

**OPINION**

For

**FOUNDATION FOR HUMAN RIGHTS**

Regarding

**EXPLORING LEGAL OPTIONS FOR THE ESTABLISHMENT OF A SPECIAL  
CAPACITY TO INVESTIGATE & PROSECUTE APARTHEID CRIMES**

**On the instructions of:**

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13 January 2020

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## INTRODUCTION

- 1 Consultant is the Foundation for Human Rights (FHR). Consultant wishes to explore the most appropriate and feasible legal options for establishing a dedicated capacity for the investigation and prosecution of apartheid crimes emanating from the Truth and Reconciliation Commission (TRC).
  
- 2 FHR seeks an opinion on whether it is legally possible to establish such a dedicated capacity within the National Prosecuting Authority (NPA), having regard to the Constitution, the National Prosecuting Authority Act, 32 of 1998 (NPA Act) the South African Police Service Act, Act 68 of 1995 (SAPS Act) and any other relevant laws. This opinion will explore whether such a special capacity:
  - 2.1 Involves appointing a Special Director; or
  - 2.2 Establishing an investigating directorate; or
  - 2.3 Whether the National Director of Public Prosecutions (NDPP) and the head of the Directorate for Priority Crimes Investigation (DPCI) may use their existing powers to establish dedicated capacities or units within their respective organisations.
  
- 3 This opinion is structured as follows:
  - 3.1 We first set out the background and context to the investigation and prosecution of apartheid-era crimes, including the challenges faced;
  - 3.2 We then set out the legal framework governing the conduct of such, including the relevant provisions from the NPA Act and the SAPS Act;

- 3.3 Next, we describe the various options for a dedicated capacity:
- 3.3.1 Option 1 - appoint a Special Director, together with an assessment of special prosecuting units created under various Special Directors;
  - 3.3.2 Option 2 - establish an investigating directorate, together with an assessment of current and former directorates;
  - 3.3.3 Option 3 - create dedicated capacities within the NPA and DPCI, employing residual powers.
- 3.4 Next, we consider the invoking of section 38, which empowers the NDPP to employ outside expertise on specific cases;
- 3.5 We then consider the possible staffing composition of a dedicated capacity to investigate and prosecute crimes of the past;
- 3.6 Finally, we provide our conclusions and recommendations.

## **BACKGROUND**

- 4 The TRC was established by section 2(1) of the Promotion of National Unity and Reconciliation Act (Act).<sup>1</sup> The objectives of the TRC included facilitating the granting of amnesty to persons who made full disclosure of all relevant facts relating to crimes associated with a political objective.<sup>2</sup>

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<sup>1</sup> 34 of 1995.

<sup>2</sup> Ibid section 3(1)(b).

- 5 The statutory design anticipated that those perpetrators who were denied amnesty or did not apply for amnesty would face justice. Indeed, the TRC recommended that the NPA adopt a “bold prosecution policy” in relation to those not amnestied.<sup>3</sup> A list comprising several hundred such cases was handed by the TRC to the NPA for this purpose (the TRC cases or crimes). Most of these cases dealt with murders and massacres.
- 6 In terms of a directive issued in 1999 by the then NDPP, the TRC cases were transferred from the then Directorate of Special Operations (DSO), and from the various offices of the Directors of Public Prosecutions (DPP) and the South African Police Service (SAPS) to the office of the NDPP.<sup>4</sup>
- 7 In 1999, a working group called the Human Rights Investigative Unit (HRIU) was established within the NPA by the then NDPP, Bulelani Ngcuka, on the initiative of the then Minister of Justice, Dullah Omar. The head of the Unit was Vincent Saldanha. It was mandated to review, investigate and prosecute cases in which perpetrators had been denied amnesty or in which perpetrators had not applied for amnesty. The HRIU continued operations until 2000, however it instituted no prosecutions.<sup>5</sup>
- 8 In 2000, the dockets held by the HRIU were transferred to the DSO, more widely known as the Scorpions. An entity was established within the DSO to handle the TRC cases

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<sup>3</sup> TRC Final Report, Volume 6, Section 5, Chapter 1 at paragraph 24, available at: <https://sabctrc.saha.org.za/reports.htm>

<sup>4</sup> Supporting affidavit of Anton Ackermann SC filed in *Nkadimeng v. the National Director of Public Prosecutions and Others* (T.P.D. Case No. 3554/2015), Gauteng Division of the High Court of South Africa, available at: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/6.-Notice-of-motion-and-founding-affidavit-and-annexures.pdf>, See pages 218 - 222, paras 9 – 14.

<sup>5</sup> Id.

known as the Special National Projects Unit (SNPU), which was headed by Advocate Chris Macadam. The SNPU operated until 2003, but it too instituted no prosecutions.<sup>6</sup>

9 On 24 March 2003, Anton Ackermann SC appointed under a presidential proclamation to head up the newly established Priority Crimes Litigation Unit (PCLU). On 15 April 2003, the TRC Report was tabled before Parliament by President Thabo Mbeki who directed that the NDPP must institute prosecutions where appropriate.<sup>7</sup>

10 In May 2003 NDPP Ngcuka, decided that all TRC-related cases, in which amnesty had been denied or not applied for, were ‘priority crimes’ in terms of the PCLU proclamation. This resulted in more than 400 investigation dockets being transferred to the PCLU.<sup>8</sup>

11 To date, very few of these cases have been taken forward. In the last 20 years we are only aware of 4 indictments being issued in respect of the TRC cases.<sup>9</sup> Two of these indictments were only issued because of considerable efforts taken by the families of victims and their legal representatives. We are not aware of any trials proceeding during this time period.

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<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> In 2004, Gideon Nieuwoudt, Johannes Martin van Zyl, and Johannes Koole were charged with abduction, assault and murder of the 3 anti-apartheid activists, known as the PEBCO 3. Litigation stopped this prosecution, which was never resuscitated. In 2007, attempted murder charges were brought against those behind the poisoning of the Rev. Frank Chikane, which resulted in a plea and sentence agreement being confirmed by the court. Following the filing of a High Court application in 2015 to compel a prosecutorial decision an indictment was issued against 4 accused for the murder of Nokuthula Simelane in 2016. Following the Inquest finding into the death of Ahmed Timol in 2017, Jao Rodrigues was charged with murder in 2018. See more generally the website: *The Unfinished Business of the TRC*, available at: <https://unfinishedtrc.co.za/>

- 12 It emerged in the 2015 case of *Nkadimeng v. the National Director of Public Prosecutions and Others*<sup>10</sup> that political interference resulted in the suppression of the TRC cases. The application included an affidavit from former NDPP, Vusi Pikoli, disclosing how he was pressured by politicians and other functionaries to drop the TRC cases. The affidavit attached a secret memorandum<sup>11</sup> that Pikoli addressed to the then Minister of Justice, concluding that there had been improper interference in the TRC cases that impinged on his conscience and oath of office.<sup>12</sup>
- 13 In September 2007, Pikoli was suspended from his duties as NDPP by President Mbeki. One of the reasons for his suspension was his insistence on proceeding with some of the TRC cases.<sup>13</sup> Shortly thereafter, Ackermann SC was relieved of his duties in relation to the TRC cases with immediate effect by Adv. Mokotedi Mpshe, then acting NDPP.<sup>14</sup>
- 14 Other attempts to shield perpetrators from justice included the creation of a ‘back door’ amnesty by amending the NPA’s Prosecution Policy; and President Mbeki’s Special Dispensation for Political Pardons sought to assist those perpetrators who did not benefit

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<sup>10</sup> (T.P.D. Case No. 3554/2015), Gauteng Division of the High Court of South Africa. Legal papers available at <https://www.ahmedtimol.co.za/nokuthula-simelane-case-files/>

<sup>11</sup> ‘PROSECUTION OF OFFENCES EMANATING FROM CONFLICTS OF THE PAST: INTERPRETATION OF PROSECUTION POLICY AND GUIDELINES’ dated 15 February 2007 (classified secret).

<sup>12</sup> Supporting affidavit of Vusi Pikoli filed in *Nkadimeng v. the National Director of Public Prosecutions and Others* (T.P.D. Case No. 3554/2015), Gauteng Division of the High Court of South Africa, available at: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/6.-Notice-of-motion-and-founding-affidavit-and-annexures.pdf>, See pages 171 - 216; and <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/2.-In-Camera-founding-affidavit.pdf> at pages 131 – 144.

<sup>13</sup> Id.

