "in concurrence with" the Minister and "after consultation with" the DPPs. **The Committee accordingly accepted a resolution that the Amended Policy has been "noted".** This office note is attached hereto and marked "**Amended Prosecution Policy(TRC Cases. NDPP Notes.23.06.2006)**".

10. I would like to clarify for the benefit of the Commission that there is a distinction between Prosecution Policy (requiring concurrence of the Minister and consultation with Directors of Public Prosecutions) and policy directives (guidelines), which are issued at the discretion of the National Director. I therefore confirm that the ATT's work focused on policy directives, and not on amending the prosecution process. For the Commission's convenience, the relevant provisions dealing with the Prosecution Policy and Policy directives in **section 179** of the Constitution and **section 21** of the NPA Act, are attached hereto and marked "**Legislation iro Prosecution Policy and Directives**".

11. In reviewing my folders and notes, I also came across an Internal Memorandum addressed to the Amnesty Task Team. I do not know who the author of this Memorandum is. However, I assume it was drafted by the Priority Crimes Litigation Unit (PCLU), because in paragraph 2 it deals with general criteria governing a decision to prosecute. These general criteria are contained in the Prosecuting Policy and Directives. In paragraph 3 the memorandum deals with the operating guidelines of the PCLU. A copy of this memorandum is attached hereto and marked "**Amnesty(NPA Policies)**".

12. I want to state it unequivocally that during the performance of my work at the NPA and during discussions and the attendance of any meetings in the performance of my duties, there were no discussions to stop or interfere with the investigation or prosecution of TRC cases.

13. **Conclusion**

(a) In conclusion I want to state that at no stage did I participate in any attempt to stop or interfere with the investigation or prosecution of TRC cases. Furthermore, at no stage was I present where such attempts or interference were discussed.

(b) As indicated above, my involvement was limited to providing legal advice, the drafting of cabinet memoranda and the submission of the Prosecution Directives to the Parliamentary Committee of Justice and Constitutional Development.

DEPONENT
SYBRAND GERHARDUS NEL (ID 5018175031087)

SIGNED and SWORN to before me at Hartenbos on this 22 nd day of June 2026 the deponent having acknowledged that he knows and understands the contents of this affidavit, that it is true and correct to the best of his knowledge and belief, and that he has no objection to taking the prescribed oath, and that he considers the oath to be binding on his conscience. The Regulations contained in Government Notice R1258 of 21 July 1972, as amended have been complied with.

Commissioner of Oaths
FULL NAMES:

CHRISTIAAN VAN DER MERWE
SAIPA : 21270
COMMISSIONER OF OATHS
Designation: Professional Accountant (SA)
Ex Officio: Republic of South Africa
Date: 22/06/2026
Jan Ellis Gebou, Kompanjelaan, Hartenbos

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

CABINET MEMORANDUM NO. OF 2005

MARCH 2005

1/3/P (SGN)

1. SUBJECT: GUIDELINES FOR THE PROSECUTION OF CASES ARISING FROM CONFLICTS OF THE PAST AND WHICH WERE COMMITTED BEFORE 11 MAY 1994

2. PURPOSE

The purpose of this memorandum is to obtain Cabinet approval to submit the Guidelines for the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994, as set out in paragraph 6 hereunder, to Parliament in terms of section 21(2) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), for its consideration.

3. SUMMARY

Following Government's response in April 2003 to the final Report of the Truth and Reconciliation Commission (TRC) regarding the handling of cases arising from conflicts of the past and which were committed prior to 11 May 1994, the National Director of Public Prosecutions is of the view that it is important to deal with these matters on a uniform basis in terms of specifically defined guidelines. Therefore, it is proposed that the National Director, with the concurrence of the Minister for Justice and Constitutional Development, should issue guidelines in terms of section 179(5)(a) of the Constitution, 1996, read with section 21 of the National Prosecuting Authority Act, 1998, and that such guidelines should, if Cabinet approve, be submitted to Parliament in terms of section 21(2) of the latter Act, for Parliament's consideration.

4. BACKGROUND INFORMATION

4.1 In his statement to the National Houses of Parliament and the Nation on 15 April 2003 the President, among others, gave Government’s response to the final report of the Truth and Reconciliation Commission (TRC). The essential features 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 undue influence to a deliberate rejection of the process.

(b) A continuation of the amnesty process cannot be considered as this would constitute a suspension of victims’ rights and would fly in the face 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 prosecuting authority as is normal practice.

(c) As part of the normal process and in the national interest, the National Prosecuting Authority (NPA), working with the Intelligence Agencies, will be accessible to those persons who are prepared to unearthing the truth and who wishes to enter into agreements that are standard in the normal execution of justice and are accommodated in our legislation.

(d) Therefore, persons who had committed crimes 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 go in 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.

