

# REPORT

# COUNTERING THE CORRUPT

## Reform of the Criminal Justice Administration in South Africa

6 February 2023



An Accountability Now hybrid event organised in  
collaboration with

Pr1merio



 **KONRAD  
ADENAUER  
STIFTUNG**

[#stopcorruptionnow](#) [#counteringthecorrupt](#) [#corruption](#)

## BACKGROUND TO THE EVENT

Chief Justice Zondo was scathing in his final report of the State Capture Commission, pointing to industrial scale fraud, looting, corruption, and massive deficit in integrity, accountability and hence governance, leading to citizens being unable to access their basic human rights as enshrined in our Constitution.

President Ramaphosa himself, when receiving the final report, expressed the deep sense of shame, embarrassment and betrayal by the governing party, and many leaders in Government and the private sector, implicated in state capture, corruption and wrongdoing, and invited citizens with the requisite skills and expertise to come forward in helping to fix the country and society broken by the state capture project.

It is in this regard that civil society partners **Konrad-Adenauer-Stiftung**, **Primerio International**, **Accountability Now** and the **University of Cape Town** have come together to heed the President's call with a critical intervention to help arrest the decay of society by fixing and rebuilding governance after the devastation of state capture, by proposing the strengthening of SA's accountability architecture. We are proud to present a conference on critical aspects of the reform of the criminal justice administration in South Africa.

## PURPOSE OF THIS DOCUMENT

This document is intended as the main text reference material to the 6 February 2023 hybrid event at UCT. It is targeted at policymakers and policy influencers and freely available to the general public.

It contains a summary of the presentations and discussions at the event.

This document is supported by video recordings of the event. These are available at:

[https://youtube.com/playlist?list=PLIR6gUX7gBQVSZtcFBGR8ULINZ\\_K5oxv0](https://youtube.com/playlist?list=PLIR6gUX7gBQVSZtcFBGR8ULINZ_K5oxv0) or found by a web search, example "KAS Midpoint Justice Youtube"

Further materials and the internet event home can be found at:

<https://www.kas.de/en/web/suedafrika/veranstaltungen/detail/-/content/kas-uct-acccountability-now-and-primerio-international-invite-you-to>

## AUTHOR OF THIS REPORT

Koogan Pillay  
OBO the Organising Partners  
Governance and Human Rights Advocate  
Former Project Manager: NACS - DPME & SIU  
082-371-9614

# CONTENTS

- BACKGROUND TO THE EVENT ..... 0
- PURPOSE OF THIS DOCUMENT ..... 1
- AUTHOR OF THIS REPORT ..... 1
- CONTENTS ..... 2
- LIST OF ACRONYMS ..... 3
  
- SUMMARY OF DISCUSSIONS OF PANEL PRESENTERS..... 4
  
- WELCOME AND OPENING REMARKS ..... 4**
  - Gregor Jaecke, Minister Ronald Lamola, Professor Firoz Cachalia ..... 4
  
- PANEL 1: WHAT ARE THE LEGAL REQUIREMENTS FOR ANTI CORRUPTION MACHINERY OF STATE? ACHIEVING COMPLIANCE WITH GLENISTER..... 5**
  - Judge Ian Farlam (moderator), Paul Pretorius SC, Lawson Naidoo, Izak Smuts SC..... 5
  
- PANEL 2: WHISTLE-BLOWER PROTECTION IN THE SHORT AND LONGER TERM..... 7**
  - Ben Theron (moderator), Malini Govender, Cynthia Stimpel, Tseliso Thipanyane ..... 7
  
- PANEL 3: NON-PROSECUTION RESOLUTION OF CORRUPTION CASES ..... 8**
  - Michael-James Currie (moderator), John Oxenham, Colette Ashton, Hermione Cronje..... 8
  
- PANEL 4: SUPPORTING THE ESTABLISHMENT OF AN INTERNATIONAL ANTI-CORRUPTION COURT TO COUNTER KLEPTOCRACY AND TRANSNATIONAL CORRUPTION CASES..... 10**
  - Justice Richard Goldstone (moderator), Mwila Bwanga, Dr Marianne Camerer, Lord Peter Hain 10
  