<sup>14</sup> Supporting affidavit of Anton Ackermann SC filed in *Nkadimeng v. the National Director of Public Prosecutions and Others* (T.P.D. Case No. 3554/2015), Gauteng Division of the High Court of South Africa, available at: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/6.-Notice-of-motion-and-founding-affidavit-and-annexures.pdf>, See pages 233 - 234, paras 37 – 38.

from the TRC’s amnesty. These measures had been proposed by the secret “Amnesty Task Team”, a multi-departmental team appointed on 23 February 2004 by the government’s Director-General’s Forum to address “*the absence of any guarantee that alleged offenders will not be prosecuted*”.<sup>15</sup> Both initiatives were stopped in the courts.<sup>16</sup>

15 In early 2019, two senior officials of the NPA admitted under oath in the matter of *Rodrigues v. National Director of Public Prosecutions of South Africa and Others*<sup>17</sup> that the NPA had succumbed to such political pressure.<sup>18</sup> The full court in this case expressed its dismay at such gross violations of the rule of law and directed the NPA, as well as the government, to investigate the interference and take steps to ensure nonrecurrence.<sup>19</sup> According to the NPA 2019/20 Annual Report ‘this investigation is still ongoing.’<sup>20</sup> However in a letter addressed to attorneys Webber Wentzel, the NDPP has indicated that she intends to wait for the outcome of the State Capture Commission of Inquiry before conducting any investigations of her own.<sup>21</sup>

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<sup>15</sup> Undated Secret Report: Amnesty Task Team.

<sup>16</sup> In *Nkadimeng v National Director of Public Prosecutions* [2008] ZAGPHC 422, available at: <http://www.saflii.org/za/cases/ZAGPHC/2008/422.html>; and *Albutt v Centre for the Study of Violence and Reconciliation & Others* 2010 (3) SA 293 (CC), available at: <http://www.saflii.org/za/cases/ZACC/2010/4.html>

<sup>17</sup> [2019] 3 All SA 962 (GJ); 2019 (2) SACR 251 (GJ), available at: <http://www.saflii.org/za/cases/ZAGPJHC/2019/159.html>

<sup>18</sup> See the supplementary affidavits of J P Pretorius and C R Macadam, at volumes 8 and 9 of the High Court record, available at: <https://www.ahmedtimol.co.za/rodrigues-high-court-sca-papers/>

<sup>19</sup> *Rodrigues*, at paras. 21–24 and 55–65

<sup>20</sup> At page 122, available at: <https://www.npa.gov.za/content/annual-report>

<sup>21</sup> Letter on file with Moray Hathorn, Webber Wentzel Attorneys.



16 In response to a parliamentary question posed to the Minister of Justice and Correctional Services on 10 November 2020 by Prof C T Msimang on the progress of apartheid era cases the Minister replied:

“...Despite the enormous challenges involved with the investigation and prosecution of Truth and Reconciliation Commission (TRC) cases, the National Prosecuting Authority (NPA) has made a commitment to properly deal with these matters. ....

Post-2003, ... a large number of cases were finalised without prosecutions being instituted for a variety of reasons, including lack of evidence, death of witnesses/suspects, suspects having been indemnified through the judicial processes or the previous indemnity dispensations. There are currently fifty-five (55) active investigations covering both deaths in detention and premeditated murders.”<sup>22</sup>

16.1 It is notable that the Minister chose not to disclose to Parliament the actual reason for the closing down of the TRC cases, namely political interference in the work of the NPA and SAPS. This is odd given that the Minister was a cited party in the *Rodrigues* matter referred to above in which the NPA admitted that political interference suppressed the TRC cases; and the full bench of the High Court called on the government to address such interference. To date the Minister and government have not responded to the directive of the court.

16.2 The claim of lack of evidence is misleading as during the period of political interference post 2003 there were no investigations of the TRC cases, which were all stopped. Only investigations uncover evidence.<sup>23</sup> The NPA confirmed in an

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<sup>22</sup> National Assembly: Question for Oral Reply: Parliamentary Question No: 586  
Date of Question: 10 November 2020, Date of Oral Submission in Parliament: 18 November 2020, available at: [https://www.parliament.gov.za/storage/app/media/Docs/exe\\_rq\\_na/15ea0c02-e6a6-4278-8ea1-767b295e7ee4.pdf](https://www.parliament.gov.za/storage/app/media/Docs/exe_rq_na/15ea0c02-e6a6-4278-8ea1-767b295e7ee4.pdf)

<sup>23</sup> The Timol family investigator and legal team uncovered considerable evidence pointing to murder some 45 years after the death in detention of Ahmed Timol. See outline of new evidence at: [https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/Main-heads-of-Argument-Timol-Family-FINAL2\\_-8-September-2017.pdf](https://www.ahmedtimol.co.za/wp-content/uploads/2020/03/Main-heads-of-Argument-Timol-Family-FINAL2_-8-September-2017.pdf)

affidavit before the *Rodrigues* Court that the DSO and the SAPS had refused to investigate the TRC cases.<sup>24</sup>

16.3 Equally puzzling is the claim that the NPA was hampered by the fact that suspects had been previously indemnified. The approximately 400 strong list of TRC cases handed over to the NPA, only included cases in which suspects had either been denied or amnesty or did not apply for amnesty.

17 In January 2019, the NPA implemented a decentralization policy in relation to the TRC cases in which the cases were transferred from the PCLU to the provincial offices of the various Directors of Public Prosecutions. According to the NPA 2019/20 Annual Report:

“The PCLU underwent fundamental restructuring at the beginning of the period under review, and Adv Chris Macadam was appointed acting head of the unit. After an audit of the PCLU’s workload, the organisation decided to adopt a decentralised model whereby prosecutions are conducted by prosecutors in the areas where the crimes were committed, with the PCLU performing a managerial or support role. The NPA has reaffirmed the original mandate of the PCLU, and all matters falling outside of the mandate were returned to the DPP offices with jurisdiction. The adoption of a decentralised model required that the DPPs appoint nodal points to manage the PCLU matters in their divisions. The nodal points were trained to enable them to properly manage PCLU cases, and a monthly reporting system was installed.”<sup>25</sup>

18 The aforesaid Annual Report suggests that the primary obstacle facing the TRC cases is that the investigations are out of the hands of the NPA:

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<sup>24</sup> NPA Supplementary Answering Affidavit of Adv C R Macadam, pp 750 – 919, *Jao Rodrigues v NDPP & Ors* Case No. 76755/18 Gauteng Division. In respect of the DSO refusal see: Annex SA1, NPA SAA, p 797 para 19. See also letter addressed by DSO Special Director Adv M G Ledwaba to investigator Andrew Leask dated 15 July 2003 reflecting this decision (Annex RCM3 pp 812 – 813) and p798 para 22 - 23. See letter of Anton Ackermann SC to Ledwaba (Annex RCM5 pp 816 – 818). In respect of the SAPS refusal see p797 para 19. See also letter of Commissioner De Beer, the Divisional Head of the Detective Service of SAPS (Annex RCM4 pp 814 – 815). The only case that proceeded thereafter (attempted murder of Rev Chikane) did not require further police investigation, as per pp 798 – 799 paras 26 – 27.

<sup>25</sup> At page 118.

“It must be emphasised that the primary issue lies with the investigation of these matters, which is a responsibility of the DPCI. Due to the nature of the cases, it is difficult to access all the relevant information needed to make informed decisions. The PCLU has undertaken a number of initiatives to prioritise cases. This includes commencing with a review of all the death in detention cases from 1963-1990, reviewing certain decisions not to prosecute and grouping cases to establish the existence of a modus operandi. Efforts are being made to establish a research capacity<sup>26</sup> to retrieve all historical information required for the proper investigation of TRC cases.”<sup>27</sup>

19 After 2 years the decentralisation approach has failed to yield a single indictment, trial or conviction. Indeed, our instructions are that no tangible progress has been made in any of the TRC cases in this period. We are advised that there is no discernible coordination of the cases and no connections are being made between cases. Our client indicates that it is entirely unclear who the nodal points are. It appears that prosecutors change on a regular basis and there seems to be no central accountability for the TRC cases. No entity is driving these cases. Moreover, our client is not aware of any investigative and prosecutorial strategy to tackle the TRC cases.<sup>28</sup>

20 It is evident that unless there is a change in approach the TRC cases are doomed to further neglect and delay. After decades of delay and neglect many suspects, witnesses, victims and family members are at an advanced age, with several already having died. Nyameka Goniwe, wife of slain Cradock leader, Matthew Goniwe, died on 30 August 2020 before reaching closure and seeing justice done in her husband’s brutal murder in 1985.

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<sup>26</sup> Our instructing attorney advises that the Head of the National Prosecution Service has decided to close this research capacity.

<sup>27</sup> At page 122.

