

**Written submission by the Foundation for Human Rights to
the NPA-appointed Independent Inquiry by Advocate Ntsebeza SC**

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Introduction

1. In June 2021, the National Prosecuting Authority (NPA) and the Directorate for Priority Crimes Investigations (DPCI, Hawks) issued a joint press statement. They announced a new approach to the investigations and prosecutions of the cases arising from the Truth and Reconciliation (TRC) process (hereinafter “TRC cases”).¹
2. The change in the state’s approach to apartheid-era cases has resulted in the NPA and DPCI setting up ‘TRC Components’, reportedly hiring 25 prosecutors and 40 investigators to work on the TRC cases, and reporting that 129 apartheid-era cases were under active investigation.² In October 2022, the NPA announced the opening of four inquests into the apartheid-era crimes involving murders and disappearances of ANC activists and MK operatives committed in Kwa-Zulu Natal Province.³
3. The FHR has welcomed the NPA’s and DPCI’s new approach and renewed commitment to pursue TRC cases. However, the FHR also notes with disappointment that these efforts have, in general, not resulted in any meaningful progress. In particular:
 - 3.1. The TRC cases lack operational and strategic oversight
 - 3.2. No tangible progress has been made in most of the TRC cases
 - 3.3. There is no discernible coordination of the cases
 - 3.4. Few if any connections are being made between cases
 - 3.5. It remains unclear who the dedicated prosecutors are (unless these are the prosecutors assigned to FHR supported cases)
 - 3.6. There is no central accountability for the TRC cases
 - 3.7. We are not aware of any investigative and prosecutorial strategy to tackle the TRC cases.

¹ [NPA/DPCI joint statement](#) regarding the TRC dedicated capacity, 27 June 2021.

² The caveat is that the NPA has refused to provide the list of cases being under investigation. Report by the DNDPP, Advocate De Kock before the Justice Portfolio Committee of the South African Parliament on 25 November 2022. Available at: [Parliamentary Monitoring Group Reports](#) of the Justice Portfolio Committee.

³ <https://www.politicsweb.co.za/politics/formal-inquests-in-trc-matters--npa--dpci>

4. The FHR has welcomed the NPA's decision to appoint this Inquiry to review the measures adopted to deal with and prosecute TRC cases and provide recommendations as needed (hereinafter "The Inquiry"). We understand that the Inquiry has also been asked to escalate any issue to the National Director of Public Prosecutions (NDPP) should it establish that there is evidence or information that could amount to a violation of Section 41(1) of the NPA Act. The appointment of the senior counsel to conduct the Inquiry follows the judgment of the Full Bench in *Rodrigues v National Director of Public Prosecutions of South Africa and Others*.⁴
5. Accordingly, we wish to make the following submissions, drawing on FHR's experience with coordinating justice efforts for the victims' families we support and our direct interactions with the NPA and DPCI. Given the Inquiry's mandate, we have focused our submission on the NPA.
6. The submission is structured as follows:
 - 6.1. It firstly provides a 'Brief Context', which includes the role of the FHR in the efforts to address the Unfinished Business of the TRC around criminal accountability and reparations. The section focuses on the FHR's activities around criminal accountability after the reopened inquest into the death in detention of Ahmed Timol in 2017 and its advocacy efforts to address systemic challenges within the NPA.
 - 6.2. Our submission further includes the points we wish to raise with the Inquiry. The points are divided into broad thematic sub-sections. Each thematic sub-section covers the relevant issues we have identified and the recommendations we propose to the Inquiry. The broad thematic sub-sections include:
 - 6.2.1. Irreparable Harm to the Families
 - 6.2.2. Political Interference
 - 6.2.3. TRC Component
 - 6.2.4. Key challenges with the investigations and prosecutions

⁴ 2019 (2) SACR 251 (GJ) (3 June 2019), <http://www.saflii.org/za/cases/ZAGPJHC/2019/159.html>

6.2.5. Public Accountability

6.2.6. International Charges

6.2.7. Interactions between the NPA and the third parties.

6.3. The submission ends with a brief conclusion.

Brief context

7. At the conclusion of its work, the Truth and Reconciliation Commission (TRC) recommended several hundred apartheid-era gross human rights violations (“TRC cases”) for investigation and prosecution where amnesty was denied or not applied for. However, the limited scope of investigations and prosecutions by the NPA when the TRC was still operating⁵ and the subsequent suppression of apartheid-era cases by the state in the period 2003-2017 (the so-called “political interference”) have led to virtually no post-TRC prosecutions for apartheid-era crimes.

The Role of the Foundation for Human Rights

8. The Foundation for Human Rights (FHR) has a long history of advocating criminal accountability for TRC crimes and supporting the efforts of victims seeking reparations.⁶ In the early 2000s, the FHR assisted the TRC in preparing the final volumes of their report, and after the winding up of the TRC, it provided seed funding to the NPA’s Missing Persons Task Team. FHR also supported the court applications opposing the Special Pardon Dispensation Programme and the 2005 Prosecutorial Guidelines, which intended to introduce “backdoor amnesties” for apartheid-era gross human rights violations, and which were successfully stopped in court. In 2002, FHR assisted the Khulumani Support Group in bringing a court application against 20 large corporations in the USA under the Alien Tort Claims Act seeking compensation for the companies’ role in the oppressive and criminal system of apartheid.

⁵ In 1996, Magnus Malan, the former Minister of Defence and 15 co-defendants were acquitted of the charges of murder concerning the killing of 13 people (including seven children) in January 1987 at the home of Victor Ntuli, an ANC activist, in his house in KwaMakhuta township, near Durban. See Suzanne Daley, “Former Officials Cleared By Court In South Africa”, New York Times, 12 October 1996, available at: <https://www.nytimes.com/1996/10/12/world/former-officials-cleared-by-court-in-south-africa.html> (accessed 9 July 2022). In the Annual Report 2009/10, the NPA’s Priority Crimes Litigation Unit, tasked with prosecuting the TRC cases, reported the withdrawal of charges against two accused in *S v Van Zyl and Coole* and a decision not to prosecute in the Anton Lubowski case. See National Prosecuting Authority, Annual Report 2009/10, at 23. The former Minister of Law and Order, Adrian Vlok, former Head of the South African Police, Johan van der Merwe, and three other former Security Branch members pleaded guilty to attempted murder of Reverend Frank Chikane. See National Prosecuting Authority, Annual Report, 2007/08, at 29.

⁶ See FHR’s website on the TRC Programme: <https://unfinishedtrc.co.za>

9. More recently, the FHR has been taking the following approach aimed at ensuring criminal accountability for apartheid-era crimes:

Supporting victims' families and pursuing emblematic cases in courts

- 9.1. FHR's primary focus for the DPCI and the NPA to act has included supporting victims' families in their quest for justice, taking up particular TRC cases, and pursuing them through the legal channels.⁷ This approach has been accompanied by concentrated media coverage.⁸ In virtually all the TRC cases before the courts today, the victims' families supported by FHR and the legal teams had to litigate or threaten litigation to force the NPA and the DPCI to act.
- 9.2. Although initially, the FHR supported only the Timol and Simelane families, the scope of FHR's support has subsequently increased, and it currently provides active assistance to 23 TRC cases.⁹ Since 2015 the FHR has had a full-fledged TRC Programme, retained the services of a private investigator, built a network of counsel, attorneys and experts, mobilised other civil society organisations (CSOs) and raised funds from independent donors to support criminal accountability efforts. Thanks to these efforts and the victims' families, some progress has been made concerning the investigations and prosecutions of the cases arising from the TRC process.
- 9.3. In 2017, the historic reopened inquest into the death in detention of Ahmed Timol took place. It culminated in Judge Mothe's judgment, which found that Ahmed Timol was tortured and murdered by the Security Branch of the South African Police.¹⁰ Encouraged by the success of the Timol inquest,¹¹ other families approached FHR for

⁷ In 2005 FHR was first approached by Thembi Nkadimeng to assist with the case into the disappearance and murder of her sister, Nokuthula Simelane. In the cases where the FHR provides support the families are represented by pro-bono attorneys from our partner law firms, who in turn require powers of attorney from the respective families. There is, of course, no obligation on families to work with the FHR. The FHR and our partner law firms are bound by the instructions from the victims' families with respect to their individual cases. No decision affecting any individual case is made without the consent of the relevant family.

⁸ See FHR's press releases: <https://unfinishedtrc.co.za/category/press-releases/>

⁹ The FHR shared the list of the TRC cases that it supports with the NPA on 23 April 2023.

¹⁰ Judgment, The re-opened inquest into the death of Ahmed Essop Timol (IQ01/2017) [2017] ZAGPPHC 652 (12 October 2017), available at <https://www.saflii.org/za/cases/ZAGPPHC/2017/652.html>.

¹¹ Full record from the reopened inquest, available at: <https://www.ahmedtimol.co.za/ahmed-timol-2017-inquest/>.

assistance. Subsequently, other inquests into the deaths in detention of Dr Neil Aggett, Ernest Dipale, Dr Hoosen Haffejee and Imam Haron were reopened. In the Aggett judgment delivered in March 2022, the court overturned the suicide findings of the inquest court in 1972, rejected the theory of an “induced suicide”, and ruled that Dr Aggett was tortured and murdered by the Security Branch of the South African Police.¹² The reopened Haffejee¹³ and Haron¹⁴ inquests concluded in October 2022 and April 2023, respectively, and the judgments are awaited.