- CLOSING REMARKS ..... 12**
  - Paul Hoffman SC (moderator), Professor Somadoda Fikeni, Archbishop Thabo Makgoba, Koogan Pillay ..... 12
  
- CONCLUSION AND WAY FORWARD ..... 14
  
- PANEL 1 ..... 14**
- PANEL 2 ..... 14**
- PANEL 3 ..... 14**
- PANEL 4 ..... 15**
- LESSONS LEARNT - 30 YEARS OF DEMOCRACY ..... 15**

# LIST OF ACRONYMS

AG: Auditor-General

Chapter 9: Refers to Chapter 9 of the Constitution of South Africa<sup>1</sup>

CH9IC: Chapter 9 Integrity Commission, a specialised anti-corruption agency compliant with the STIRS criteria<sup>2</sup>

Concourt: Constitutional Court of South Africa

DBE: Department of Basic Education

DOJ: Department of Justice

DPCI: The Directorate for Priority Crime Investigation

DSO: The Directorate of Special Operations<sup>3</sup>

FIC: The Financial Intelligence Centre

Glenister: Glenister judgements by the Constitutional Court<sup>4</sup>

Hawks: See DPCI

IACC: International Anti-Corruption Court

IACD: International Anti-Corruption Day

ID: Investigative Directorate

NACAC: National Anti-Corruption Advisory Council

NACS: National Anti-Corruption Strategy

NDP: National Development Plan

NPA: National Prosecuting Authority

NTR: Non-trial resolution<sup>5</sup>

PDA: Protected Disclosures Act

PP: Public Protector

PSC: Public Service Commission

SA: South Africa

SAPS: South African Police Service

SARS: South African Revenue Service

SC: Senior Counsel

Scorpions: See DSO

SDGs: Sustainable Development Goals by the United Nations

SIU: Special Investigating Unit

State Capture Report / State Capture Commission: Refers to The Commission of Inquiry into Allegations of State Capture<sup>6</sup>

STIRS criteria: In Glenister, The Concourt made a binding ruling that an effective and efficient anti-corruption machinery of state must be STIRS compliant, (STIRS stands for: S for a specialised unit dedicated to investigating and prosecuting the corrupt; T for properly trained staff, which is equipped to do so; I for independence from political influence and interference; R for guaranteed resources sufficient to the task; and S for security of tenure of office.)

UNCAC: United Nations Convention against Corruption<sup>7</sup>

Zondo Report / Commission: Refers to The Commission of Inquiry into Allegations of State Capture<sup>8</sup>

---

<sup>1</sup> <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng-09.pdf>

<sup>2</sup> <https://accountabilitynow.org.za/submission-to-the-constitutional-review-committee/>

<sup>3</sup> Summary of concerns about its disbandment and institutional successor can be found here: <https://www.corruptionwatch.org.za/political-interference-in-south-africas-elite-anti-corruption-unit-leads-to-impunity/>

<sup>4</sup> <https://collections.concourt.org.za/handle/20.500.12144/3617>

<sup>5</sup> <https://www.iaca.int/media/attachments/2022/06/27/colette-ashton-mt-23-june-22.pdf>

<sup>6</sup> <https://www.statecapture.org.za/site/information/reports>

<sup>7</sup> <https://www.unodc.org/unodc/en/treaties/CAC/>

<sup>8</sup> <https://www.statecapture.org.za/site/information/reports>

# SUMMARY OF DISCUSSIONS OF PANEL PRESENTERS

## WELCOME AND OPENING REMARKS

### **Gregor Jaecke, Minister Ronald Lamola, Professor Firoz Cachalia**

**Gregor Jaecke, Resident Representative for South Africa for the Konrad-Adenauer-Stiftung (KAS)**, welcomed all, both in person and virtually, and opened the conference with brief introduction. KAS is a think tank that promotes democracy, good governance, human rights and the rule of law. It fosters dialogue between policymakers, actors from the private sector and civil society to promote professional networks and the exchange of ideas that tackle political and socio-economic challenges. One of these is the subject of the day: the dangers of corruption and weak criminal justice administration. In summary: "corruption is an international sickness that eats our future and therefore eats our children." Mr Jaecke noted that the success of Germany's post-war social stabilisation and economic growth could be directly drawn from the rule of law.