<sup>28</sup> See generally Varney, De Silva, and Raleigh, ICTJ, *Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute*” (2019) at 25 – 41, available at: <https://www.ictj.org/publication/guiding-and-protecting-prosecutors-comparative-overview-policies-guiding-decisions>

21 The FHR has called for an urgent change of direction in its September 2020 memorandum to the President, NPA, SAPS and various Ministers titled ‘Proposed New Approach to Apartheid Era Prosecutions’. This memo provides comparative research into the approaches adopted by several countries dealing with crimes committed in past conflicts. The FHR found that those countries which created dedicated capacities to investigate and prosecute such crimes were the most successful, whereas those that did not, invariably failed to deliver adequate justice.

## **OVERVIEW OF THE LEGAL FRAMEWORK**

### ***The NPA Act***

22 The NPA Act is the national legislation regulating the NPA, as contemplated by section 179 of the Constitution. Section 2 provides for a single prosecuting authority. Section 3 provides that it consists of ‘the Office of the National Director and the offices of the prosecuting authority at the High Courts, established by section 6(1)’. Section 4 sets out the composition of the prosecuting authority as follows:

‘The prosecuting authority comprises the –  
(a) National Director;  
(b) Deputy National Directors;  
(c) Directors;  
(d) Deputy Directors; and  
(e) Prosecutors.’

23 Section 5 establishes a National Office of the Prosecuting Authority (known as the Office of the NDPP). It provides for the NDPP, DPPs, investigating directors, special directors, other appointed or assigned members and administrative staff.

- 24 Section 6 establishes offices for the prosecuting authority at the seat of each High Court division. Each such office consists of (1) a head of office, who is either a DPP or a Deputy DPP (DDPP); (2) a DDPP; (3) prosecutors; (4) persons appointed to perform specific functions in terms of the NPA Act, and; (5) administrative staff.
- 25 The DNDPPs are appointed in terms of section 11 of the NPA Act. The President, after consultation with the Minister and NDPP, may appoint not more than four persons as DNDPPs.<sup>29</sup> DNDPPs exercise powers set out in section 20(1)<sup>30</sup> subject to the control and directions of the NDPP.<sup>31</sup>
- 26 Section 13(1) of the NPA Act provides that the President may, after consultation with the Minister and the NDPP, appoint DPPs as heads of the prosecuting authority at the respective seats of each high court. The DPPs are responsible for prosecutions within their respective jurisdictions, subject to the control and directions of the NDPP.<sup>32</sup> DPPs may conduct criminal proceedings only in relation to offences that have not been expressly excluded from their jurisdiction by the NDPP.<sup>33</sup>

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<sup>29</sup> Section 11(1) of the NPA Act.

<sup>30</sup> Section 20(1) provides for the power to institute and conduct criminal proceedings. —  
“(1) The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to—  
(a) institute and conduct criminal proceedings on behalf of the State;  
(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and  
(c) discontinue criminal proceedings,  
vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.”

<sup>31</sup> Section 20(2) of the NPA Act.

<sup>32</sup> Section 20(3)(a) of the NPA Act.

<sup>33</sup> Section 20(3)(b) of the NPA Act.

27 The DDPPs' powers, duties and functions are set out in section 20(4) of the NPA Act, which provides that they act subject to the control and direction of the DPP in the jurisdiction for which they appointed and exercise powers in respect of such offences as authorised in writing by the NDPP.

28 Section 16(1) provides for the appointment of prosecutors. Section 16(1) in turn provides:

‘(1) *Prosecutors* shall be appointed on the recommendation of the *National Director* or a member of the *prosecuting authority* designated for that purpose by the *National Director*, and subject to the laws governing the public service.’

29 Section 22 deals with the powers, duties and functions of the NDPP. Sub-section (1) provides that:

‘(1) The *National Director*, as the head of the *prosecuting authority*, shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the *prosecuting authority* by the *Constitution, this Act* or any other law.’

30 Section 22(4) provides that the NDPP may when exercising his or her powers in terms of section 22(2) of the NPA Act, *inter alia*:

30.1 conduct any investigation necessary in respect of a prosecution or prosecution process or directives, directions or guidelines given or issued by a DPP in terms of the NPA Act, or a case or matter relating to such prosecution or prosecution process or directives, directions or guidelines;<sup>34</sup>

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<sup>34</sup> Section 22(4)(a)(i).

30.2 consider such recommendations, suggestions and requests concerning the Prosecuting Authority as the NDPP may receive from any source;<sup>35</sup> and

30.3 make recommendations to the Minister regarding the NPA or the administration of justice as a whole.<sup>36</sup>

31 Provisions dealing with the appointment of Special Directors and outside counsel and the establishment of Investigating Directorates are dealt with below.

### ***The SAPS Act***

32 The South African Police Service Act, Act 68 of 1995 (the SAPS Act) is the national legislation governing the police as contemplated in section 205(3) of the Constitution.

33 The SAPS Amendment Act No. 57 of 2008 amended the SAPS Act in order to, *inter alia*:

33.1 enhance the capacity of the SAPS to prevent, combat and investigate national priority crimes and other crimes, by establishing a separate division in the SAPS, the DPCI;

33.2 provide for the transfer of powers, investigations, assets, budget and liabilities of the Directorate of Special Operations, established in terms of the NPA Act, to the SAPS;

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<sup>35</sup> Section 22(4)(c).

<sup>36</sup> Section 22(4)(i).

- 33.3 ensure a multi-disciplinary and integrated investigative approach for the DPCI by providing for the secondment of personnel from other government departments to the DPCI;
- 33.4 provide for the designation by the President of a Ministerial Committee to oversee the functioning of the DPCI; and
- 33.5 provide for Parliamentary oversight in respect of the activities of the DPCI.
- 34 The SAPS Amendment Act No. 10 of 2012 was enacted in response to a Constitutional Court judgment,<sup>37</sup> which found that the DPCI lacked the necessary operational independence to fulfil its mandate without undue influence.

#### Directorate for Priority Crimes Investigation

- 35 Section 17C of the SAPS Act establishes the DPCI. Section 17D speaks to the functions of the DPCI, 17D(1) states:

*“The functions of the Directorate are to prevent, combat and investigate—*

- (a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Minister and approved by Parliament;*
- (aA) selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); and*
- (b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and approved by Parliament.”*

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<sup>37</sup> *Glenister v The President of the Republic of South Africa & Others* ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) at para 251.



36 Subsection 17D(1)(a) provides for the prevention, combatting and investigation of national priority offences which, in the opinion of the head of the DPCI, need to be handled by the DPCI. National priority offences are defined as “*organised crime, crime that requires national prevention or investigation, or crime which requires specialized skills in the prevention and investigation thereof, as referred to in section 16 (1)*”.

### **OPTION 1: SPECIAL DIRECTOR**

37 Section 13(1) provides for appointment of directors and acting directors. Section 13(1)(c) makes provision for the appointment of Special Directors:

“The President, after consultation with the Minister and the National Director—

...

(c) may appoint one or more Directors of Public Prosecutions (hereinafter referred to as Special Directors) to exercise certain powers, carry out certain duties and perform certain functions conferred or imposed on or assigned to him or her by the President by proclamation in the Gazette.”

38 Section 24(3) provides for the powers of Special Directors. It states that a:

“Special Director shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her by the President, subject to the directions of the National Director: Provided that if such powers, duties and functions include any of the powers, duties and functions referred to in section 20 (1), they shall be exercised, carried out and performed in consultation with the Director of the area of jurisdiction concerned.”

39 Various courts have pronounced on the ambit of section 13(1)(c).<sup>38</sup> The powers under this section must be understood in conjunction with the powers set out in section 20 to

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<sup>38</sup> *Freedom Under Law v National Director of Public Prosecutions and Others* [2013] ZAGPPHC 271; [2013] 4 All SA 657 (GNP); 2014 (1) SA 254 (GNP) (*FUL v NDPP*); 2014 (1) SACR 111 (GNP). *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2015 (1) SACR 255 (CC); 2014 (12) BCLR 1428 (CC) at para 58.

institute and conduct criminal proceedings.<sup>39</sup> A Special Director is entitled to exercise the powers and perform the functions assigned to her pursuant to her appointment together with those set out in the Act.<sup>40</sup>

40 A Special Director enjoys powers stipulated by the Presidential Proclamation, subject to the control of the NDPP.<sup>41</sup> An assessment of the proclamations issued so far suggests that the powers typically assigned to a Special Director are not as comprehensive as those the NPA Act affords to Investigating Directorates under section 7.

41 We are aware of four presidential proclamations issued under section 13(1)(c) which have appointed Special Directors, which are set out below. It appears that the President is at liberty to grant narrow or expansive powers to Special Directors, which range from legal advice and liaison to managing and directing investigations and prosecutions of a special category of cases.