9.4. In all these matters but one (Dipale case), the FHR has provided funding and coordinated the legal support. We note that while the Aggett and Dipale inquest proceedings took place at the same time (in the course of 2020 and 2021), the Aggett inquest concluded with a judgment in March 2022. To our knowledge, the closing arguments in the Dipale matter were only heard in November 2022, and the judgment in this matter is still awaited.

9.5. In October 2022, the NPA decided to open inquests into four other matters, namely the murders and enforced disappearances of the ANC activists and MK operatives in Kwa-Zulu Natal, including Ntombikayise “Ntombi” Kubheka, Musawenkosi “Sbo” Phewa, Zamukwenzani Bright Mlobeli/Sokhulu, and Jameson Ngoloyi Mngomezulu. The Khubeka and Phewa families have since instructed the FHR to assist with their matters. The reasons for opening these inquests have been opaque, especially since the cases do not seem ripe for court proceedings.¹⁵

9.6. In addition to eight inquests into apartheid-era crimes, which are ongoing or have been concluded before the Courts, to our knowledge there are only three TRC cases

¹² Judgment, Re-opened Inquest into the Death of Dr Neil Hudson Aggett (445/2019; 139/1985) [2022] ZAGPJHC 110 (4 March 2022), available at <http://www.saflii.org/za/cases/ZAGPJHC/2022/110.html>.

¹³ The full record of the reopened Haffejee inquest is available here: <https://unfinishedtrc.co.za/hoosen-haffejee/#1631621270858-899246ce-cc28>

¹⁴ The full record of the reopened Haron inquest is available here: <https://unfinishedtrc.co.za/imam-haron/#1667878653653-63ebaf77-bf1c>

¹⁵ Since 24 October 2022, the matters have been adjourned multiple times. Pre-inquest hearings were conducted on 24 October 2022, 31 November 2022, 14 February 2023, 22 March 2023. The matter was initially adjourned to 11 May 2023, but the NPA has requested a further postponement to 21 June 2023 in view of some administrative impediment in processing the last remaining state defence application.

where the NPA has decided to prosecute. These are the cases concerning the murders of anti-apartheid activists Nokuthula Simelane, the COSAS FOUR and Caiphus Nyoka, respectively. These cases have progressed only due to consistent pressure from the families, legal representatives, and the FHR. Particularly the Simelane case is emblematic of the ineffectiveness of the NPA as it continues to face multiple delays.

FHR's Advocacy Efforts

9.7. In addition to pursuing justice through the emblematic cases, the FHR has attempted to address the systemic challenges within the NPA by focusing on concentrated strategic interventions. These have centred on advocacy to set up dedicated capacity within the NPA and the DPCI, and the inclusion of international charges under customary international law as per section 232 of the Constitution in the indictments of the accused. In addition, the FHR has made proposals around the need to set up a liaison structure between the NPA and interested parties (i.e., FHR, victims' groups etc.) to create a permanent communication channel for regular progress reporting and information sharing about the TRC cases.

9.8. The FHR has also called on the President to set up an independent and public commission of inquiry as per the Commissions Act 8 of 1947 to investigate the political interference by the Executive in the work of the NPA and the police and the suppression of apartheid-era crimes.¹⁶ There has been no response from the Presidency.

¹⁶ Letters from the Former Truth Commissioners, South African Coalition for Transitional Justice, other CSOs, the Apartheid-Era Victims Group and other victims' families; [Webinar by the FHR and the Tutu Foundation](#) (23 February 2022), "The Call for an Independent Commission of Inquiry into the Suppression of TRC Cases".

FHR's Written Submissions

Irreparable harm to the families

10. Families have had to wait decades for truth and justice. Now that the state has eventually agreed to act, they are faced with more delays. Irreparable harm has been visited upon the families because in most cases suspects and witnesses have died or become medically unfit to stand trial.
11. This is not speculation on our part. Indeed, it stands to reason given that most of the offences took place between the 1960s and 1980s and most perpetrators were born between the 1930s and 1950s. Three of the senior perpetrators behind the operation to murder the COSAS FOUR, Jan Carel Coetzee, Abraham Grobbelaar and Brigadier Willem Frederick Schoon died before they could face justice. The current accused are elderly. Rorich is 75 years old and Mfalapitsa is aged 68.
12. The bulk of the apartheid-era cases have come to an end because suspects and witnesses have died, not to mention family members of victims. On 29 August 2020, Nyameka Goniwe, wife of Matthew Goniwe, one of the Cradock Four, passed away before seeing justice done in her husband's brutal murder. She was 69 years old. The cruel indifference of the post-apartheid South African State robbed her of justice, peace, and closure.
13. In *the Nokuthula Simelane case*, two of the four accused died since the issuing of the indictment in 2016.
 - 13.1. Accused one, Timothy Radebe, died during 2019 at the age 68. Fourth accused, Frederick Mong, died during 2021 at the age of 76. Both were of similar ages to the accused in the COSAS Four matter.
 - 13.2. We are also aware of at least 8 family members and witnesses who have passed on. Three of them died in the last 12 months.

- 13.3. To top it off, on 6 June 2022, the very day that the belated trial was to begin against the two-remaining accused, Willem Coetzee and Anton Pretorius, their legal team produced a 2-page doctor's report claiming that Coetzee was mentally unfit to stand trial. A state assessment found him fit to stand trial, but his legal team are now preparing a review of that finding, which could take years to resolve.
14. The story of accused dying before they can be held to account is ongoing, as demonstrated by just a few examples:
- 14.1. Former Lieutenant Stephen Whitehead, lead interrogator and tormentor of Dr Neil Aggett, died on 23 April 2019, in the same week that the Minister of Justice announced the reopening of the Aggett inquest. He was 62 years old.
 - 14.2. Former Security Branch Colonel James Taylor, who was involved in the arrest and brutal interrogation of Dr Hoosen Haffejee died just days after the reopening of inquest was announced in August 2019.
 - 14.3. Former SB Sergeant Joao Rodrigues died in September 2021 before he could stand trial for his role in the murder of Ahmed Timol.
 - 14.4. Most persons connected to the Cradock Four murders have passed away, including all 6 members of the police death squad. Some 49 persons are connected to that case as potential suspects or witnesses, but only 10 are confirmed as still alive. Since the families launched litigation against the NPA and SAPS in July 2021, 3 suspects have died, including the former Commander of the SB and SAP Commissioner, Johan van der Merwe.
15. The prejudice visited upon the family and the community by the state's inaction has been irreversible and incalculable.

Political interference

16. In the early efforts by the Executive to introduce “back door amnesties” for the perpetrators of gross human rights violations who did not apply for or were refused amnesty, the secret Amnesty Task Team was established in 2004 to address “the absence of any guarantee that alleged offenders will not be prosecuted”.¹⁷ This process resulted in the amendments to the NPA’s Prosecution Policy to allow for a backdoor amnesty¹⁸ and the launch of President Mbeki’s Special Dispensation on Political Pardons. Both initiatives had to be stopped in court.¹⁹
17. It is no longer in dispute that there was political interference resulting in the decision to neither investigate nor prosecute any of the several hundred serious criminal cases in which amnesty had been denied or not applied for. A former National Director of Public Prosecutions (NDPP) and a former head of the NPA’s Priority Crimes Litigation Unit (PCLU) have provided affidavits to this effect in the 2015 matter of *Nkadimeng v National Director of Public Prosecutions*.²⁰ This was confirmed under oath by senior officials representing the NPA in 2019 in *Rodrigues v National Director of Public Prosecutions of South Africa*.²¹

¹⁷ Undated “*Report: Amnesty Task Team*” – *Secret*. Application in *Nkadimeng vs NDPP & Others*, Case Number 35554/2015.

¹⁸ See proposed Section 8A and Appendix 1 of [2005 NPA’s Prosecution Policy](#), which were aimed at introducing a backdoor amnesty.

¹⁹ See in particular par. 61 of *Albutt v Centre for the Study of Violence and Reconciliation and Others*, 2010 (3) SA 293 (CC), (23 February 2010), available <http://www.saflii.org/za/cases/ZACC/2010/4.html> (accessed 9 July 2022); *Nkadimeng & Others v The National Director of Public Prosecutions & Others TPD case No 32709/07*, (32709/07) [2008] ZAGPHC 422, (12 December 2008), available at: <http://www.saflii.org/za/cases/ZAGPHC/2008/422.html> (accessed 9 July 2022).

²⁰ 3554/2015, Application to compel: [An Index to the Notion of Motion and Funding Affidavit](#); [Notice of Motion and Founding Affidavit and Annexes](#). See in particular the following exhibits: TN7 Supporting Affidavit of Vusi Pikoli, Former NDPP and annexes (p. 170 – 216); TN8 Supporting Affidavit of Anton Ackermann and annexes (p. 217 – 235); TN43 Relevant extracts from the affidavit of Vusi Pikoli before the Ginwala Commission (p. 446 – 471).

