Press Release

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NPA Prosecution Policy for Apartheid Crimes Struck Down

The NPA's Prosecution Policy that effectively provided a second amnesty for apartheid perpetrators was today struck down by the High Court in Pretoria.

The court challenge against the amendments was launched in 2007 by the widows of the "Cradock Four" and the sister of Nokuthula Simelane, supported by three civil society organisations, the Khulumani Support Group the International Center for Transitional Justice (ICTJ), and the Centre for the Study of Violence and Reconciliation (CSVR). The applicants were represented by the Constitutional Litigation Unit of the Legal Resources Centre

The applicants claimed that the amended prosecution policy allowed the National Prosecution Authority to "re-run" the Truth and Reconciliation Commission amnesty process and grant effective indemnities from prosecution to those who had been refused, or failed to apply for, amnesty from the TRC. The criteria to be applied under the policy in considering whether to prosecute or not were substantially similar to those applied during the TRC amnesty process and included whether the perpetrator had made full disclosure, whether they had demonstrated remorse, their "attitude towards reconciliation" and "willingness to abide by the Constitution". Under the policy, these criteria would entitle the prosecution authorities to decide not to prosecute, even in circumstances where there was adequate evidence to justify a prosecution.

According to the applicants, this not only undermined the integrity of the TRC process (which was based on the principle that those who did not obtain amnesty would be prosecuted) but also the rule of law and the political independence of the prosecution authorities - and consequently the legal system. In addition, it infringed the human rights of the victims, including their rights to life, dignity, freedom and security of the person and equality. Furthermore, the policy amendments were in breach of international law.

The prosecution policy amendments were adopted in 2005 in order to address some of the "unfinished business" of the TRC. At the time of the announcement of the amendments, the President claimed that the new policy would not be a re-run of the TRC truth-for-amnesty process, but would instead be a way for those who did not participate in the TRC process to 'cooperate in unearthing the truth' in exchange for prosecutorial leniency. But in fact, the policy amendments not only allowed for the non-prosecution of those who met the TRC requirements for amnesty (full disclosure of crimes committed for a political objective before 11 May 1994), but also provided additional open-ended criteria under which the NDPP could decline to prosecute, even where there was enough evidence to secure a conviction. Moreover, the policy did not even allow victims to see the 'truth' disclosed by perpetrators and the whole process was to occur behind closed doors.

In its judgment, the court rejected the respondents' argument that the policy amendments would only be relevant where the prosecution authority was considering entering into plea bargaining arrangements (section 105A of the Criminal Procedure Act) or where a person agreed to turn states' evidence in another prosecution and was

seeking a conditional indemnity that might be granted by the court on the basis of that evidence being of assistance against the other accused. The court accepted that, on its face, the policy could be utilised for the purposes of making a simple decision not to prosecute the perpetrator who sought relief under the policy (see paragraph 15.3 of the judgment).

The court found that the policy amendments did in effect amount to a "copy or duplication" or "copy-cat" of the TRC amnesty process (paragraph 15.4.3.1). This was unlawful because "when there is sufficient evidence to prosecute, the [NDPP] must comply with its obligation. Entitlement by the [NDPP] to refuse to prosecute where there is a strong case and adequate evidence to do so would in my view be unconstitutional" (paragraph 15.4.4). The court further found that "many of the criteria … are not relevant in deciding whether or not to prosecute" (paragraph 15.5.2) In addition, the court found that the policy amendments contained "a recipe for conflict and absurdity" (paragraph 15.5.3)

The court found that the amended policy was unconstitutional irrespective of the intention of the currently incumbent prosecution authorities and that there was a "real threat to the applicants' constitutional rights" which could not "be sidestepped by an undertaking that it will not happen. For as long as the respondents insist that it will enforce the policy amendments, the applicants should be entitled to have [them] impugned on the ground that [they are] unconstitutional." (paragraphs 15.4.4.1 and 16.2.3.4).

The court rejected the respondents submissions that the policy amendments did not allow for an indemnity to be granted to those who did not receive amnesty at the TRC on the basis that they could be privately prosecuted. According to the court, "crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted" (paragraph 16.2.3.3).

The TRC handed over a list of more than 300 names to the National Prosecuting Authority (NPA) for further investigation and prosecution. These were cases where the TRC felt there were grounds for possible prosecution, and where the suspected perpetrators did not apply for amnesty or were refused amnesty. The victims who participated in the court challenge represent cases where the state has evidence to pursue prosecution, but is failing to act. Subsequent to the TRC process only a handful of prosecutions have been taken forward, and none have in fact been lodged under the prosecution policy amendments.

Hugo van der Merwe of the Centre for the Study of Violence and Reconciliation said in response to the judgement: "*This presents an important opportunity. To date, there has been minimal public consultation regarding the prioritising of cases that need urgent attention. Victims who are generally neglected should be able to provide direct input into such prosecutorial decisions*."

Comfort Ero of the International Centre for Transitional Justice said that "*the judgment upheld an important principle of the rule of law in a democratic state, namely that where there is sufficient evidence to prosecute, the National Prosecuting Authority must comply with its obligation under the Constitution. She said that the judgment affirmed the historic compact that was made with victims and called upon the NPA to meet its constitutional obligation and to prosecute deserving cases from the conflicts of the past*."

Marje Jobson of the Khulumani Support Group pointed to the finding of the Court that "*crimes are not investigated by victims*" and that it is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted. She noted that victims, particularly victims of apartheid crimes, are often the most marginalised in society. They have no choice but to rely on the responsible institutions of state to deliver justice. Jobson called upon the NPA to take effective steps to investigate and prosecute deserving cases as recommended by the TRC. "*There is today no longer any impediment to such prosecutions. There is nothing standing in the way of the prosecution authority. There are no more excuses. After so many years of delay victims deserve their day in court*."

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