### ***Priority Crimes Litigation Unit***

42 Under Proclamation 46 of 2003 GG 24876, Anton Ackerman SC was appointed as a Special Director to head the PCLU and the Director had to exercise the powers, carry out the duties and perform the functions necessary within the Office of the National Director of Public Prosecutions as directed by the NDPP. In particular:

“(a) to head the Priority Crimes Litigation Unit and to manage and direct the investigation and prosecution of crimes contemplated in the Implementation of the Rome Statute of the International Criminal Court Act, 2002(Act No. 27 of 2002), and serious national and international

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<sup>39</sup> *FUL v NDPP* at para 146 and 151

<sup>40</sup> *Id.*

<sup>41</sup> Section 24(3) of the NPA Act. See also wording of Proclamation 63 of 2011 GG 34767.

crimes, which include acts of terrorism and sabotage committed under the Internal Security Act, 1982 (Act No. 74 of 1982), high treason, sedition, foreign military crimes committed by mercenaries, or such other priority crimes to be determined by the National Director;

(b) generally giving such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed on or assigned to him by the Constitution or any other law.”<sup>42</sup>

43 As mentioned above, the PCLU proved to be ineffective at pursuing justice for the TRC cases, in the face of political opposition to these cases proceeding. Those prosecutors who attempted to prosecute TRC cases were either removed or relieved of their duties in relation to these cases. Other prosecutors and officials in the PCLU acquiesced in the suppression of the TRC cases. This shameful history makes the PCLU ill-placed to handle the TRC cases.<sup>43</sup>

### ***Specialised Commercial Crime Unit***

44 Proclamation 63 of 2011 GG 34767 – Through this Proclamation, Adv Mrwebi was appointed as a Special Director to head the Specialised Commercial Crime Unit (SCCU) in the Office of the National Director and, amongst others, to conduct prosecutions of commercial crime cases, manage and direct the investigation and prosecution of serious organised and complex financial crime. Adv Mrwebi’s powers, functions and duties were subject to the control of the NDPP. Specifically, the proclamation states that:

“(a) To head the Specialised Commercial Crime Unit in the Office of the National Director and to conduct prosecutions of commercial crime cases;

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<sup>42</sup> Proclamation 46 of 2003 GG 24876, a and b.

<sup>43</sup> See above under “Background”.

(b) To manage and direct the investigation and prosecution of serious organised and complex financial crimes;

(c) To manage special projects and operations as per the directives of the National Director; and

(d) Generally, to give such advice or rendering such assistance to the National Director as may be required to exercise the powers, carry out the duties and perform the functions which are conferred or imposed or assigned to the National Director by the Constitution or any other law.”<sup>44</sup>

45 Altbeker writes that the SCCU pioneered closer cooperation between detectives and prosecutors, noting that the detectives of the SAPS Commercial Branch in Pretoria is integrated with the work of the prosecutors of the SCCU.<sup>45</sup> Unlike the practice in much of the rest of the criminal justice system, SCCU prosecutors are involved in investigation at an early stage. Investigators and prosecutors are placed in project teams to complete investigations. Commercial Branch investigators are required to present a draft investigation plan to the prosecutor and together they are jointly responsible for ensuring that case is properly investigated.<sup>46</sup>

46 This integrated way of working,<sup>47</sup> results in thorough case preparation and presentation in court. Consequently, SCCU cases appear to be more expertly executed and are turned around faster, with more of them ending in convictions. Altbeker ascribes the integrated approach to the relatively high level of success of the SCCU.<sup>48</sup>

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<sup>44</sup> Proclamation 63 of 2011 GG 34767, a – d.

<sup>45</sup> Antony Altbeker, Monograph 76: *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court*, Institute for Security Studies, 01 Jan 2003, available at: <https://issafrica.s3.amazonaws.com/site/uploads/Mono76.pdf>

<sup>46</sup> Altbeker at pages 5 – 6.

<sup>47</sup> Sometimes described as prosecution-led investigations or prosecutor-serviced investigations.

<sup>48</sup> Altbeker at pages 5 – 6.

47 Altbeker pointed to other factors explaining the success of the SCCU, including the co-location of investigators and prosecutors in the same building; the support provided by the private sector, particularly Business Against Crime, which helped to facilitate organisational processes and provide additional resources to the SCCU and the Commercial Branch. Finally, he observed that tensions between the SAPS and NPA were handled with grace, professionalism and competence by the management staff in both organisations.<sup>49</sup>

48 In relation to the criticism that the integrated approach may reduce the independence of prosecutors, Altbeker observed that neither prosecutors nor investigators at the Commercial Branch and SCCU believed that there had been any compromising of prosecutorial independence. On the contrary, he noted they maintained that prosecutors were better able to exercise their discretion, having had much more insight into the docket than would otherwise have been the case; and that a prosecutor's training helped her overcome any subjectivity in the exercise of her discretion.<sup>50</sup>

49 In a report to the Justice Portfolio Committee in 2008, the head of the SCCU noted that in the 2006/07 financial year, the unit had maintained a high conviction rate of 95.6% and finalised 3574 cases, which was a 57,4% increase from previous year. More than 60% of complainants had been provided with progress reports. Challenges included

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<sup>49</sup> Id.

<sup>50</sup> Altbeker at page 66.

constraints in finalising investigations, high number of vacancies in SAPS, the delay in filling of posts and high caseloads per prosecutor.<sup>51</sup>

50 According to the NPA 2019/20 Annual Report, the SCCU obtained 599 convictions from the 649 cases finalised with a verdict. This represents a conviction rate of 92.3%.<sup>52</sup> In respect of cybercrime prosecutions the prosecutors and advocates of the SCCU finalised 325 cases with a verdict, and obtained 320 convictions, representing a conviction rate of 98.5%.<sup>53</sup> Critical staff shortages impacted productivity and quick turnaround of cases. Of 231 posts, 77 remained unfilled, a vacancy rate of 33%.<sup>54</sup>

### ***Sexual Offences and Community Affairs Unit***

51 The sexual offences and community affairs unit (SOCA unit) was established in September 1999 through a Presidential Proclamation issued in terms of section 13(1) (c) of the NPA Act.<sup>55</sup> The main objective of eradicating all forms of gender-based violence against women and children including improving the conviction rate in gender-based crimes and crimes against children.<sup>56</sup>

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<sup>51</sup> Adv Chris Jordaan SC, Head: SCCU, *PowerPoint Report on SCCU 2006 – 2007 to Justice and Constitutional Development Portfolio Committee*, 20 February 2008, available at <https://slideplayer.com/slide/13059889/>.

<sup>52</sup> NPA 2019/20 Annual Report, p 90, available at: <https://www.npa.gov.za/content/annual-report>

<sup>53</sup> Id, p 104.

<sup>54</sup> Id, p 141.

<sup>55</sup> National Prosecuting Authority Annual Report 2005 – 2006, at p 44.

<sup>56</sup> NPA website at <https://www.npa.gov.za/node/18>

- 52 The SOCA unit employs a multidisciplinary approach which includes research, capacity building and training for prosecutors of sexual offences, domestic violence and maintenance cases, as well as managing young offenders.<sup>57</sup>
- 53 SOCA has four operational sections, namely the Sexual Offences Section, Domestic Violence Section, Maintenance Section and Child Justice Section.<sup>58</sup> SOCA's achievements include helping to create the Sexual Offences Courts<sup>59</sup> and the Thuthuzela Care Centres (TCC).<sup>60</sup> There are currently 55 operational TCC sites<sup>61</sup> and 106 sexual offences courts.<sup>62</sup> SOCA has secured relatively high conviction rates of between 71% and 75% of cases brought between 2015 and 2020.<sup>63</sup>

### *Special National Projects*

- 54 Proclamation 26 of 2020 GG 43591 – This Proclamation appointed Adv Mthunzi Mhaga as Special Director of Public Prosecutions in the Office of the NDPP. His duties include providing legal advice to the NDPP regarding specific legal and administrative issues;

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<sup>57</sup> Sexual Offences and Community Affairs (SOCA) Unit, Power Point Presentation on the Annual report 2006/2007, dated 20 February 2008 at side 2. Accessible on <https://pmg.org.za/files/docs/080220soca.ppt> . See also: Kruger and Reyneke, "Sexual Offences Courts in South Africa: Quo Vadis?" 2008 Journal for Juridical Science 33(2): 32-75 at p 43.

<sup>58</sup> Sexual Offences and Community Affairs (SOCA) Unit, Power Point Presentation on the Annual report 2006/2007, dated 20 February 2008 at side 3. Accessible on <https://pmg.org.za/files/docs/080220soca.ppt>

<sup>59</sup> Since 1999, the SOCA Unit has been tasked with driving the rollout of the Sexual Offences Courts.