²¹ *Rodrigues v NDPP & Others*, Case No.: 76755/18, Gauteng Division. Full record of the permanent stay of prosecution proceedings can be accessed here: <https://www.ahmedtimol.co.za/rodrigues-high-court-sca-papers/>. Founding Affidavit in Case No.: 76755/18: [Notice of motion, founding affidavit by Rodrigues and annexes](#); The following documents are particularly relevant: [First Respondent Supplementary Affidavit, Jacobus Petrus Pretorius](#) (p. 750 – 793); [Supporting Affidavit on behalf of First Respondent, Raymond Christopher Macadam, including annexes](#) (p. 794 – 879); [Heads of Arguments on behalf of First Respondent](#) (See in particular par. 4.18 – 4.20, whereby the NDPP acknowledges the political interference); [Heads of Arguments on behalf of Fourth Respondent \(Imtiaz Cajee\)](#) See in particular p. 12-23; Judgment, *Rodrigues v National Director of Public Prosecutions of South Africa and Others* (76755/2018) [2019] ZAGPJHC 159; [2019] 3 All SA 962 (GJ); 2019 (2) SACR 251 (GJ) (3 June 2019) See paras. 29-34; 55-70.

18. The High Court²² and the Supreme Court of Appeal²³ in *Rodrigues's* stay of prosecution proceedings expressed their dismay at how such interference could take place in our new constitutional order. It is important to cite the relevant passage of the judgment by the Full Bench of the High Court in *Rodrigues*, which has been cited as the basis for this Inquiry:²⁴

[64] Of course, it may well be asked, what was the NPA required to do in the face of high-level political interference? Rather than simply succumb to it, it was open and incumbent upon the NPA to have brought this interference into the open. Victims of those crimes where investigation and prosecution was being suppressed certainly had the right to know what was happening and why such cases were not being prosecuted. Society as a whole had an ongoing interest in the work of the TRC and the follow-up that the government had committed itself to. Parliament, which ultimately represents the legislative authority of the state, had a right to know when the letter and spirit of legislation that it had passed was being deliberately undermined. None of this occurred and the NPA must accordingly accept the moral and legal consequences of this most serious omission and dereliction of duty on its part.

[65] It is also for these reasons that **the conduct of the relevant officials and others outside of the NPA at the time** should be brought to the attention of the National Director of Public Prosecutions for her consideration and **in particular**, to consider whether any action in terms of Section 41(1) of the NPA Act is warranted. **(emphasis added)**

19. While some evidence has been uncovered in the *Nkadimeng* and *Rodrigues* matters, the full reasons behind the suppression of the TRC cases are not known, and the sources of such interference remain opaque.

20. As a result of this manipulation of the criminal justice system the former TRC commissioners, families of victims and CSOs have repeatedly called on the President to

²² [Rodrigues v National Director of Public Prosecutions of South Africa and Others](#) (76755/2018) [2019] ZAGPJHC 159; [2019] 3 All SA 962 (GJ); 2019 (2) SACR 251 (GJ) (3 June 2019).

²³ [Rodrigues v National Director of Public Prosecutions and Others](#) (1186/2019) [2021] ZASCA 87; [2021] 3 All SA 775 (SCA); 2021 (2) SACR 333 (SCA) (21 June 2021), see in particular, paras. 26 – 30, 54.

²⁴ 2019 (2) SACR 251 (GJ) (3 June 2019), paras. 64-65. In addition, see 2021 (2) SACR 333 (SCA) (21 June 2021), paras. 26 – 30, 54.

appoint a commission of inquiry to investigate the political interference and identify those responsible, within and outside the NPA and SAPS, for suppressing the TRC cases. The former commissioners of the TRC addressed three letters to the President calling for the establishment of the independent commission of inquiry in 2019 and two in 2021, which fell on the deaf ears. The Apartheid-Era Victims Families Group (AVFG), representing some families of apartheid-era victims, addressed separate letters to the President in which they expressed dismay at the lack of justice for the apartheid-era crimes and supported the call for the setting up of the independent commission.²⁵

21. The FHR and civil society working on the issues of the Unfinished Business of the TRC have long believed that the suppression of the TRC cases by the Executive through political interference in the work of the NPA and SAPS has been a form of State Capture. For this reason, Lukhanyo Calata acting as a main applicant and other families of victims, made representations to the Zondo Commission on the role played by the Executive in the suppression of the investigations and prosecution of the TRC cases.²⁶ While the Zondo Commission considered the representations and commenced the investigation, it has never completed it.

22. On 5 November 2021, the Minister of Justice, Mr Ronald Lamola, in his address to the Inaugural Fort Calata Foundation Memorial Lecture, indicated that he had appointed an inquiry to investigate the suppression of the cases referred by the TRC to the NPA.²⁷ He indicated that the investigation would be presided over by a retired judge. The Minister did not disclose the terms of reference of the inquiry or the identity of the Judge. In an open letter, the FHR, former TRC commissioners, victims' families and other CSOs responded to the proposal by the Minister.²⁸ The signatories to the letter pointed out the

²⁵ Letters from Former Truth Commissioners, South African Coalition for Transitional Justice, other CSOs, the Apartheid-Era Victims Group and other victims' families.

²⁶ Affidavit by Lukhanyo Calata available at: <https://unfinishedtrc.co.za/wp-content/uploads/2022/09/Affidavit-Lukhanyo-Calata-reduce-size.pdf> ; Chronology of political interference: <https://unfinishedtrc.co.za/wp-content/uploads/2022/09/Political-Interference-Chronology.pdf>

²⁷ Marianne Thamm, 'Too many knives': Will Justice Minister Ronald Lamola's promise of justice for Cradock Four materialise?, 8 November 2021, available at: <https://www.dailymaverick.co.za/article/2021-11-08-too-many-knives-will-justice-minister-ronald-lamolas-promise-of-justice-for-cradock-four-materialise/>

²⁸ Statement by the Former TRC Commissioners, Apartheid-Era Victims' Family Members and Civil Society Organisations, *Call for an independent, public and open Commission of Inquiry into the Suppression of the TRC Cases*, 9 November 2023. Available at: <https://unfinishedtrc.co.za/3104-2/>

key objections, namely that this initiative would amount to the Executive investigating the Executive and that it was aimed at avoiding public scrutiny, amongst other concerns. There has been no further update from the Justice Department on the proposed “inquiry”.

Issues

23. We understand that this Inquiry has been requested to make recommendations under section 41 (1) of the NPA Act concerning individuals who might have contravened the NPA Act to escalate the matters to the NDPP. We understand that this section of the Inquiry’s Terms of Reference relates to some form of an investigation into the “political interference”. We wish to submit that the Inquiry should not make any findings in this regard beyond noting the obvious fact that the NPA failed in its duty to the South African public in not prosecuting the TRC cases, that this failure was due to some form of political interference, and that in order to avoid some future repetition of this miscarriage of justice a full, open and public commission inquiry is needed.

24. We are of the opinion that any other finding (of the form that the Inquiry did not find any evidence of current contraventions of section 41(1), or that only specific instances of historical contraventions of section 41(1) were found) will be used to claim that the NPA has complied with the recommendations by the Full Bench of the High Court in *State v Rodrigues*. We submit that intention of the Full Bench was not that such a serious miscarriage of justice should be dealt with *en passant* by the Inquiry into the current form of the NPA’s response to the TRC cases. In addition,

24.1. We wish to point out that this Inquiry has no powers (i.e., search and seizure or powers of subpoena) nor investigative capabilities to unearth the extent of the political interference and to get to the full truth. Hence, it should refrain from undertaking an enquiry that it cannot reasonably complete.

24.2. We submit that political interference implicated multiple state institutions (i.e., Ministries, NPA, SAPS, state intelligence agencies) and actors; the NPA was just

one of many actors involved. Given the limited time frame of the Inquiry (3 months), it is highly unlikely that the full extent of political interference could be meaningfully and fully investigated and determined within this period. In addition, the Inquiry's focus would be the sole involvement of the NPA and hence, the Inquiry would not be able to investigate the roles of other state institutions.

Recommendations

25. Based on the above, we wish to make the following recommendations:

- 25.1. Setting up of an Independent Commission of Inquiry: We wish to submit that the Inquiry recommends that political interference be dealt with by an independent and public commission of inquiry established by the President under the Commissions Act 8 of 1947. Only an open, independent and public commission of inquiry with powers of subpoena and search and seizure will be able to investigate the full extent of political interference and make recommendations on how to strengthen the NPA and ensure the non-recurrence of such interference. In our communication with the President we proposed the Terms of Reference for the future commission of inquiry, which among other functions, shall investigate “the impact, if any, on victims, families, communities, the rule of law, the criminal justice system and related institutions, and South Africa as a whole” and “the steps, measures and reforms needed to prevent a recurrence of the interference.” Following an investigation, such a commission of inquiry will have all information at its disposal to formulate recommendations around a systemic reform of the NPA, which would ensure greater independence of the agency from the political players and non-recurrence of the interference.

TRC Component

26. In 2019 we indicated, in discussions with the NDPP, the need for more structure in the investigations and prosecutions of the TRC cases. The response by the NDPP was that they

would continue with a decentralised approach (in which cases would be dealt on a regional basis) but would ensure that TRC cases were prioritised.