4.2 In view of the above, the National Director of Public Prosecutions, in concurrence with the Minister for Justice and Constitutional Development, is of the view that guidelines are required to reflect and attach due weight to the following:

(a) The constitutional obligation on the NPA to exercise its functions without fear, favour or prejudice (section 179 of the Constitution).

(b) 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 authority to make representations and for them to be dealt with.

(c) The existing general guidelines issued by the National Director of Public Prosecutions to assist prosecutors in arriving at a decision to prosecute or not.

(d) The Human Rights values which underline the Constitution and the status accorded to victims in terms of the TRC legislation.

(e) The constitutional right to life.

(f) The non-prescriptivity of the crime of murder.

(g) 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.

(h) 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.

(i) The *dicta* of the Constitutional Court justifying the constitutionality of the above process 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***)

(j) 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.)***

(k) The recommendation by the TRC that the NPA should consider prosecutions for persons who failed to apply for amnesty or who were refused amnesty.

(l) Government's response to the final Report of the TRC as set out in paragraph 4.1 above.

5. COMMENTARY ON ABOVE CRITERIA

5.1 Since the indemnity process commenced in 1990 to date, blanket amnesty for human rights abuses has never been an option. In the light of the constitutional *dicta* above, such process would in all likelihood be unconstitutional.

5.2 Government did not intend to mandate the National Director to, under the auspice of his own office, perpetuate the TRC amnesty process.

5.3 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 National Director, among others—

(i) must issue policy directives to be observed in the prosecution process;

(ii) may review a decision to prosecute or not to prosecute.

(d) The above process would not indemnify such a person from civil liability.

5.4 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 or civil liability.

6. PROPOSED GUIDELINES FOR THE PROSECUTION OF HUMAN RIGHTS ABUSES ARISING FROM CONFLICTS OF THE PAST

Apart from the general guidelines, the following guidelines are proposed for the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994:

(a) The Priority Crimes Litigation Unit (PCLU) in the Office of the National Director of Public Prosecutions shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

(b) The regional Directors of Public Prosecutions have been instructed to refer all TRC matters with which they may be seized, to the Office of the National Director.

(c) 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.

(d) The National Director must approve all decisions to prosecute or not to prosecute. He must also be consulted when perpetrators are offered the status of section 204 witnesses and must approve all section 105A plea and sentence agreements.

(e) The National Director must inform the Ministry for Justice & Constitutional Development of all decisions, which are likely to attract heated public debate.

(f) Prosecutions of these matters shall be restricted to the following cases:

  (i) Gross violations of human rights violations.

  (ii) The evidence must be sufficient to secure a conviction.

  (iii) There must not be a legal impediment to such prosecution (e.g. some form of previous indemnity granted).

(g) The victims must be consulted before taking any decision not to prosecute and be informed of all decisions not to institute criminal proceedings.

(h) Once such a case meets the above criteria, a decision not to prosecute may nevertheless result if one or more of the following is established:

  (i) The victims do not desire prosecution or such prosecution may contribute to their re-traumatisation.

  (ii) Humanitarian factors prevail in the case of the potential accused.

  (iii) The interests of promoting reconciliation.

  (iv) Any other consideration, which would be relevant to the specific dynamics of a particular case.

(i) The institution of any prosecution would not deprive the accused from making representations to the National Director requesting him to withdraw the charges against him. These representations would be considered according to the NPA legislative guidelines and established practice. The victims must be consulted in any such process and be informed, should the accused's representations be successful.

(j) The National Director may make public statements where such statements are necessary in the interests of transparency.

7. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

As pointed out in paragraph 6 above, the Priority Crimes Litigation Unit (PCLU) in the Office of the National Director of Public Prosecutions shall be responsible for overseeing investigations and instituting prosecutions in all such matters.

8. FINANCIAL IMPLICATIONS

None

9. COMMUNICATION IMPLICATIONS

This is a very sensitive and controversial matter. It is therefore proposed that the Minister for Justice and Constitutional should, once Cabinet has approved the proposed guidelines and way forward, issue a media statement thereanent.

10. OTHER DEPARTMENTS/BODIES CONSULTED

- The Inter-ministerial Committee on Safety and Security
- The Department of Justice and Constitutional Development
- The National Intelligence Agency
- The South African Police Service
- The Department of Defence

11. RECOMMENDATIONS

That Cabinet approve—

(a) the above Guidelines for the prosecution of cases arising from conflicts of the past and which were committed before 11 May 1994;

(b) that the Guidelines be submitted to Parliament in terms of section 21(2) of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998), for its consideration.

NOTES FOR NDPP

Sir,

Just a few notes regarding the Amended Prosecution Policy.