<sup>60</sup> A TCC is a 24-hour facility providing professional support and services required by victims of sexual abuse. These one-stop service centres coordinate and centralise the activities of all role players, providing investigative, prosecutorial, medical and psychological services under one roof.

<sup>61</sup> National Prosecuting Authority Annual Report 2019/2020 at p 112.

<sup>62</sup> Department of Justice website at <https://www.justice.gov.za/vg/sxo-SOC-list.html> .

<sup>63</sup> National Prosecuting Authority Annual Report 2019/2020 at p 113. See also: Sexual Offences and Community Affairs (SOCA) Unit, Power Point Presentation on the Annual report 2006/2007, dated 20 February 2008 at slide 5. Accessible on <https://pmg.org.za/files/docs/080220soca.ppt> .

managing special national projects and operations as per the directives of the NDPP; providing strategic inputs in matters brought before the NDPP.<sup>64</sup>

## **OPTION 2: INVESTIGATING DIRECTORATES**

55 Section 7(1) of the NPA Act provides for the establishment of an investigating directorate within the NPA. It states “[t]he President may, by proclamation in the Gazette, establish one or more Investigating Directorates in the Office of the National Director, in respect of such offences or criminal or unlawful activities as set out in the proclamation.”

56 A directorate must be situated in the office of the NDPP. The head of the directorate is appointed by the President in terms of section 13(1)(b). Only a DPP may be appointed as a head of an investigating directorate. Subsection 4 sets out the personnel comprising a directorate:

“(4) (a) The head of an Investigating Directorate shall be assisted in the exercise of his or her powers and the performance of his or her functions by—

- i. one or more Deputy Directors;
- ii. prosecutors;
- iii. officers of any Department of State seconded to the service of the Investigating Directorate in terms of the laws governing the public service;
- iv. persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the Investigating Directorate; and
- v. any other person whose services are obtained by the head of the Investigating Directorate.”

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<sup>64</sup> Proclamation 26 of 2020 GG 43591, a – g.



57 Aside from prosecutors, section 7 allows a directorate to be supported by outside persons with multi-disciplinary skills, including researchers and investigators.<sup>65</sup>

58 Chapter 5 of the NPA Act sets out the powers, duties and functions of investigative directorates.

58.1 Section 27 allows members of the public to approach a directorate directly:

“27 Reporting of matters to Investigating Director

If any person has reasonable grounds to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may report the matter in question to the head of an Investigating Directorate by means of an affidavit or affirmed declaration specifying-

- (a) the nature of the suspicion;
- (b) the grounds on which the suspicion is based; and
- (c) all other relevant information known to the declarant.”

58.2 Section 28 empowers an investigating director to conduct inquires.

58.2.1 Subsection 1(a) allows an investigating director to conduct an investigation whether or not it has been reported to him or her. Subsection 1(c) allows an investigating director to extend the investigation to include any offence, whether or not it is a specified offence, which he or she suspects to be connected with the subject of the investigation.

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<sup>65</sup> See section 16(2)(c) of the NPA Act which allows for prosecutors to be appointed to Investigating Directorates. Also see sections 24(2)(a) and (b) regarding powers of prosecutors working within an investigative directorate and 25(1)(b).

- 58.2.2 Subsection (2)(a) permits the designation of other parties by the Investigating Director to conduct investigations. It states that the Investigating Director may designate any person referred to in section 7 (4) (a)<sup>66</sup> or, in the case of an investigation requested by the Head of the Directorate for Priority Crime Investigation in terms of section 17D (3) of the SAPS Act, any member of the prosecuting authority or a member of his directorate, to conduct the investigation.
- 58.2.3 Subsection 2(b) provides that the designated person shall have the same powers as an investigating director for the purposes of the investigation.
- 58.2.4 Subsection 4 allows the investigating director discretion regarding how an investigation is to be conducted, having regard to the circumstances of each case.
- 58.2.5 A directorate also has the power to summon any person believed to be in possession of information related to the subject matter of the investigation to give evidence under oath.<sup>67</sup>
- 58.2.6 A directorate is empowered in terms of subsection 8(a) and (b) to compel a witness summoned in terms of subsection 6 to give evidence that is self-incriminating, provided that such evidence shall not be admissible in criminal proceedings, except in cases where the witness has perjured himself.

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<sup>66</sup> Such persons could include deputy directors, prosecutors, officers of any Department of State seconded to the service of the Investigating Directorate, persons in the service of any public or other body who are by arrangement with the body concerned seconded to the service of the Investigating Directorate, and any other person whose services are obtained by the head of the Investigating Directorate.

<sup>67</sup> Subsection 6(a) – (b) and 10.

58.3 Section 29 grants a directorate the power to enter premises for the purposes of an investigation without prior notice and inspect and search those premises;<sup>68</sup> examine any object that might have a bearing on the investigation;<sup>69</sup> make copies of or take extracts from any book or document and seize anything that might have a bearing on the investigation in question.<sup>70</sup>

### ***Structural Investigations***

59 The powers afforded to an investigation directorate lend themselves to the conducting of structural investigations into apartheid-era crimes.<sup>71</sup> Structural investigations were pioneered by German prosecutors investigating Nazi crimes and war crimes committed by the Syrian regime and terror organisations, such as ISIS.<sup>72</sup> Structural investigations do not focus on specific suspects but rather on all role players and the entire context in which the crimes happened. The purpose is not to assign individual criminal liability, but to develop an understanding of the “overarching organizational structures which would otherwise be missed if an investigation is solely concentrated on the person itself.”<sup>73</sup>

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<sup>68</sup> Section 29(1)(a).

<sup>69</sup> Section 29(1)(b).

<sup>70</sup> Section 29(1)(c) and (d).

<sup>71</sup> European Center for Constitutional and Human Rights, Definition of Structural Investigation, available at: <https://www.ecchr.eu/en/glossary/structural-investigation/>

<sup>72</sup> Graulich, *Die Zusammenarbeit von Generalbundesanwalt und Bundeskriminalamt bei dem Vorgehen gegen den internationalen Terrorismus*, Duncker & Humblot, 2013, pp. 316, 317, 337 and 340.

<sup>73</sup> Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 1*, 2018, Torkel Opsahl Academic EPublisher, Brussels, 135, available at: <https://www.toaep.org/ps-pdf/32-bergsmo-stahn>

60 Structural investigations involve investigating the background to the crimes, including the *modus operandi* of the perpetrators, organisational structures and chains of command of those behind the crimes. They are aimed at collecting and preserving evidence in preparation for future proceedings in respect of both identified and unidentified perpetrators.<sup>74</sup> A structural investigation “enables law enforcement agencies to explore the complexities of a ‘situation’ independent of the procedural destiny of a single case which aims at assigning individual criminal responsibility.”<sup>75</sup> Such investigations tend to reveal connections between cases, perpetrators and victims and to ultimately identify perpetrators or groups of perpetrators for specific criminal investigation and prosecution.

### ***Examples of investigating directorates***

61 We are aware of five investigating directorates that have been established to date. The DSO was the most well-known investigating directorate created under section 7 of the NPA Act. However, prior to its establishment, three investigating directorates, located within the NPA existed and were ultimately absorbed into the DSO.<sup>76</sup> These included the investigating directorates on organised crime and public safety (IDOC), serious economic offences (IDSEO) and the Investigating Directorate: Corruption. More recently, an investigating directorate was established to address state capture and complex corruption.

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<sup>74</sup> Jahn, in Heghmanns and Scheffler (eds.), *Handbuch zum Strafverfahren*, C.H. Beck, 2008, chap. I, para. 82; Ziercke, “*Welche Eingriffsbe-fugnisse benötigt die Polizei?*”, in *Datenschutz und Datensicherheit*, 1998, vol. 22, no. 6, pp. 319 and 321; Sielaff, “*Am selben Strang ziehen: Die Zusammenarbeit von Polizei und Staatsanwaltschaft bei der Bekämpfung der Organisierten Kriminalität*”, in *Kriminalistik*, 1989, vol. 43, no. 3, pp. 141 and 142.

<sup>75</sup> Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 1*, 2018, Torkel Opsahl Academic EPublisher, Brussels, 136.

<sup>76</sup> Schonteich, M. *Lawyers for the People. The South African Prosecution Service*. Institute for Security Studies. Monograph 53. March 2001.

62 The IDOC was established in 1998. According to Schonteich, its aim was to bring together under one line of command all the different agencies engaged in the fight against crime.<sup>77</sup> The IDOC was a prosecution-driven unit with broad objectives that included:

62.1 Co-ordinating and liaising with other relevant institutions concerned with the investigation and/or prosecution of organised crime.

62.2 Ensuring the expeditious conclusion of IDOC investigations through an effective and co-ordinated multi-agency approach.

62.3 Allocating specific high-profile cases emanating from projects driven by IDOC to senior and appropriately skilled prosecutors.