27. The FHR's advocacy efforts around the dedicated capacity for the TRC cases began on 7 September 2020, when the FHR sent a letter to the NDPP and DPCI's Head pointing out the shortcomings of the decentralised model and the continued challenges of dealing with the TRC cases by the discredited Priority Crimes Litigation Unit (PCLU).²⁹ The FHR also enclosed a memorandum which set out international examples of how other countries have dealt with the crimes of the past, and made proposals for the new approach for the TRC cases in South Africa.³⁰
28. Subsequently, the FHR shared a legal opinion setting out the legal basis for establishing a dedicated investigative and prosecutorial capacity for the TRC cases with the NPA and DPCI. The opinion proposed a model whereby a Special Director is appointed to head up a special unit, or an Investigative Directorate is set up to lead the investigations and prosecutions into the TRC cases.³¹
29. These FHR advocacy efforts were followed by direct interactions between the FHR and DPCI/NPA Head Offices throughout 2021 and 2022. On 17 February 2021, the parties held a joint meeting convened by FHR and agreed in principle that such an approach was necessary but differed regarding details. The FHR was concerned that the proposal made by the NPA for a new approach, as presented by Advocate Macadam during the meeting, would, in fact, amount to reinventing the compromised PCLU and that nothing would change. The FHR expressed these concerns in subsequent correspondence to the NPA and DPCI.

²⁹ The PCLU was established in 2003 through the Presidential Proclamation and was located in the Office of the National Director of Public Prosecutions (NDPP). During her report to the Justice Portfolio Committee on 1 June 2022, the NDPP indicated that the PCLU was no longer in existence. See, [Parliamentary Monitoring Group Reports](#) of the Justice Portfolio Committee.

³⁰ [FHR Memorandum](#) on the "new approach to TRC cases" (September 2020).

³¹ [The legal opinion](#) "Exploring Legal Options for the Establishment of a Special Capacity to Investigate & Prosecute Apartheid Crimes" by Advocate Howard Varney and Advocate Thabang Poee, 13 January 2020.

30. The exchange of communication in the period that followed the joint meeting marks a shift in the NPA's approach to collaboration with FHR. Instead of designing the reforms within the NPA/DPCI in relation to the TRC cases in a collaborative process as initially discussed, the NDPP/DPCI communicated their intention to reform their approach to the TRC cases to FHR on 8 March 2021.
31. On 27 June 2021, the NPA and DPCI formally announced the setting up of a dedicated capacity for the TRC cases, which was operationalised later in 2022.³² The communication exchange between the FHR and the NPA/DPCI continued through 2021 and 2022 and resulted in a meeting between the FHR, NPA, and DPCI on 30 January 2023. Despite certain constructive outcomes of the meeting, there has been generally no further follow-up from the NPA. The NPA has only responded to our communications regarding the inclusion of international charges but has not taken any other matters discussed during the meeting forward.
32. From our interactions with the NPA, we understand that the NPA's TRC Component falls under the Deputy National Director of Public Prosecutions (DNDPP), Advocate De Kock. In addition, it includes Special Director Advocate E Matzke and Advocate Singh (TRC National Coordinator), as well as administrative staff to support the TRC Component. Advocate E Matzke oversees TRC matters at the operational level. In addition, the NPA has indicated that it appointed 25 prosecutors across provincial offices to deal exclusively with the TRC cases. As explained by Advocate De Kock during his presentation before the Justice Portfolio Committee (JPC), these prosecutors form a cohesive unit which operates at the national level.³³ They, however, report directly to their respective Director of Public Prosecutions (DPPs). At the time of our last interaction, the NPA was hiring a Deputy Director for the TRC Component.
33. A TRC component was also set up at the DPCI. The DPCI TRC Component falls under the oversight of General Mosipi, the Provincial Head of DPCI. The DPCI has also appointed a

³² [NPA/DPCI joint statement](#) regarding the TRC dedicated capacity, 27 June 2021.

³³ See Parliamentary Monitoring Group Report dated 25 November 2022.

TRC Coordinator, Colonel Nkuna, and have recruited 40 investigators to work exclusively on the TRC cases.

Issues

Prosecution-led investigations

34. The creation of the TRC Component combined with the decentralisation approach has failed to advance the TRC cases. There has been little tangible progress in most of the cases. We have gained the impression that the majority of cases are, to varying degrees, stagnating in provincial offices without any discernible effort to prioritise them.
35. In the current approach prosecutors and detectives work apart from each other under no unified command. There are no prosecution-led investigations from what we can see. The NPA has no investigative capacity and is entirely reliant on the DPCI and SAPS. Until investigators and prosecutors are brought together, we do not expect to see any significant progress. There is considerable precedent for this approach in South Africa.
36. Even though prosecution-led investigations are standard practice in inquisitorial legal systems, the prosecution-led investigations introduced in South Africa in the late 1990s were considered ground-breaking for a common law jurisdiction.³⁴
- 36.1. Prosecution-led investigations were initially introduced to tackle the prevalence of carjackings in Johannesburg in 1999 under a task force at the NPA's Investigating Directorate: Organised Crime and Public Safety. The unit was headed by a deputy director of public prosecutions and included senior prosecutors, investigating officers, and intelligence agents. A hallmark of this sub-directorate was that its work was intelligence-driven, making use of intelligence agents and

³⁴ Martin Schönreich, "Prosecution-Led Investigation: An Innovative Approach from South Africa," presentation for the Open Society Justice Initiative conference in Mar del Plata, Argentina, Dec. 5–6, 2005, biblioteca.cejamericas.org/bitstream/handle/2015/3188/schoenteich-prosecution-led-ing.pdf?sequence=1&isAllowed=y.

informants.³⁵ According to Martin Schönteich, its success was attributed to close prosecutor-investigator cooperation. This involved bi-weekly strategy meetings with stakeholders to share intelligence and develop enforcement and prevention plans.³⁶ Within 18 months, the unit had increased the conviction rate from 10 percent to 42 percent, reduced the time from arrest to finalisation of trial from 180 to 120 days, stopped the loss and sale of case dockets, and established an effective pool of experienced and specialized prosecutors.

36.2. Another example of prosecution-led investigations was the establishment of the Directorate of Special Operations (DSO) in 2001 to investigate and prosecute organized crime, serious economic offenses, corruption by public officials, and terrorism. The DSO saw the integration of three traditionally separate functions: intelligence, investigations, and prosecutions.³⁷ In terms of staff, investigators made up 64 percent of the total, prosecutors 18 percent, analysts and specialists 2 percent each, and administrative support 14 percent. The investigations were prosecution-led and intelligence-driven.³⁸ Investigating directors led teams of prosecutors, investigators, and specialists at the DSO. Prosecutors guided investigators to enable the collection of admissible evidence, meeting face to face with investigators from the beginning of each case. Prosecutors were ultimately responsible for cultivating good cooperation from witnesses and became leaders of multiagency solutions to crime problems.³⁹ The DSO was a highly effective unit with a conviction rate of well over 90 percent.⁴⁰

36.3. The creation in 2011 of the Specialized Commercial Crime Unit (SCCU) in the NPA to prosecute complex financial crimes also helped to pioneer close cooperation

³⁵ Martin Schönteich, Institute for Security Studies, “Lawyers for the People: The South African Prosecution Service,” Monograph 53 (March 1, 2001).

³⁶ Schönteich, “Prosecution-Led Investigation.”

³⁷ Moses Montesh, “A Critical Analysis of Crime Investigative System Within the South African Criminal Justice System: A Comparative Study” (2007).

³⁸ Schönteich, “Prosecution-Led Investigation.”

³⁹ Ibid.

⁴⁰ 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): 5.

between detectives and prosecutors.⁴¹ SCCU prosecutors are involved in investigations at an early stage, and investigators and prosecutors work together in project teams. Investigators are required to present draft investigation plans to prosecutors, and together they are jointly responsible for ensuring proper investigations.⁴² According to Antony Albekker, this integrated approach resulted in thorough case preparation and presentations in court, faster turnaround times, and higher convictions.⁴³ The SCCU enjoys a conviction rate of over 90 percent.⁴⁴ Other factors explaining the success of the SCCU include the colocation of investigators and prosecutors in the same building and the material and expert support provided by the private sector. Albekker notes that tensions between detectives and prosecutors were handled with grace, professionalism, and competence.⁴⁵

36.4. In relation to criticism that the integrated approach reduces the independence of SCCU prosecutors, Albekker observes that neither prosecutors nor investigators believed that to be the case. On the contrary, he found that they maintained that prosecutors were better able to exercise their discretion and preserve their independence since they enjoyed more insight into investigation dockets than they normally would, and that a prosecutor's training helps to overcome subjectivity in the exercise of discretion.⁴⁶

Independence of the prosecutors as a starting point

37. It appears that the position of the NPA is that strategic or operational oversight over the TRC cases would violate a core principle of the prosecution service, namely that the prosecutors are independent in their work. Accordingly, the only way to affect a prosecutorial decision is through a "review system". Any concerns with the decisions or conduct of a lead prosecutor should be raised with the relevant DPP and, ultimately, with

⁴¹ Antony Albekker, Institute for Security Studies, "Justice Through Specialisation? The Case of the Specialised Commercial Crime Court," Monograph 76 (2003).

⁴² *Ibid.*, 5–6.

⁴³ *Ibid.*

⁴⁴ National Prosecuting Authority, "Annual Report 2019/20," 90.

⁴⁵ *Ibid.*

⁴⁶ Albekker, "Justice Through Specialisation?," 66.

the NDPP if necessary. Under this approach we note that the role of the TRC Component has been largely passive in nature, restricted to accounting for progress with respect to individual cases, and as a consequence has had limited or no impact on resolving or expediting the TRC cases.