**The Honourable Ronald Lamola, MP and Minister of Justice and Correctional Services**, commended the multi-stakeholder meeting, citing democracy in action. He cited some successes in fighting corruption, viz. greater level of collaboration among the law enforcement agencies, the number of cases from state capture reaching court and the recovery of R12,5 billion in stolen money. He also noted opportunities for improvement, such as increased collaboration between the justice and economic clusters given the potential threat of grey listing from FATF.

The Minister mentioned the pending consultative processes currently aimed at making the Investigative Directorate (ID) of the National Prosecuting Authority (NPA) what he called "permanent". There appear to be divergent ideas about what is the majority and what is the minority Constitutional Court judgement in Glenister 2. The Ministry of Justice appears to regard the main judgment as the binding majority judgment. The Minister quoted from it as if it is an authoritative statement of the law.

Minister Lamola also shared his concerns with regard to overlapping competencies and the burden of additional coordination, and structural and operational autonomy issues, risks also alluded to in the Glenister 2 judgments and by the judicial commission on state capture chaired by Chief Justice Zondo.

Minister Lamola agrees that whistle-blowing should form integral part of anticorruption framework, but the following gaps exist with regard to the Protected Disclosures Act (PDA): accountability for entities victimizing whistle-blowers, transition for whistle-blowers to witnesses in criminal cases, and responding to the State Capture Report<sup>9</sup>, in so far as comparative research with regard to incentivization for whistle-blowers.

Over the past two years the DOJ has been conducting research and a review of SA's anti-corruption architecture, including the mandates of the various entities engaged in the fight against corruption, and a comparative study with international benchmarks and best practice, towards the creation and modalities of an anti-corruption entity. A discussion document will be shared with all stakeholders for inputs.

**Professor Firoz Cachalia, Chairperson of the National Anti-Corruption Advisory Council (NACAC)**, advised that the role of NACAC is to provide advice to the President on the strengthening of the institutions of the criminal justice system, compliance with the requirements of the Constitution as set out in the Glenister Constitutional Court judgement, the Zondo State Capture Commission recommendations, and the national anti-corruption strategy<sup>10</sup> adopted by cabinet. These all envisage the establishment of a new agency.

<sup>9</sup> <https://www.statecapture.org.za/site/information/reports>

<sup>10</sup> [https://www.gov.za/sites/default/files/gcis\\_document/202105/national-anti-corruption-strategy-2020-2030.pdf](https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf)

Professor Cachalia cited Professor Stone, who proposes an 80/20 split, viz. more attention should be paid to making structural changes and building a culture of professional excellence in government, as opposed to focusing on people behaviour. He also proposed a multi-agency approach versus a single agency which could be susceptible to capture.

In terms of the UNCAC<sup>11</sup>, the envisaged anti-corruption entity should be independent of the executive, and should follow an all-of-society approach, i.e., it should be inclusive and based on engagement / consultations with all stakeholders in society. This should include other government departments, e.g., Department of Basic Education and law enforcement agencies; include comparative and international best practice research with other jurisdictions; and should include critical aspect of whistle-blowing. Professor Cachalia stressed the urgency of creating such an agency (“yesterday”) and current case studies could be used to guide urgent corrective action, e.g., Tembisa hospital in primary health care<sup>12</sup>.