62.4 Ensuring the proper management and application of crime intelligence in specific projects.

62.5 Developing the skills of investigators and prosecutors dealing with organised crime and related issues.

63 IDOC's head office was in Cape Town. This office was primarily responsible for investigating and prosecuting cases of organised crime, urban terrorism and gang-related crimes in the Western Cape. IDOC had three sub-directorates, one of which operated in Gauteng, dealing mainly with vehicle-hijackings., another in KwaZulu-Natal, which

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<sup>77</sup> Id at p 36.

addressed political violence, and the third in the Eastern Cape, which focussed on taxi-related violence.<sup>78</sup>

64 The IDOC sub-directorate on vehicle hijacking was situated in the office of the NDPP and was headed by a DDPP.

64.1 Other personnel at the sub-directorate included senior public prosecutors, investigating officers and intelligence agents. The sub-directorate investigated and prosecuted car-hijacking syndicates and conducted undercover operations against hijacking syndicates. A hallmark of this sub-directorate was that its work was intelligence-driven, making use of intelligence agents and informants.<sup>79</sup>

64.2 According to Schönsteich the success of this unit was attributed to close prosecutor investigator cooperation. This involved biweekly strategy meetings between stakeholders to share intelligence and develop enforcement and prevention plans.<sup>80</sup> Within 18 months the unit had:

64.2.1 increased the conviction rate from 10% to 42%;

64.2.2 reduced the time from arrest to finalisation of trial from 180 to 120 days;

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<sup>78</sup> Id at p 39. See also *Guarding the Guard in South Africa: Report of the International Anti-Corruption Expert Round Table*, Vienna, June 2000, by Dr Ugljesa Zvekic, Senior Crime Prevention and Criminal Justice Expert and Charlotte Ingestend, Regional Office South Africa, for the Global Programme Against Corruption, Centre for International Crime Prevention, Office of Drug Control and Crime Prevention, United Nations Office at Vienna, International Expert Round Table, Pretoria at p 12, available at <https://www.unodc.org/pdf/crime/gpacpublications/cicp9.pdf> .

<sup>79</sup> Id

<sup>80</sup> Martin Schönsteich, “*Presentation: Prosecution led investigation: An innovative approach from South Africa*,” 6 December 2005, Open Society Justice Initiative., available at: <http://biblioteca.cejamericas.org/bitstream/handle/2015/3188/schoenteich-prosecution-led-ing.pdf?sequence=1&isAllowed=y>;

64.2.3 stopped the loss and sale of case dockets;

64.2.4 established an effective pool of experienced and specialised prosecutors;

64.2.5 improved victims' perceptions.<sup>81</sup>

65 The IDOC sub-directorate on political violence was headed by a deputy director of public prosecutions. Its primary objective was to investigate and prosecute serious cases of political violence in KwaZulu-Natal.<sup>82</sup>

*Investigating Directorate: Serious Economic Offences*

66 The IDSEO was established following the promulgation of the NPA Act in October 1998. Schonteich explains that the IDSEO replaced the Office for Serious Economic Offences (OSEO), which had been in existence since 1991. OSEO was created to address an almost complete collapse of the prosecution of economic crime in South Africa.<sup>83</sup> Traditional investigative and prosecutorial methods had failed to keep up with increasingly sophisticated white-collar crime. This was addressed by creating multi-disciplinary investigation teams which was adopted by IDSEO.<sup>84</sup>

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<sup>81</sup> Id.

<sup>82</sup> Schonteich, M. *Lawyers for the People. The South African Prosecution Service*. Institute for Security Studies. Monograph 53. March 2001.

<sup>83</sup> Id at p 40.

<sup>84</sup> Id.

### *Investigating Directorate: Corruption*

67 The Investigating Directorate: Corruption was established in February 2000 to investigate and prosecute serious cases of corruption. Schonteich writes that the directorate used IDOC offices and staff to assist it in its investigations due to shortfalls in staff and resources.<sup>85</sup>

### *Directorate of Special Operations*

68 These three investigating directorates mentioned above were incorporated into the DSO when it was launched in September 1999.

69 The DSO officially came into existence in January 2001 with the enactment of the National Prosecuting Authority Amendment Act 61 of 2000. Section 7(1)(a) of the NPA Act, as amended, established the DSO with the aim to:

- ‘(i) Investigate and carry out any functions incidental to investigations;
- (ii) Gather, keep and analyse information; and
- (iii) Where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings relating to -
  - (aa) Offences or any criminal or unlawful activities committed in an organised fashion; or
  - (bb) Such other offences or categories of offences as determined by the President by proclamation in the Gazette.’ (Thus far, the President has not proclaimed any further class of offences).

70 The DSO saw the integration of 3 traditionally separate functions: intelligence, investigations & prosecutions. In terms of staff compliment, investigators comprised 64% of the total, prosecutors 18%, analysts and specialists 2% each and administrative

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<sup>85</sup> Id.



support 14%. The investigations were prosecution led and intelligence driven. Cases included organised crime, serious economic offences, corruption by public officials and terrorism.<sup>86</sup>

71 Investigating directors lead teams of prosecutors, investigators and specialists. Prosecutors guided the strategy and tactics of police investigators focusing on the collection of admissible evidence and ensuring investigations were court directed. Prosecutors met face to face with investigators from the beginning of each case. Prosecutors were ultimately responsible for cultivating good cooperation from witnesses. Prosecutors become leaders of multi-agency solutions to crime problems.<sup>87</sup>

72 The DSO was considered very effective and had a very high conviction rate. By February 2004, the DSO had completed 653 cases, comprising 273 investigations and 380 prosecutions. Of the 380 prosecutions 349 resulted in convictions, representing an average conviction rate of 93%.<sup>88</sup> By 2007 the DSO had finalised 1 500 cases, arrested 1 600 and had an average conviction rate of between 80-90 per cent. In addition, DSO investigations led to the seizure of R5 billion in contraband making it one of the major

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<sup>86</sup> Martin Schönreich, “*Presentation: Prosecution led investigation: An innovative approach from South Africa*,” 6 December 2005, Open Society Justice Initiative., available at: <http://biblioteca.cejamericas.org/bitstream/handle/2015/3188/schoenteich-prosecution-led-ing.pdf?sequence=1&isAllowed=y>;

<sup>87</sup> Schonteich, M. *Lawyers for the People. The South African Prosecution Service*. Institute for Security Studies. Monograph 53. March 2001.

<sup>88</sup> Joey Berning and Moses Montesh “*Countering corruption in South Africa*” *The rise and fall of the Scorpions and Hawks*”, SA Crime Quarterly no 39, March 2012 at p 5.

contributors to the Criminal Asset Recovery Account.<sup>89</sup> Its conviction rate in 2007/08, its final year, was 94%.<sup>90</sup>

73 However, the DSO became a victim of its own success, and as its investigations targeted high profile and powerful suspects in society it came under withering political attack.<sup>91</sup> It was ultimately disbanded in May 2008 with the passing of General Law Amendment Act, 2008. Some of its personnel and functions were transferred to the SAPS and the DPCI was created under the control of the National Commissioner of Police.

#### *Investigating Directorate: State Capture and Complex Corruption*

74 The most recent Investigating Directorate was established by the President in April 2019 through Proclamation number 20 of 2019 on the recommendation of the Ministers of Justice, Police and the NDPP.<sup>92</sup>

75 The Directorate is required to investigate complex corruption cases that constitute common law offences such as fraud and theft and statutory offences in terms of the Prevention and Combating of Corrupt Activities Act 6 of 2000, Prevention of Organised Crime Act 121 of 1988, the Public Finance Management Act 1 of 1999, the Protection

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<sup>89</sup> Gail Wannenburg “Putting paid to the untouchables? The effects of dissolving the Directorate of Special Operations and the Specialised Commercial Crime Units” SA Crime Quarterly No 24, June 2008 at p 19

<sup>90</sup> The 2007/08 Annual Report is accessible at <https://www.npa.gov.za/sites/default/files/annual-reports/Annual%20Report%202007-08%20Section%201-3.pdf> .