38. It is our understanding that the core element of prosecutorial independence is the independence of the NPA as an institution from external influence. In our respectful view, individual prosecutors are not independent of the institution as a whole. The abdication of institutional responsibility by the national office in respect of the conduct and decisions of prosecutors at the provincial level was not intended by the legislative scheme and leads inevitably to dysfunction and inconsistencies.
39. There have been at least five Investigative Directorates established in South Africa at various points in time, and all of them have adopted a model incorporating strategic oversight over their cases.⁴⁷ While the model of work has differed between the Investigating Directorates, in all instances, prosecutors have guided the strategy and tactics of police investigators, focusing on collecting admissible evidence and ensuring investigations were prosecution directed.⁴⁸ The example includes the today's Investigating Directorate: State Capture and Complex Corruption, which have been granted the investigative powers directly under the NPA Act.⁴⁹
40. In addition, strategic oversight, direction, and guidance, especially concerning the investigations and prosecutions of gross human rights violations, has been an established best practice and has resulted in better results than a piecemeal and *laissez-faire* approach.⁵⁰

⁴⁷ These have included investigating directorates on organised crime and public safety (IDOC), serious economic offences (IDSEO), the Investigating Directorate: Corruption, the Directorate of Special Operations (DSO, Scorpions) and Investigating Directorate: State Capture and Complex Corruption.

⁴⁸ Schonteich, M. Lawyers for the People. The South African Prosecution Service. Institute for Security Studies. Monograph 53. March 2001. See also, [The legal opinion](#) "Exploring Legal Options for the Establishment of a Special Capacity to Investigate & Prosecute Apartheid Crimes" by Advocate Howard Varney and Advocate Thabang Poee, 13 January 2020.

⁴⁹ Sections 27-29.

⁵⁰ H Varney and K Zdunczyk, Gearing Up the Fight Against Impunity: Dedicated Investigative and Prosecutorial Capacities, ICTJ & FHR, 2022. Available at: <https://www.ictj.org/node/35041>

41. There is also an argument that the strategic approach contributes to developing a leadership culture and appropriate capabilities and expertise within the institution.

TRC Component lacks strategic oversight over the TRC cases

42. We understand that the current reforms at the NPA are largely intended to improve the management (i.e., accountability sessions where prosecutors give feedback on cases, enhanced monitoring and evaluation of the progress, project management plans, and performance indicators) of the TRC cases without addressing the underlying challenges in the investigations and prosecutions of the TRC cases. In particular, by setting up the TRC Component, the NPA has opted for a low-key initiative instead of appointing a Special Director to head the TRC Unit or setting up an Investigating Directorate. This option lacks impetus and appears to provide little or no strategic direction and oversight of the TRC cases. By focusing the recent reforms on operational affairs and including no real oversight over the legal strategies across the TRC cases, the NPA has set itself up for failure.
43. The TRC Component, although responsible for coordinating the TRC cases across all provinces, does not appear to have a grasp of what is going on in each of the cases. It is not clear what the Component does and what actual coordination is happening. The TRC Component does not attend court hearings of the TRC cases and so remains largely unaware of developments unless specifically advised. We presume they do not discuss strategy or approach in specific cases with prosecutors. In this regard we understand that they prefer to operate at arm's length from each case, hiding behind the claim that they may not get involved because of the NDPP's review power in terms of s 22 of the NPA Act. In short, little or no oversight of the TRC cases is provided by the Component, and this shows in the lack of progress.
44. Even if the Component attempted to offer real oversight, it is quite likely that such efforts would be ignored or rejected by prosecutors at the local level who, under the decentralised approach, report directly to their DPPs. The Component has no authority

over prosecutors involved in the TRC cases. At best they can ask for progress reports and offer encouragement, training and advice. However, prosecutors are under no obligation to follow such advice and may do as they please, as long as they have the cover of their DPPs.

No strategic approach to the TRC cases

45. We understand that the NPA was developing a prosecutorial strategy for TRC cases. Despite FHR's request, it has not been shared with FHR for input. To date, we have not heard more from the NPA concerning the prosecutorial strategy for the TRC cases; hence, we assume that the strategy is still in the making. The best practice shows that developing a sound, reasonable and context-specific prosecutorial strategy to deal with the crimes of the past is one of the best practices.⁵¹

Structure of the TRC Component

46. There is little clarity on the respective functions of individuals assigned to work at the NPA's TRC Component at the Head Office and what powers they have with respect to directing the work of the TRC prosecutors in the provinces. As mentioned above it appears they have no powers at all. It is unclear what actual coordination is taking place. The Component is unable to strategically inform and direct investigations and prosecutions. When prosecutors make decisions, which are difficult to understand, e.g., a decision to proceed with an inquest where there are living suspects and available evidence of *prima facie* cases, the Component, even if aware of all the details, has no choice but to accept such decisions.

47. The decentralised approach, even coated with the veneer of coordination, means that poor performance or misguided decisions are not timeously corrected at an institutional

⁵¹ 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>

level, but instead only ever potentially corrected after the fact. This would appear to be suboptimal in the normal course of events, but when dealing with issues where time is of the essence it is actively antithetical to the course of justice.

48. The queries from legal teams and FHR to the TRC Component are bounced around between the Component and provincial offices. Even in the instances where the communication from FHR or a legal team relates to the coordination function of the TRC Component, we are referred to the DPPs at the provincial level. It would indicate that the TRC Component has very little knowledge of what is happening in the individual TRC cases.

49. To the best of our knowledge, the TRC Component lacks analysts, researchers and experts with institutional knowledge of the TRC cases and apartheid-era security systems and structures.

50. It has been suggested that no ranking head of the TRC Component is required since it reports to and falls under DNDPP Advocate De Kock. However, the DNDPP cannot be expected to provide close and detailed supervision of the TRC cases when he is also in charge of the entire National Prosecuting Services. It is incongruous to have a person in charge of the “dedicated capacity” who himself is not ‘dedicated’, in the sense that he is not on these cases full time and is deflected by multiple other pressing responsibilities.

Prosecutors assigned to the TRC cases

51. Apart from the cases that we support, we do not know who the other prosecutors working exclusively on the TRC cases are. There has also been no indication of what the “dedication to the TRC” means. It may mean that the prosecutors are dedicated because they devote 100% of their time to the TRC cases, but it may very well be that they still spend some proportion of their time on non-TRC cases.

Recommendations

52. The TRC cases are often complex criminal cases, which are almost always interconnected. Best international practice demonstrates that such cases should be investigated and prosecuted by truly specialised units with decision-making powers, clear strategy, and strategic oversight.⁵² Argentina established a truly specialised unit that has helped speed up cases. In South Africa, considerable time has been wasted through the suppression of the cases and the current ongoing delays. These investigations are a race against time since the majority of suspects, witnesses and family members have already died, and more die with each passing day. In light of this, we recommend:

52.1. The creation of an Investigating Directorate or Special Unit under a Special Director:⁵³ It will make a true difference in the quality of investigations and prosecutions. A full-time Investigating Directorate or Special Director, who is the public face of the unit, at whose desk the buck stops, and who has the power to act decisively, is urgently needed. They must be accountable for the lack of progress. Having a truly dedicated capacity (i.e., a Special Director or an Investigating Directorate) would allow for better coordinated cases and ensure they are taken forward and handled effectively. It would further ensure that teams of prosecutors and investigators are assigned to specific cases and that the conduct of the cases is adequately overseen. This would involve ensuring that the cases are properly investigated and developed for trial. Where there are shortcomings, challenges and delays, the sufficiently empowered capacity would facilitate solutions or step in to help resolve them. The TRC cases must be urgently prioritised by the NPA and finalizing the cases must be seen as an important national project.

⁵² H Varney and K Zdunczyk, *Gearing Up the Fight Against Impunity: Dedicated Investigative and Prosecutorial Capacities*, ICTJ & FHR, 2022.

⁵³ See, [The legal opinion](#) “Exploring Legal Options for the Establishment of a Special Capacity to Investigate & Prosecute Apartheid Crimes” by Advocate Howard Varney and Advocate Thabang Pooe, 13 January 2020, paras 44-50.

53. Developing a TRC prosecutorial strategy: The NPA should develop a prosecutorial strategy for TRC cases and share it with the FHR and other interested stakeholders for input before it is formally approved.
54. The NPA should share information about dedicated prosecutors to ensure transparency: The NPA should share the names of the prosecutors working on the TRC cases with the FHR and other parties involved in the work on the TRC cases. Similarly, the NPA should share information to what extent these prosecutors are exclusively “devoted” to the TRC cases.

Key challenges with the investigations and prosecutions of the TRC cases

Issues

Delays and the impression that the NPA contributes to the delay

55. The TRC cases have faced several delays and postponements, with the NPA seemingly condoning or contributing to these delays:
- 55.1. Since the NPA indicted the four accused in the Nokuthula Simelane matter on 14 March 2016, the trial has faced countless postponements. Initially the case was delayed by the SAPS refusal to pay the legal costs of defence of the accused, former Security Branch Officers of the South African Police (SAP), as well as other interlocutory applications brought by the accused. The family had to intervene in these proceedings. The court eventually ruled that the SAPS, as the successor in title to the SAP, was obliged to pay the reasonable legal costs of the accused.⁵⁴
- 55.2. More delay was caused by the claim in June 2022 by Coetzee’s legal team that he was mentally unfit to stand trial based on a “preliminary” medical report, which

⁵⁴ Willem Helm Johannes Coetzee & Others v Minister of Police & Others, Gauteng Division, Case No. 72747/2016. Available at: <https://www.ahmedtimol.co.za/wp-content/uploads/2020/07/Judgment-Coetzee-Ors-v-Minister-of-Police.pdf>

the NPA did not challenge, even though it provided no basis for yet more delay. Coetzee was subsequently deemed fit to stand trial by a state psychiatrist in December 2022. The case was further postponed to 9 February 2023 and then 12 to 14 June 2023 at the request of Coetzee's legal team and with the agreement of the NPA. In June, another judge will hear a section 77(3) inquiry on Coetzee's fitness to stand trial. These continued delays cause immeasurable harm to Nokuthula's elderly mother and other family members who have been waiting for justice since 1983. The Simelane case is an example where the NPA has failed to be seen to be opposing the endless delays. It has simply agreed to all defence requests for postponements, without recording any opposition.