1. When I submitted the "Presentation Document" to the Chairperson of the Portfolio Committee on Justice and Constitutional Development for her consideration before the distribution thereof to Members of the Committee, she affected changes to paragraph 6(a) (see page 4) to make it clear that Cabinet did not "approve" the Amended Policy **but it was merely submitted to Cabinet so as to note the Amended Policy.** Thereby emphasising that the NDPP acts independently in determining the Prosecution Policy and the only requirements are that you must determine the Policy "in concurrence with" the Minister and "after consultation with" the DPPs.

2. Before she introduced me at the meeting, she gave some background to why the NPA and the Minister tabled the Amended Prosecution Policy at this stage and not during June 2006 as required by section 35(2) of the NPA Act. (See sections 21(2) and 35(2) of NPA Act.) It was pointed out that we regard these amendments in a very serious light and it is of National and public interest to take Parliament on board and to inform Parliament and the public about these amendments. She also requested us to incorporate the Amended Policy in our Annual Report later this year. She also pointed out that Parliament do not have to approve the amendments. **The Committee accordingly accepted a resolution that the Amended Policy has been "noted".**

3. Some MP's and members of the Media wanted to know why we took so long in developing the Guidelines. I pointed out that it was a long consultation process where we had to consult with other law enforcement agencies, relevant departments, the Minister, the DPPs and Unit Heads. Furthermore, the Minister consulted Cabinet.

Gerhard Nel

Section 179 of the Constitution provides as follows:

"179. Prosecuting authority

1. There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of

a. a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

b. Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

2. The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

3. National legislation must ensure that the Directors of Public Prosecutions

a. are appropriately qualified; and

b. are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

4. National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

5. The National Director of Public Prosecutions

a. must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

b. must issue policy directives which must be observed in the prosecution process;

c. may intervene in the prosecution process when policy directives are not complied with; and

d. may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

i. The accused person.

ii. The complainant.

iii. Any other person or party whom the National Director considers to be relevant.

6. The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

7. All other matters concerning the prosecuting authority must be determined by national legislation.

The relevant provisions in the NPA Act provides as follows:

"21 Prosecution policy and issuing of policy directives

(1) The *National Director* shall, in accordance with section 179 (5) *(a)* and *(b)* and any other relevant section of the *Constitution*-

(a) with the concurrence of the *Minister* and after consulting the *Directors*, determine prosecution policy; and

(b) issue policy directives,

which must be observed in the prosecution process, and shall exercise such powers and perform such functions in respect of the prosecution policy, as determined in *this Act* or any other law.

(2) The prosecution policy or amendments to such policy must be included in the report referred to in section 35 (2) *(a)*: Provided that the first prosecution policy issued under *this Act* shall be tabled in Parliament as soon as possible, but not later than six months after the appointment of the first *National Director*.

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

INTERNAL MEMORANDUM

TO : AMNESTY TASK TEAM

FROM : OFFICE OF THE NATIONAL PROSECUTING AUTHORITY

SUBJECT : INPUT: AD PARAGRAPHS 1 AND 2 OF TERMS OF REFERENCE OF AMNESTY TASK TEAM

DATE : : 26 FEBRUARY 2004

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1. INTRODUCTION

1.1 In terms of paragraph 1 of the terms of reference of the abovementioned Amnesty Task Team, the Task Team must indicate what criteria the National Prosecuting Authority (NPA) applies in deciding on current and impeding prosecution of cases flowing from the conflict of the past. In this regard it is important to point out that the following cases may be considered by the NPA:

(a) Persons who did apply for amnesty through the TRC process but their applications were refused.

(b) Persons who did not apply for amnesty through the TRC process, however, information or evidence is available that they were involved in acts of gross human rights violations. The following cenarios

1.1 The possible institution of criminal proceedings flowing from the conflict of the past may emanate from the following

2. GENERAL CRITERIA GOVERNING A DECISION TO PROSECUTE

2.1 General

(a) The process of establishing whether or not to prosecute usually starts when the investigating officer presents a docket to the prosecutor. The case needs to be studied carefully to make sure that it is properly investigated. In this regard the prosecutor may—

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

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

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

(d) In deciding whether or not to institute criminal proceedings against an accused person, prosecutors should assess whether there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution. There must indeed be a reasonable prospect of a conviction, otherwise the prosecution should not be commenced or continued. This assessment may be difficult, because it is never certain whether or not a prosecution will succeed. In borderline cases, prosecutors should probe deeper than the surface of written statements. Where the prospects of success are difficult to assess, prosecutors should consult with prospective witnesses in order to evaluate their reliability. The version or the defence of an accused must also be considered, before a decision is made. This test of a reasonable prospect must be applied objectively after careful deliberation, to avoid an unjustified prosecution. However, prosecutors should not make unfounded assumptions about the potential credibility of witnesses.

(e) The review of a case is a continuing process. Prosecutors should take into account changing circumstances and fresh facts, which may come to light after an initial decision to prosecute has been made. This may occur after having heard and considered the version of the accused person and representations made on his or her behalf. Prosecutors may therefore withdraw charges before the accused has pleaded in spite of an initial decision to institute a prosecution.