<sup>91</sup> See Sebastian Berger, “South African crime-fighting unit stung by its own success,” *The National*, July 29, 2008, [www.thenational.ae/news/world/africa/south-african-crime-fighting-unit-stung-by-its-own-success](http://www.thenational.ae/news/world/africa/south-african-crime-fighting-unit-stung-by-its-own-success)

<sup>92</sup> Proclamation 20 of 2019, GG 42383, available at: [https://www.npa.gov.za/Investigating\\_Directorate/sites/default/files/Proclamation%20of%20new%20ID%20%28002%29.pdf](https://www.npa.gov.za/Investigating_Directorate/sites/default/files/Proclamation%20of%20new%20ID%20%28002%29.pdf)

of Constitutional Democracy against Terrorist and Related Activities, 33 of 2004 (Act No. 33 of 2004); and the Local Government Municipal Finance Management Act, 56 of 2003. In particular, the Directorate must investigate criminal activities arising from the following commissions of inquiry:

- 75.1 The Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State promulgated under Presidential Proclamation No. 3 of 2018 published in Government Gazette No. 41403 of 25 January 2018;
  - 75.2 The Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (SARS) established by Presidential Proclamation No. 17 of 2018 published in Government Gazette No 41562 of 24 May 2018,
  - 75.3 The Commission of Inquiry into Allegations for Impropriety regarding the Public Investment Corporation established under Presidential Proclamation No. 30 of 2018 Published in the Government Gazette No 41979 of 17 October 2018; and
  - 75.4 Any other serious, high profile or complex cases of corruption referred to the Directorate by the National. Director in accordance with Section 28(1)(b) of the NPA Act.
- 76 The Directorate exercises its powers and functions in terms of Chapter 5 of the NPA Act. It is empowered to use outside expertise and by way of example has secured forensic accountants and legal resources from SA Revenue Service, the Special Investigation

Unit, Financial Intelligence Centre, Reserve Bank and State Security Agency.<sup>93</sup> In the 18 months since its inception it has launched over 100 criminal proceedings.<sup>94</sup>

### **OPTION 3: DEDICATED CAPACITIES WITHIN THE NDPP AND DPCI**

77 The final option involves the NPA and DPCI simply exercising their existing residual powers to create specialist capacities within their respective institutions to work exclusively on the TRC cases, in a collaborative manner.

#### ***Possible Dedicated Capacity in the DPCI***

78 Currently, the DPCI is investigating TRC cases under the statutory mandate of section 17D(1)(a) of the SAPS Act which includes crimes that require national investigation, or crimes which require specialized skills in investigation.

78.1 The TRC cases currently fall within the category of ‘crimes against the state’ (CATS) and are being handled by the DPCI’s Component for Serious Organised Crime (SOC).

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<sup>93</sup> Claire Badenhorst, *Cyril’s Corruption Crackdown Has Over 100 Rogues Arrested – And Counting*, 12th November 2020, Biznews, available at: <https://www.biznews.com/good-hope-project/2020/11/12/corruption-arrested>. See also: <https://www.iol.co.za/news/politics/we-have-the-power-to-make-arrests-and-prosecute-corruption-cases-investigating-directorate-3d230007-487f-4d24-bda6-b70ad9f52901>

<sup>94</sup> Id

- 78.2 This unit also deals with narcotics and chemical monitoring, environmental crimes, vehicle related crimes, human trafficking, serious violent crime, and crimes related to non-ferrous metals and illicit mining.<sup>95</sup>
- 78.3 As far as we are aware investigators assigned to the TRC cases also must work on other cases falling within the responsibility of the SOC component.
- 79 Recently, the DPCI issued adverts for 4 experienced former SAPS investigators to supervise TRC related investigations.<sup>96</sup> The core functions were set out as:
- 79.1 Supervise the investigation of TRC-related cases focusing on the directives and standards as set out in the performance agreement and ensure investigators are functioning according to relevant guiding principles;
- 79.2 Adopt a multidisciplinary approach in investigating TRC cases and gathering of evidence to ensure prosecution driven investigations.
- 79.3 Ensure that investigations are conducted effectively and efficiently according to the applicable Legislation and ensure effective and efficient control over human, physical and financial resources;
- 79.4 Attend court proceedings, oppose bail and give evidence before court.

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<sup>95</sup> Presentation to Parliament: Mandate and Activities Directorate For Priority Crime Investigation (DPCI): 17 September 2014, available at: <http://pmg-assets.s3-eu-west-1.amazonaws.com/140917saps.pdf>

<sup>96</sup> Directorate for Priority Crime Investigation (Pretoria) REFERENCE: DPCI/HO/67/2020 (4posts), available at: <file:///C:/Users/howar/AppData/Local/Temp/DPCI%20HO%2067.pdf>

80 The advert suggests that at least the 4 officers appointed in terms of the aforesaid advert will work exclusively on the TRC cases.

80.1 In response to a parliamentary question posed to the Minister of Justice and Correctional Services on 10 November 2020 by Prof C T Msimang on the progress of apartheid era cases the Minister replied that these cases will impose additional responsibilities on the DPCI, although “the DPCI has indicated that it will appoint retired police officers to deal with TRC cases” and introduce “a strategic multidisciplinary approach”.<sup>97</sup>

80.2 However, the aforesaid advert explicitly excludes former members who retired early or reached retirement age; those who left the Service due to severance package, ill health or retirement as a result of a medical boarding; and those who left the Service more than ten years ago. This would seem to exclude most former officers with long experience.

81 The National Head of the DPCI is authorised to establish dedicated capacities within the DPCI to focus exclusively on matters within its statutory mandate.<sup>98</sup>

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<sup>97</sup> National Assembly: Question for Oral Reply: Parliamentary Question No: 586, Date of Question: 10 November 2020, Date of Oral Submission in Parliament: 18 November 2020, available at: [https://www.parliament.gov.za/storage/app/media/Docs/exe\\_rq\\_na/15ea0c02-e6a6-4278-8ea1-767b295e7ee4.pdf](https://www.parliament.gov.za/storage/app/media/Docs/exe_rq_na/15ea0c02-e6a6-4278-8ea1-767b295e7ee4.pdf)

<sup>98</sup> In terms of section 17DB(a) and (b) of the SAPS Act the National Head of the DPCI may determine the number and grading of posts, in consultation with the Minister and the Minister for the Public Service and Administration; and he may appoint the staff of the Directorate, provided that where a member of the Service is appointed to the Directorate, he shall do so after consultation with the National Commissioner.

81.1 An example is the response of the DPCI to the cash-in-transit (CIT) threat through the creation of the National Investigative CIT Task Team, which focuses on organised criminal groups involved in CIT robberies.<sup>99</sup>

81.2 Similarly, there is nothing stopping the head of the DPCI from creating a national investigative task team to focus exclusively on the TRC cases. Such a capacity could be referred to as the Crimes of the Past Task Team or the Apartheid-Era Crimes Task Team. A dedicated unit would bring much needed cohesion and coordination to the investigation of the TRC cases and facilitate the proposed “strategic multidisciplinary approach.”

### ***Possible Dedicated Capacity in the NPA***

82 In terms of section 20(1) read with subsection (5) of the NPA Act “any prosecutor” has the power to institute legal proceedings on behalf of the state “to the extent that he or she has been authorised thereto in writing by the National Director”. In addition section 22(1) provides that the NDPP as the head of the prosecuting authority, *shall have authority over the exercising of all the powers, and the performance of all the duties and functions conferred or imposed on or assigned to any member of the prosecuting authority* by the Constitution, this Act or any other law.

83 This means that the NDPP has the power to require a prosecutor or prosecutors to focus exclusively on legal proceedings in relation to the TRC cases. This would include the creation of a team of prosecutors dedicated exclusively to the TRC cases. However, only

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<sup>99</sup> South African Police Service | Annual Performance Plan 2020/2021, at page ix, available at: [https://www.saps.gov.za/about/stratframework/strategic\\_plan/2020\\_2021/saps\\_app\\_2020\\_2021.pdf](https://www.saps.gov.za/about/stratframework/strategic_plan/2020_2021/saps_app_2020_2021.pdf)

the President may appoint a special director at the level of director in terms of section 13 of the NPA Act. Nonetheless the NDPP could appoint a prosecutor below the level of director, but with sufficient experience and seniority to lead such a team.

- 84 This collaboration between the dedicated capacities in the NPA and DPCI could be regulated by a memorandum of understanding between the two entities, which ought to prescribe the best practices disclosed in the examples described above.

### INVOKING SECTION 38 OF THE NPA ACT

- 85 Section 38 of the NPA Act, enables the NDPP to bring in outside expertise to assist with specific cases. It provides as follows:

‘(1) The *National Director* may in consultation with the *Minister*, and a *Deputy National Director* or a *Director* may, in consultation with the *Minister* and the *National Director*, on behalf of the State, engage, under agreements in writing, persons having suitable qualifications and experience to perform services in specific cases.

(2) The terms and conditions of service of a person engaged by the *National Director*, a *Deputy National Director* or a *Director* under subsection (1) shall be as determined from time to time by the Minister in concurrence with the Ministers of Finance.

(3) Where the engagement of a person contemplated in subsection (1) will not result in financial implications for the State –

(a) the *National Director*; or

(b) a *Deputy National Director* or a *Director*, in consultation with the *National Director*, may, on behalf of the State, engage, under an agreement in writing, such person to perform the services contemplated in subsection (1) without consulting the *Minister* as contemplated in that subsection.