---

## PANEL 1: WHAT ARE THE LEGAL REQUIREMENTS FOR ANTI CORRUPTION MACHINERY OF STATE? ACHIEVING COMPLIANCE WITH GLENISTER

### Judge Ian Farlam (moderator), Paul Pretorius SC, Lawson Naidoo, Izak Smuts SC

**Ian Farlam, former Judge of the Supreme Court of Appeal.** In opening remarks, Judge Farlam described the background to the Glenister Constitutional Court case, viz. the dissolution of the Scorpions / DSO. Two important points to note:

- The time-honoured practice of briefing counsel, including senior counsel, to handle tricky and complex corruption prosecutions ought to be revisited by the NPA
- It is evident that the final S in STIRS<sup>13</sup> is not in place in the current anti-corruption dispensation in SA and equally clear that there are no plans to address or implement this binding requirement of the majority judgment (not the main judgment) in Glenister 2

**Paul Pretorius, Senior Counsel,** opened up with the technical aspects pertaining to Glenister 2, focusing specifically on the requirements for an independent anti-corruption unit, and without political interference. In terms of Glenister 2, while a ministerial committee was to be appointed to look at policy guidelines on fighting corruption, with Parliament being tasked to create an independent anti-corruption entity, an informal structure, the Anti-Corruption Task Team (ACTT)<sup>14</sup> was also formed.

Adv Pretorius pointed out that the then Chief Justice wrote the minority judgment in Glenister 2 (which is called the main judgment in the law reports) while the binding STIRS criteria are set in the majority joint judgment of the then Deputy Chief Justice Moseneke and Justice Cameron. The topic is also discussed by the Zondo commission in its final recommendations, after some initial confusion in tranche 1 of the report, which mistook the joint judgment as a minority judgment. The fundamental difference on the proper source of the applicable law as set out in Glenister 2, remains unresolved. The constitutionality of remedial legislation could be affected if the binding nature of the STIRS criteria are not given recognition, as regards the security of tenure of office and the operational and structural independence of the anti-corruption entity that emerges from the legislative process as the implementation of the requirement that effective and efficient anti-corruption machinery be put in place.

---

<sup>11</sup> <https://www.unodc.org/unodc/en/treaties/CAC/>

<sup>12</sup> <https://www.medicalbrief.co.za/tembisa-hospital-corruption-well-orchestrated-and-meticulously-planned/>

<sup>13</sup> S for security of tenure in office, see also list of acronyms

<sup>14</sup> <https://www.gov.za/AntiCorruptionTaskTeam>

Aspects covered pertained to the majority and minority Glenister 2 judgements and include: international obligations and issues of independence, i.e. ability to perform effectively without undue interference. As per the OECD, the issues of independence covers: genuine political will, free from undue political interference, comprehensive anti-corruption strategy, structural and operational autonomy, clear legal basis and mandate, transparent procedures for appointment and removal of director and finally accountability. A serious concern and potential conflict was the appointment of a Ministerial committee to oversee anti-corruption – where members themselves could be implicated – thereby creating a potential risk to independence. Further, the failure by Parliament, as also reported by the Zondo State Capture Commission, to hold the executive, including the said Ministerial committee, to account.

Much of the discussion focused on the period 2011 to present. This period followed the dismantling of the Scorpions / DSO) in 2008, which opened the floodgates to grand corruption, state capture, and impunity. This provided fertile grounds for the capture of institutions of state, such as the NPA, Hawks (DPCI), SARS, and others. The capture of the key accountability units saw an estimated excess of a trillion rand leave the country, through the complicity of the private sector. The result is the state of paralysis in the country today, with symptoms such as rolling power blackouts, alleged sabotage of SOEs, insurrection against the state, and assassinations at various institutions. These elements appear typical of a mafia state, or in Clem Sunter's words, a near failed state.

This period also saw activism in civil society against the perceived threats to SA's constitutional architecture and democracy. Key to this was the response to the dismantling of the Scorpions, and the replacement by the Hawks in the SAPS, viz. the Glenister litigation and the escalation to the Constitutional court, with Glenister 2 and 3, with their respective minority and majority judgements. This led to the pronouncement on STIRS criteria for an independent crime and corruption fighting unit, viz. specialized, trained, independent, resourced and with security of tenure.

**Lawson Naidoo, Executive Director of Council for the Advancement of the South African Constitution (CASAC).** Chief Justice Zondo made three key recommendations in the state capture report, viz. 1) make permanent the commission of inquiry, with oversight over parliament, 2) create an agency for the protection of whistle-blowers, and 3) create an agency for procurement and dealing of corruption in procurement. While supporting Glenister 2, he proposed the addition of 'A' for accountability hence to replace STIRS with STAIRS.