55.3. In COSAS Four, since the NPA issued indictments in August 2021, the trial has been delayed by the refusal of SAPS to pay the legal defence fees of one of the accused, Christiaan Siebert Rorich.⁵⁵ Following the intervention by the legal representatives of the COSAS Four families,⁵⁶ the court ordered SAPS to pay the legal costs of Rorich.⁵⁷ The NPA was silent on the initiative launched by the family in the COSAS Four matter. It also did not oppose SAPS's application for leave to appeal and condonation. In fact, during the hearing on 31 January 2023, Judge Mokgoatlheng said he was shocked that the Prosecutor did not oppose the Ministers' application. While the Minister of Police has decided against approaching the Supreme Court of Appeals with the application for leave to appeal,⁵⁸ the SAPS is yet to comply with the court order to pay the legal costs of Rorich.⁵⁹

⁵⁵ Full record of the COSAS FOUR legal battle is available at: <https://unfinishedtrc.co.za/future-cases/#COSAS-3-Zandisile-Musi>

⁵⁶ *State v Thlmedi Ephraim Mfalapitsa and Christiaan Siebert Rorich* case no SS70/21, Legal Argument (25 March 2022) on behalf of the Nhlapo & Madikela Families on the legal costs issue. Available at: <https://unfinishedtrc.co.za/wp-content/uploads/2022/03/LEGAL-ARGUMENT-ON-BEHALF-OF-THE-NHLAPO-MADIKELA-FAMILIES-Final-250322.pdf>

⁵⁷ *State v Thlmedi Ephraim Mfalapitsa and Christiaan Siebert Rorich* case no SS70/21: The court order (4 May 2022) by Mokgoatlheng J on the legal costs question. Available at: <https://unfinishedtrc.co.za/wp-content/uploads/2022/07/COSAS-4-Court-Order-04May2022.pdf>

⁵⁸ *Minister of Police v Rorich Christiaan Siebert and Others* Case no SS70/2021: [Application for leave to appeal](#) by the Minister of Police (16 August 2022).

⁵⁹ *Maide Christina Selebi (Intervening Applicant), Minister of Police v Rorich Christiaan Siebert and the State* no SS70/2021: [The court order](#) (13 January 2023) by Mokgoatlheng J on the legal cost question; Foundation for Human Rights and Legal Resources Centre [Press Release](#) (14 April 2023).

55.4. In the Caiphus Nyoka matter, in late 2019, former Security Branch officer, Johan Marais, confessed to a Rapport journalist that he had killed Nyoka in cold blood more than 30 years ago. Despite Marais's confession in 2019, the NPA only instituted charges against the surviving perpetrators in 2022. The case is now facing further delays due to the legal costs issue and the delay tactics by the defence. In a series of the latest developments, some of the accused requested to have their charges withdrawn. The lead prosecutor rejected the request, but the defence has now approached the NDPP for the review of this decision. During the last court hearing on 17 April 2023, it was still unclear whether the SAPS had decided on the payment of the accused's legal costs. Similarly, there has been no formal decision by the NDPP on whether to include international charges in the indictments of the accused, even though the family legal team sought a review of the DPP's decision to refuse such charges on 1 June 2022 – almost a year ago.

55.5. In Cradock Four, 4 families have been waiting for almost three decades for those implicated in the deaths of Matthew Goniwe, Fort Calata, Sparrow Mkonto and Sicelo Mhlauli to be investigated and charged for their gruesome murders. In July 2021, Lukhanyo Calata applied to the Pretoria High Court on behalf of the Calata, Mhlauli and Mkonto families to compel the NPA and SAPS to finalise the investigation and to make a prosecutorial decision with respect to the torture and murder of the Cradock Four.⁶⁰ The litigation prompted collaboration, and subsequently the litigation has been put on hold while the NPA and family legal team have worked on the way forward. During March 2023, attorneys acting for the Cradock Four families, shared a Memorandum containing a detailed analysis of the evidence with the NPA in the Eastern Cape. The family legal team had to wait up to three months for feedback.

⁶⁰ *L Calata et All v NDPP and Others*, Application to compel the SAPS to complete the investigation and the NPA to make a prosecutorial decision (Application No. 3S447/21). In particular, see from page 108. The answering and replying affidavits point out to some systemic issues within the NPA. Affidavits are available at: <https://unfinishedtrc.co.za/the-cradock-four/#1636466878186-35874482-2b37>

- 55.6. The case into the murder of Adriaano Louis Bambo is an example of serious neglect and delay. The first communication with respect to the case was on 11 September 2019, when Brigadier Marion (FHR's commissioned investigator) concluded an assessment of the case on behalf of the FHR and shared suggested investigative activities to the NPA and DPCI. There have been multiple interactions between the legal representatives and the DPCI and NPA since 2019. On a request from a new investigating officer, in December 2022 Brigadier Marion shared the relevant documents including the list of the suggested investigative activities, TRC transcripts and amnesty transcripts. Given its connection to the Simelane case it should have been prioritised, but this does not seem to have been the case. To the best of our knowledge, there has been no major movement in this matter since our first communication with the NPA and DPCI on 11 September 2019.
- 55.7. In the Mathews Mabelane case Brig Marion concluded an assessment of the case and drew up a list of suggested investigative activities, which he shared with the DPCI during April 2021, along with subsequent additional information which he shared with the DPCI and NPA in the course of 2021. Since then, confirming a progress meeting with the prosecutor has been severely delayed.
- 55.8. In 2020, the DPP North Gauteng (Pretoria), Advocate Mzinyathi, declined to prosecute the Security Branch officers implicated in the death of Ahmed Timol, namely Neville Els and Seth Sons, for perjury. Judge Mothle recommended the prosecution of Els and Sons in the judgment following the reopened Timol inquest. On 21 June 2020, the legal team on behalf of the family (Imtiaz Cajee) made representations to the NDPP to review the decision of the DPP not to prosecute the two individuals. To our knowledge, there has been no formal decision or response to the review application.

Capacity and capability to work on complex criminal cases

56. The investigators and prosecutors working on the TRC cases require special capacity and capabilities to effectively deal with the cases. While the legal, practical and logistical challenges are inherent in the investigation and prosecution of past crimes i.e., TRC cases,⁶¹ especially since they have remained “cold” for the past few decades, the investigations and prosecutions are possible and can be successful if supported by a required set of skills and competences. This has been confirmed by international practice and successful prosecutions in countries such as Argentina or Germany.

57. In light of the above, we wish to submit that the existing capacity and capability of the prosecutors need to be improved to meet the requirements of the effective investigations and prosecutions of the TRC cases. Since the TRC Component has been established in 2021, to the best of our knowledge there has been no new indictments issued in the TRC cases, and only a handful of inquests have been opened or reopened.⁶² It must be mentioned that the four reopened inquests into the deaths in detention (including Timol, Aggett, Haron and Haffejee) were reopened only thanks to the pressure from the family and the support of FHR and the pro-bono lawyers who threatened legal action against the NPA and the Minister of Justice to get the inquests reopened.

⁶¹ E.g., The TRC cases include gross human rights violations, i.e., kidnappings, torture, murder or enforced disappearances, which were committed during apartheid. These are complex criminal matters implicating multiple role players at the various levels of the command structure within the police, military or other organised entities, whose operations were surrounded by secrecy. Some of these cases are five or four decades old. In the large majority of these cases, the evidence is scarce, with witnesses, perpetrators, and victims having died and records having been destroyed or lost. It is also common that cases involving gross human rights violations are largely built on witnesses' testimonies as opposed to forensic evidence, which may not be available. At the legal level, the investigations and prosecutions of TRC cases also pose a serious challenge; many crimes have prescribed under common or statutory law; there might be multiple legal regimes that apply, i.e., domestic and international; and there are a number of legal questions that may affect the successful completion of the cases in the future (i.e., admissibility of TRC evidence in the subsequent legal proceedings)

⁶² These include four inquests in KwaZulu Natal and the reopened inquest into the death in detention of Imam Haron in Cape Town.