2.2 Factors to be considered when evaluating evidence

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

(a) ***How strong is the case for the State?***

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

(b) ***Will the evidence be admissible?***

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

(c) *Will the state witnesses be credible?*

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

(d) *Will the evidence be reliable?*

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

(e) *Is the evidence available?*

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

(f) ***How strong is the case for the defence?***

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

2.3 Prosecution in the public interest

Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise. There is no rule in law, which states that all the provable cases brought to the attention of the NPA must be prosecuted. On the contrary, any such rule would be too harsh and impose an impossible burden on the prosecutor and on a society interested in the fair administration of justice. When considering whether or not it will be in the public interest to prosecute, prosecutors should consider all relevant factors, including:

(a) ***The nature and seriousness of the offence:***

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

(b) ***The interests of the victim and the broader community***

- The attitude of the victim of the offence towards a prosecution and the potential effects of discontinuing it. Care should be taken when considering this factor, since public interest may demand that certain crimes should be prosecuted - regardless of a complainant's wish not to proceed.
- The need for individual and general deterrence, and the necessity of maintaining public confidence in the criminal justice system.

- Prosecution priorities as determined from time to time, the likely length and expense of a trial and whether or not a prosecution would be deemed counter-productive.

(c) ***The circumstances of the offender***

- The previous convictions of the accused, his or her criminal history, background, culpability and personal circumstances, as well as other mitigating or aggravating factors.

- Whether the accused has admitted guilt, shown repentance, made restitution or expressed a willingness to co-operate with the authorities in the investigation or prosecution of others. (*In this regard the degree of culpability of the accused and the extent to which reliable evidence from the said accused is considered necessary to secure a conviction against others, will be crucial).*

- Whether the objectives of criminal justice would be better served by implementing non-criminal alternatives to prosecution, particularly in the case of juvenile offenders and less serious matters.

- Whether there has been an unreasonably long delay between the date when the crime was committed, the date on which the prosecution was instituted and the trial date, taking into account the complexity of the offence and the role of the accused in the delay.

The above factors and the weight to be attached to them will depend upon the particular circumstances of each case. It is important that the prosecution process is seen to be transparent and that justice is seen to be done.

3. OPERATING GUIDELINES OF THE PRIORITY CRIMES LITIGATIONS UNIT (PCLU)

3.1 The PCLU was established in the Office of the National Director on 1 June 2003. This Unit assists in the litigation of serious national and international crimes as proclaimed by the President. It also deals with priority crimes determined by the National Director. The National Director has determined that cases emanating from the Truth and Reconciliation Commission's process shall also be dealt with by the PCLU.

3.2 Apart from the above general criteria governing a decision to prosecute, the PCLU has developed the following operating guidelines governing a decision in respect of cases emanating from the TRC process or any other case flowing from the conflict of the past:

3.2.1 Prosecutions must only be instituted where there is strong evidence (see the KZN matter relating to Cliff Nkuna heard in 2001);

3.2.2 Cases must reflect geographically and politically the aims and objective set out in the Promotion of National Unity and Reconciliation, 1995(Act 34 of 1995), and not be in conflict with the requirements of objectivity in prosecutions specified in the Constitution;

3.2.3 Offences charged must be serious;

3.2.4 The ill health of or other humanitarian consideration relating to the accused may justify then non-prosecution of such cases;

3.2.5 The re-traumatisation of victims and the re-opening of conflicts in areas where reconciliation has already taken place must also receive due consideration;

3.2.6 Decision to prosecute should not be on a piece meal basis, but taken once all the relevant cases have been identified after the TRC tables its final report and conclude all 175 unfinished business. The National Director must endorse the final prosecution policy prior to the institution of criminal proceedings;

3.2.7 Each identified case for an investigation and potential prosecution within the project will be forwarded to the Head Directorate of Special Operations (DSO) on the basis of an application in terms of section 28 of the NPA Act. Attached to each application must be an individual operational work plan sheet in support of the focus points regarding targets, objectives, task indicator, time management, etc. After the issuing of the declaration (by the Head of the DSO), the cases will be investigated as per the above methodologies and in accordance with the DSO's policy. All cases earmarked for prosecutions will be referred to the National Director for consideration and approval;

3.2.8 Each identified case for investigation and potential prosecution not falling within the ambit of section 7 of the NPA Act (in other words where section 28 may not be utilized), will be diverted to SAPS;

3.2.9 Each case identified for closure due to lack of evidence will be submitted to the Head of the DSO on the basis of a fully motivated opinion. It will be within the discretion of the Head of the DSO to inform the National Director of any such decisions;

3.2.10 All reparation related issues will be dealt with according to the applicable law and in accordance with public policy.