(4) For purposes of this section, “services” include the conducting of a prosecution under the control and direction of the *National Director*, a *Deputy National Director* or a *Director*, as the case may be.’



86 The ‘services’ referred to in section 38 include the conducting of a prosecution under the control and direction of the National Director of Public Prosecutions, or a Deputy National Director or a Director (section 38(4)).

87 Du Toit’s Commentary on the Criminal Procedure Act suggests that section 38 must be understood in the context of the following observations by Hartzenberg J in *S v Tshotshoza & others*<sup>100</sup>:

‘All over the world, outside prosecutors are engaged to prosecute on behalf of the State. There cannot be objection in this country to the engagement of outside prosecutors in specific cases. There are many reasons why it may become necessary for the NPA to engage outsiders. One thinks of a shortage of staff or of staff with the necessary expertise and experience to prosecute in particular cases.’<sup>101</sup>

88 Section 38 could potentially be invoked in order to support apartheid era prosecutions that include international criminal charges in the indictment. Specialist prosecutors with experience in prosecuting crimes against humanity, particularly under customary international law, could be appointed in terms of this section to assist or lead the prosecutions of such charges.

89 Section 38 could be used to assist prosecutors pursuing apartheid era crimes on a case by case basis, or should a Special Director be appointed or an Investigating Directors established it could be invoked to assist in the building of a multi-disciplinary skills in such teams. By way of example, researchers and experts on apartheid security apparatuses could be appointed to assist with structural investigations, as described above.

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<sup>100</sup> 2010 (2) SACR 274 (GNP) at [19].

<sup>101</sup> These observations were also referred to in *Moussa v S & another* 2015 (2) SACR 537 (SCA) at [16]. In *Moussa* it was held that s 38 is not unconstitutional.

## DEDICATED CAPACITY COMPOSITION

90 The potential universe of cases for a dedicated capacity pursuing justice for crimes of the past is limited. Although the TRC referred more than 400 cases to the NPA in which amnesty had been denied, the political suppression of the cases in the aftermath of the TRC means that comparatively few can be taken forward. This is because many suspects, witnesses and family members have died in the last 20 years.

91 Given the enormous challenges facing the NPA and DPCI, and the budgetary and resource constraints facing government, we propose, at least initially, the creation of a modest dedicated unit. To begin with, we propose a unit comprising the following 15 full-time dedicated staff members:

91.1 Head of Unit / Directorate (or Special Director);

91.2 Three prosecutors (2 experienced prosecutors and 1 junior prosecutor to be mentored);

91.3 Chief Investigator and six investigators (3 experienced investigators and 3 “rookies” who can be mentored and trained on the job);

91.4 Two analysts / researchers (one experienced, one to be mentored);

91.5 Two administrative support staff.

92 To begin with we suggest that the unit be centrally based in Johannesburg or Pretoria to ensure that information is kept central. A basic database will be needed to ensure all documents and information collected are kept secure, including originals and digitised copies. The database need not be overly sophisticated. It should allow for both closed

and open source searches for names, vehicles, police /military units and other entities etc, in order to establish links. It should be able to generate chronologies. The unit will need the necessary technology to trace persons by searching for cell phone numbers, addresses, relatives, companies and ID numbers etc.<sup>102</sup>

93 It is anticipated that the Chief Investigator will manage the investigations, in close collaboration with the assigned prosecutors, until indictments are issued, whereafter management of the cases will pass to the allocated prosecutor. During the investigation stage, investigators will be expected to:

93.1 examine all possible scenarios;

93.2 follow all possible leads;

93.3 cultivate informants.<sup>103</sup>

94 Staff should be taken on for a period of 5 years, which should be renewable where necessary. Over time it may be necessary to expand the unit with the creation of satellite offices in some DPP offices around the country, where specific cases are pursued. The skills set of the unit can be enhanced by the occasional hiring of retired prosecutors and investigators, or bringing in specialist skills from the private sector.<sup>104</sup>

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<sup>102</sup> Interview with Frank Dutton, 10 January 2021

<sup>103</sup> Interview with Frank Dutton, 10 January 2021

<sup>104</sup> Interview with Clifford Marion, 10 January 2021

## CONCLUSION

- 95 This opinion has pointed to the likelihood that on the current trajectory few if any apartheid era crimes will see the light of a day in a criminal court. In relation to the TRC cases, South Africa no longer has the luxury of time. Within a few years it will no longer be possible to pursue these cases as suspects die or are no longer able to stand trial. Should this happen, the responsible authorities will have committed a grave and indelible injustice against past and future generations of South Africans.
- 96 We have referenced several local examples of dedicated approaches to crime in South Africa that have reaped results. In addition, we have demonstrated that a dedicated capacity to investigation and prosecute apartheid era crimes is possible employing existing legal provisions. The options set out in this opinion include the establishment of an Investigating Directorate, the appointment of a Special Director, or the creation of dedicated capacities within the NPA and DPCI utilizing residual statutory powers.
- 97 Comparative experience, as set out in the FHR memorandum ‘Proposed New Approach to Apartheid Era Prosecutions’ suggests that the prospects of justice are greater when the necessary expertise is brought under one roof. Examples include the Argentinian Office of the Prosecutor for Crimes against Humanity<sup>105</sup> and in Germany the Central Office of the State Judicial Administration for the Investigation of National Socialist Crimes,<sup>106</sup>

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<sup>105</sup> Ministerio Público Fiscal. Procuraduría de Crímenes contra la Humanidad (PCCH). Available: <https://www.mpf.gob.ar/lesa/>

<sup>106</sup> Records of the Central Office of the Judicial Authorities of the Federal States for the Investigation of National Socialist Crimes (B 162). Available: <https://portal.ehri-project.eu/institutions/de-006145>

and more recently, the International Crimes Unit in the Federal Prosecutor's office.<sup>107</sup> In our view the local option that most approximates these initiatives is the Investigating Directorate as it would be able to bring the necessary skills under one roof. It would also signal the state's intention to turn the page on past political interference and deal with Apartheid-era crimes seriously and expeditiously.

98 The next best option in our view would be the appointment of a Special Director to oversee a specialised unit that focusses specifically on South Africa's crimes of the past. Such an appointment would also signal the state's serious intent to expedite the TRC cases. While a unit under a Special Director would not enjoy its own investigative capacity, if it was modelled on the SCCU approach, it could cultivate the closest possible relationship with DPCI investigators to spearhead multi-disciplinary prosecution-led investigations.

99 The final option explored was that of the National Head of the DPCI and the NDPP employing their residual powers to create dedicated capacities to pursue the TRC cases.

99.1 Regardless of the option adopted by the NPA we would recommend that the DPCI create a dedicated team of detectives along the lines of a 'Crimes of the Past Task Team', which would be expected to work in the closest collaboration with the NPA. Such an initiative by the DPCI would signal its intention to prioritise these long-neglected cases. It would also be of considerable help to the NPA's prosecutors who have struggled to get these cases off the ground.

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<sup>107</sup> Human Rights Watch. 2014. Lessons in specialized war crimes units. Available at: <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and>

99.2 In relation to the NPA, while any form of serious dedicated approach to the TRC cases would be welcome, a low-key initiative would lack the impetus and authority of an investigating directorate or a Special Director. It would also fail to signal the intent of the state to deal expeditiously with apartheid-era crimes. The ongoing confusion around lines of responsibility may persist.

100 Regardless of the approach adopted we would encourage the NPA to invoke section 38 in order to bring much needed expertise to bear on the prosecution of TRC cases. We would also recommend the conducting of initial structural investigations in order to understand the systemicity of apartheid era crimes and to identify the most appropriate suspects. These inquiries will assist in the development of a sensible and fair investigative and prosecutorial strategy.<sup>108</sup>

101 Given the long lapse of time since the committal of apartheid crimes, the potential universe of suspects and cases have narrowed considerably. Its also likely that a comparatively small number of perpetrators committed many crimes against many victims. Accordingly, a dedicated capacity pursuing TRC crimes, will not need the same resources and personnel required by other special investigations such as the SCCU or the State Capture Investigating Directorate. Indeed, its resource needs will be modest in comparison. Moreover, its temporal mandate will be similarly limited by the advanced ages of the cases.

102 We advise accordingly.

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<sup>108</sup> See Varney, De Silva, and Raleigh, ICTJ, *Guiding and Protecting Prosecutors: Comparative Overview of Policies Guiding Decisions to Prosecute* (2019) at 33 – 36, available at: <https://www.ictj.org/publication/guiding-and-protecting-prosecutors-comparative-overview-policies-guiding-decisions>

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13 January 2021