Lessons learnt from previous inquests

58. Five reopened inquests into the deaths in detention have concluded before the courts. Courts delivered judgments in Timol and Aggett inquests; judgments in Haffejee, Haron and Dipale inquests are still awaited. These inquests have generated a substantial amount of knowledge, practice, and jurisprudence of how to build an old and cold case with limited access to evidence, i.e., forensic and witness evidence. However, the inquests have not been purely legal processes; they have revisited the responsibility of individuals and institutions not only in the commission of apartheid-era crimes but also their suppression in the period 2003-2017; and have played an important truth-seeking and healing functions. The inquests have placed on record before the courts the experience of victims, families, communities, and society under the oppressive, racist regime. At the same time, for the inquest to play these functions and be truly transformative, a substantial amount of work is required, which should go beyond regular inquest activities.
59. There is, therefore, a large amount of information which can form the 'lessons learned' from the inquests, which have already been concluded. The NPA does not seem to look at these practices and does not build on previous experiences. For example, in the Timol and Aggett matters, it developed as a best practice that the NPA would ensure that witnesses who might be potentially implicated as suspects have legal representation before the inquest commences. This principle, however, was not followed in the Haffejee and Haron inquests. In Haffejee, the court had to adjourn the hearing to ensure the potential person of interest had a duly appointed legal representative, while in Haron, Mr Burger (the only surviving person allegedly implicated in Haron's death) did not have a legal representation. We believe he should have been represented. Similarly, in the Khubeka and Phewa inquests, some of the potentially implicated security branch officers are still waiting to finalise their requests to SAPS for legal representation, even though the first pre-inquest hearing took place in October 2022.

Inquest as a strategy

60. While inquests are important exercises and sometimes constitute the only available avenue for justice,⁶³ it should be noted that they will not always be the best strategy. This is, in particular, the case where there are surviving perpetrators who have not applied for amnesty, have been granted amnesty for some crimes but not the others, or have been denied amnesty. We fear that there is a new approach in place, which is to simply refer these cases to inquests, rather than seriously considering a prosecution. Inquests take several years to set up and finalize. Once inquests are concluded, there may be no perpetrators left alive to indict. Accordingly:

60.1. It remains unclear why the NPA has decided to open inquests into four cases in KwaZulu Natal. When asked by the legal teams acting for the Phewa and Khubeka families why the NPA preferred to pursue inquests rather than prosecutions, no answer was forthcoming. The question of strategy is particularly warranted in the Khubeka matter, where several persons of interest are still alive.

60.2. We are concerned that prosecutors may be opting to refer apartheid era cases to inquests rather than prosecutions, even when suspects may have *a prima facie* case to answer. This is the impression we have gained, correctly or incorrectly, in the Motasi, Khubeka and Cradock Four cases. We note that it is considerably harder and more labour intensive to prepare a case for prosecution than it is to prepare a case for inquest. However, where there is a case to answer an inquest should not be held. Firstly, the Inquest Act only permits an inquest when a prosecution is not possible.⁶⁴ Secondly, one is not allowed to use an inquest to simply extract more evidence, when there is already *prima facie* case.⁶⁵ Thirdly, perpetrators, in particular former Security Branch officers invariably never come clean in inquests. They either engage in deception, claim ignorance or resort to their right against self-incrimination.

⁶³ E.g., The Imam Haron inquest, where all key perpetrators are long late.

⁶⁴ Sections 4, 5 and 6 of the Inquest Act.

⁶⁵ In *Re Mjoli* 1994 (2) SA 815 (T), the court held that this was an abuse of the process.

Fourthly, and most significantly, in the multiple years it takes to set up and finalise an inquest, there is invariably little or no prospect of pursuing justice thereafter. In short, in respect of apartheid era cases, an inquest should only be resorted to when there is no prospect of bringing a prosecution.

60.3. So, if there is insufficient evidence to prosecute then an inquest must be held – indeed in this regard there is no choice in the matter. If there is evidence of a case to answer (*prima facie* case) then a prosecution should happen, and it would be wrong to refer to an inquest.

Recommendations

61. Creating a mentorship and accountability process: While individual prosecutors are likely to be subjected to a periodical performance evaluation review, consideration should be given to the setting up of a mentorship and accountability process, whereby the prosecutors can learn from their peers and where they can be held accountable for poor performance or a lack of action. The assessment of a prosecutor's work should take place on an ongoing basis and in a proactive manner.
62. Follow the best practices from previous inquests: We respectfully submit that the NPA should identify best practices from the earlier reopened inquests; including the necessary case-building activities and checklists of what needs to be done before the inquest. These should be shared with prosecutors around the country who are allocated such inquests.
63. Justification of an inquest decision: The NPA should provide a written justification for the reopening or opening of an inquest instead of proceeding with a prosecution. The decision should be shared with the victim's family and legal representatives for the family.
64. Capacity building: Prosecutors require special skills, expertise, and methodologies involved in investigating and prosecuting "cold cases". In addition, they need to understand systems and structures behind the crimes, how to identify links and patterns; and adopt creative and bold legal strategies. Specialist training should be offered to the

prosecutors involved in the TRC cases. The prosecutors themselves should identify the areas they need capacity building. Possible subject matters for training could include:

- 64.1. Developing an investigative and prosecutorial strategy for crimes of the past.
- 64.2. Basic Elements of Investigation: Purpose, strategies, phases, outcomes.
- 64.3. Criteria for an Effective Investigation: International standards, guidelines and best practices.
- 64.4. Investigating to Build a Case: Identifying, accessing and exploiting sources of evidence.
- 64.5. Assessing and Mitigating Risks to an Investigation: Secure communications; planning and undertaking fieldwork.
- 64.6. “Storyboarding” the Investigation: Investigative planning, management and continual review.
- 64.7. Working with Sources: Preparing and conducting interviews & handling controversial source material.
- 64.8. Overcoming Investigative Challenges: Key witnesses, credibility and corroboration.
- 64.9. Understanding Structural Investigations and how to conduct them.
- 64.10. Best practices from specialised units in other countries
- 64.11. Investigating cold cases: How to build an old complex criminal case from scratch.
- 64.12. Understanding the systems and machinery of the Apartheid-era security apparatus.
- 64.13. The use of new technologies to effectively investigate and prosecute.
- 64.14. Dealing with defence delay tactics.
- 64.15. International crimes – building capacity to prosecute crimes under international criminal law.
- 64.16. Lessons learned from inquests in South Africa.
- 64.17. Case studies from other countries, including:
 - Team composition and roles
 - Resources, equipment & logistics devoted to the case.
 - How the investigative and prosecutorial strategy was developed and evolved
 - How leads were identified, developed and pursued
 - Nature of any structural investigations conducted

- Relationship between investigators and prosecutors
- What cracked open each case.
- How leads were generated and how the cooperation of insider witnesses were secured.
- The development of domestic and international charges in the indictments
- How the prosecution and trial unfolded
- What worked and what did not
 - What were the main obstacles and challenges
 - How they were overcome
- The outcome of the case and its impact on the community and society.

65. The FHR has offered to facilitate such training by seeking out recognised and experienced global experts.

66. Introducing 'structural investigations' for TRC cases: As observed in the legal opinion commissioned by the FHR (by Advocates Varney and Poee), "Structural investigations", which precede case-by-case investigations, were pioneered by German prosecutors investigating Nazi crimes and war crimes committed by the Syrian regime and terror organisations, such as ISIS. Structural investigations do not initially focus on specific suspects but rather on all role players and the entire context in which the crimes happened. The purpose is to develop an understanding of the "overarching organisational structures which would otherwise be missed if an investigation is solely concentrated on the person itself."⁶⁶ Structural investigations facilitate the development of investigative and prosecutorial strategies and help to identify cases and suspects.

Public accountability

Issues

Deeply entrenched distrust

⁶⁶ [The legal opinion](#) "Exploring Legal Options for the Establishment of a Special Capacity to Investigate & Prosecute Apartheid Crimes" by Advocate Howard Varney and Advocate Thabang Poee, 13 January 2020.

67. Decades of neglect and political interference in the TRC cases have left a legacy of deep distrust towards the NPA. This legacy will not be repaired overnight. A starting point would be to promote transparency and responsiveness.

The non-publication of 129 TRC cases under investigation

68. When on 25 November 2022, the DNDPP, Advocate De Kock, appeared before the Parliamentary Portfolio Committee on Justice and Correctional Services, he revealed that 129 active TRC cases were under investigation at the time. Subsequently, at a meeting with the NPA and DPCI during January 2023, the FHR requested that the list of 129 cases is made available to the public. The FHR provided the following reasons in support of its request for the public release of the list of cases:

- Members of the public would be encouraged to come forward with information and leads concerning specific cases
- The cases arise from the TRC process, which are public
- These are cold cases, so the risk of potential suspects tampering with evidence is low.

69. We should note that we did not seek the details of investigations but only the names of cases and their status, including whether the investigation is ongoing, closed, referred for a prosecutorial decision, and whether any such decision has been made. To date the request for the list of cases has been denied.

No public information about the TRC Component

70. In addition to its operational functions, the setting up of the TRC Component should have been a public confidence-building exercise. However, there is no information about the new Component on the NPA website. Until recently we were not even aware of its name. Unless one personally knows a staff member there would be no way to contact the Component directly. The webpage dealing with the NPS still lists the PCLU as one of the

existing units, even though it has been our understanding that the NDPP has closed that unit.⁶⁷

Recommendations

71. **Public scrutiny of 129 cases:** It is recommended that the list of active cases should be made public. This should be accompanied by a call for information and leads from the public. It would also allow the FHR, like-minded organisations and the general public to be alert to possible information that could assist the NPA and DPCI.
72. **Explanation for decisions:** The NPA should provide an explanation for final decisions made in the TRC cases. For instance, where a decision is made not to prosecute, or where a decision is made to open or reopen an inquest rather than prosecute, reasons should be provided to the affected families and their legal representatives.
73. **Website information:** The NPA should include information about the TRC Component on its website. In particular, it should include the structure of the Component, key individuals involved and official contact details.

The issue of international charges

74. The issue of whether to include international charges, such as crimes against humanity, in apartheid era cases remains unresolved. Such crimes have been included in one case (COSAS Four) but rejected in others (Nokuthula Simelane and Caiphus Nyoka).
75. The FHR and its legal team, as well as independent international criminal law experts (Max Du Plessis SC and Professor Chris Gevers) believe that such charges are competent under South African law.⁶⁸ Du Plessis and Gevers argue that s 232 of the Constitution makes

⁶⁷ See NDPP Report to the Justice Portfolio Committee, 1 June 2022. Available at, [Parliamentary Monitoring Group Reports](#) of the Justice Portfolio Committee.

⁶⁸ See, Max Du Plessis SC and Christopher Gever, Prosecuting Apartheid Crimes under International Law, 15 March 2021. Available at: <https://unfinishedtrc.co.za/wp-content/uploads/2022/12/2021-03-15-FHR-Opinion->

customary international law (CIL) directly applicable (without a need for domestication), as confirmed by the Constitutional Court.⁶⁹ They contend further that this does not violate the principle of non-retroactivity of laws, since the conduct in question (amounting to crimes against humanity) was criminalised under CIL at the time when the offences were committed. Accordingly, the application of s 232 in this manner does not introduce new offences but only creates a jurisdictional basis for such charges, as has been confirmed by the Constitutional Court.⁷⁰

Issues

Numerous interactions with the NPA on the issue of international charges

76. The FHR and the legal teams in the Simelane, COSAS Four and Caiphus Nyoka cases have been engaging with the NPA on the issue of including international charges for a long time. With respect to the Simelane case, this engagement can be traced as far back as 2005, when the FHR submitted the first legal opinion on the question of torture as defined under international law, being a competent charge in South Africa.

77. Following the issuing of the indictment in the Nokuthula Simelane case in 2016, the legal teams acting for the Simelane, Nyoka and COSAS Four families submitted some six legal opinions explaining why section 232 can be used as a stand-alone basis for including international charges in the indictments.⁷¹

NPA's lack of consistency regarding international charges

78. On 8 October 2021, the NDPP declined to overturn the DPP's decision not to include international charges in the Simelane matter and his refused to issue a certificate *nolle*

[Apartheid-Prosecution Max-du-Plessis-SC-Chris-Gevers16356902.1.pdf](#) ; other relevant opinions on the issue can be accessed here: <https://unfinishedtrc.co.za/legal-opinions/> .

⁶⁹ Constitutional Court: *S v Basson* 2005 (1) SA 171 (CC); National Commissioner of SAPS v SALC and Another 2015 (1) SA 315 (CC).

⁷⁰ See par. 37 of *S v Basson* 2005 (1) SA 171 (CC)

⁷¹ See the relevant opinions on this page: <https://unfinishedtrc.co.za/legal-opinions/>

prosequi to allow the family to pursue a private prosecution on the international charges. Her reason was that the inclusion of international charges would further delay the case, but that she may be open to such charges in an appropriate case. On 19 November 2021, the lead prosecutors in the COSAS Four included crimes against humanity of murder and apartheid in the indictment of the two accused. On 26 May 2022, the Director of Public Prosecutions (DPP) declined to include international charges in the Caiphus Nyoka matter. The legal team for the Nyoka family made representations to the NDPP on 1 June 2022 – almost a year ago. The NDPP’s decision on review is still pending.

No policy decision on the issue of international charges

79. The NPA has furnished the FHR with two legal opinions⁷² submitted by Professor Hennie Strydom, an international law specialist from the University of Johannesburg. It is unclear to us why the NPA employed an academic who does not specialise in international criminal law or constitutional law and is not a senior counsel. The NPA also failed to provide Professor Strydom with the most relevant opinion by Max Du Plessis SC and Professor Gevers titled “Constitutionality of prosecuting the apartheid-era cases under international law” (date 15 March 2021).⁷³
80. Professor Strydom concluded that charges under CIL are not competent in South Africa because their inclusion would violate the principle of legal certainty in criminal law. He argued that customary international law in criminal matters is not self-executing and requires enabling legislation.
81. It appears that the NPA Head Office has still made no policy decision on the issue of international charges. The lack of clarity from the NPA is likely to further delay the trials.

⁷² Two opinions were prepared by Professor Strydom. The second opinion was prepared when we brought to the attention of the NPA that they had failed to furnish Prof Strydom with the Gevers/Du Plessis SC opinion. Despite our intervention, the NPA once again provided Strydom with the wrong opinion, which means that Strydom has never seen the most critical opinion by Gevers/Du Plessis.

⁷³ Available at: https://unfinishedtrc.co.za/wp-content/uploads/2022/12/2021-03-15-FHR-Opinion-Apartheid-Prosecution_Max-du-Plessis-SC-Chris-Gevers16356902.1.pdf

82. During May 2023 FHR wrote to DNDPP De Kock indicating that the FHR is considering seeking direct access to the Constitutional Court for a declarator on the question of the direct application of customary international criminal law on the basis of section 232 of the Constitution. We have asked the NPA to consider joining such an application but we never received a response.

83. FHR has made these requests for a policy decision for years, and the NPA has still not made or communicated such a policy decision. This demonstrates that there is a serious problem with the decision-making process within the NPA. Decision making is generally characterised by much feet dragging and delay, which seriously prejudices the interests of justice. It also reflects a lack of urgency on the part of the NPA, when such cases should be pursued expeditiously for the obvious reasons.

Recommendation

84. Adopt a clear position on international charges: There is a need for the NPA to adopt a clear position on the issue, bearing in mind that TRC cases are old and the victims, family members and accused are advanced in age. There is a real risk that victims and family members may die before seeing justice being done (Zandisile Musi, who was injured in the COSAS Four attack, died in 2021 before justice was served), and the accused may die without facing justice.

Interactions between the NPA and the third parties regarding the TRC cases

Issues

Liaison Structure between the NPA/DPCI and interested parties

85. In 2019 the FHR made a recommendation for the setting up of a liaison structure between the NPA/DPCI and civil society. This would create a platform for communication and

establish regular and direct communication with the NPA/DPCI, which in turn would address the problems of distrust and lack of transparency.

Legal representation for victims' families

86. Where families have chosen to be represented, and the legal representatives have placed themselves on record with the NPA, the legal representatives should be kept fully informed of developments in the case. In the past attempts have been made to exclude lawyers from meetings. The NPA/DPCI has also on occasion refused to hold meetings with the duly appointed legal representatives without victims or their families being present. At a meeting between the FHR and NPA/DPCI, Adv De Kock clarified that this is not NPA policy; and that, in some instances, it is better for the victims and family members not to attend meetings, especially when legal strategy and evidential questions are discussed.

87. We still face reluctance from many prosecutors to share information or to provide detailed feedback. This creates further suspicion and mistrust.

Recommendations

88. Setting up of the liaison structure: We propose that a Liaison Structure between the NPA and interested parties (i.e., victims' families' groups, FHR, and other CSOs) is set up. It could be composed of senior NPA, DPCI officials, representatives of the FHR, family groups and other interested parties. The structure could meet regularly to discuss potential challenges. It will improve levels of trust and promote transparency and accountability.

89. Families should be made aware of their right to legal representation: The NPA should advise families that they have a right to legal representation of their choice. The NPA should also make the families aware that the FHR may link them with pro-bono legal assistance. The relevant directive should be circulated within the NPA.

Conclusion

90. The TRC cases constitute the most serious crimes known in our law. Some are crimes against humanity and hence, should be treated as such. Notwithstanding the seriousness of these crimes, the TRC cases have been terribly neglected over the last 20 years. They were intentionally abandoned under political pressure, which implicated multiple state institutions including the NPA, DPCI, intelligence agencies and ministries in the period 2003-2017. The Supreme Court of Appeals in *Rodrigues* found that it is “perplexing and inexplicable” why such a stance was taken towards the TRC cases. Yet, there has been no formal independent, public and open commission of inquiry to identify the individuals and reasons behind the political decision not to investigate and prosecute the TRC cases.

91. The authorities owe a special duty to families and the community to reverse this appalling injustice and make up for lost time. Such a duty derives from international law (in particular, the right to an effective remedy), South Africa’s Constitution and the relevant legislation. Therefore, the TRC cases still need to be treated as priority cases. The window of opportunity to investigate and prosecute TRC crimes is fast closing. It has become a race against time. Key suspects and witnesses have died before the persons implicated in the apartheid-era crimes could face justice. We owe it to surviving family members, and our country, to pull out the stops before it is too late.

92. In summary our central recommendation is to concentrate national efforts under an Investigating Directorate or Special Unit within the NPA to:

- ensure strategic and operational oversight over the TRC cases
- facilitate effective and real coordination of the TRC cases
- facilitate effective exchange of information and leads
- establish clear lines of responsibility and accountability
- enable interventions with real authority
- bring investigators and prosecutors together under one roof

- build teams of motivated, well-capacitated, skilled investigators and prosecutors with the necessary expertise who are truly devoted to the TRC cases and are not distracted or diverted onto other cases.
- ensure that the buck stops with a Special Director of an Investigating Directorate or Special Unit.