The role of Parliament as accounting body needs to be clearly defined. In addition to investigation and prosecuting corruption, handled by Hawks and NPA, the society wide aspects, viz. education, awareness, ethics has been left mainly to civil society. Globally the trend for success has been prosecution-led investigations, similar to the successful Scorpions. Hence need to relook at the mandates of all entities tasked with law enforcement, viz. Hawks, SIU, FIC, SARS, and chapter 9, e.g. PP, AG, etc. The location of the agency also needs to be determined, independent of the executive, possibly in a Chapter 9, which needs to be further discussed and debated.

**Izak Smuts, Senior Counsel, Eastern Cape Society of Advocates, and formerly member of the Judicial Services Commission.** Adv Smuts is in agreement with the majority decision of Glenister 2 and the criteria for independent anti-corruption unit. However, he believes that political posturing prevailed (led by former President Jacob Zuma), hence the consequence of nine wasted years, for which the country and citizens at large are paying the costs today, and hence Clem Sunter's prognosis for a potentially failed state.

Given Minister Lamola's and Professor Cachalia's earlier presentation, the panel presented both differing and sometimes complementary views on the kind of entity needed to fight corruption. Differing views included the interpretations of the majority vs minority rulings of Glenister 2 and 3, and the Zondo State Capture Report. Concern was shared about the implications for the rule of law, a critical pillar for SA's constitutional democracy, and its people.

## PANEL 2: WHISTLE-BLOWER PROTECTION IN THE SHORT AND LONGER TERM

### **Ben Theron (moderator), Malini Govender, Cynthia Stimpel, Tseliso Thipanyane**

**Ben Theron, Executive Director, Whistle-blower House.** In his opening remarks, he depicted the current terrain of whistle-blowers as the making patriotic and heroic sacrifices without protection from the legal architecture and facing the wrath of unscrupulous, dishonest leaders.

Current examples cited include:

- Various SOEs viz. Mathapelo More, Public Investment Corporation (PIC) subsidiary (R200 million), Martha Ngoye, PRASA, Cynthia Stimpel, SAA
- Patricia Mashuale from the SAPS
- Babita Deokaran assassinated in the Tembisa health care sector (R850 million)
- Athol Williams exiled in the UK amid security fears, Bain whistle-blower
- Assassination of leaders from various sectors, viz. local councillors, University VC, etc
- SA Tourism R1 billion deal with the Tottenham Hotspurs (a football team in the United Kingdom), and the Media Development and Diversity Agency (MDDA)

These examples provide current live case studies for actioning and resolving.

**Cynthia Stimpel, Executive Director, Whistle-blower House.** Presentation covered definition of whistle-blowers and whistle-blowing, the lived experiences of whistle-blowers, and lessons for policy engagement. While the PDA does not use the term “whistle-blower” or “whistle-blowing,” Transparency International, the German-based anti-corruption non-profit organisation, defines whistle-blowing as:

*“The disclosure of information related to corrupt, illegal, fraudulent or hazardous activities being committed in or by public or private sector organisations – which are of concern to or threaten the public interest – to individuals or entities believed to be able to effect action.”*

There was consensus on the role played by whistle-blowers as true patriots and champions of human rights, and in exposing state capture and corruption. Yet they pay the ultimate price of losing lives and livelihoods, and continue to face harassment and persecution from employers in the public and private sectors. This while senior leaders/employers alleged to have committed crime, corruption, and various other offences continue to enjoy impunity and live in comfort.

Further, the lack of adequate support for whistle-blowers has led to the crisis of corruption and state capture, more recently the attempted assassination of the Vice-Chancellor (VC) of the university of Fort Hare, the assassination of the VC’s bodyguard, the assassination of Gauteng health sector whistle-blower, Ms. Babita Deokaran, and the harassment of many others. The examples of current case studies were cited, viz. Ms Martha Ngoye from Passenger Rail Agency of South African (PRASA), Ms Zuki from MDDA, exile of Bain whistle-blower, Athol Williams, and the SA Tourism hounding of the whistle-blower who exposed the sponsoring of UK based football team Tottenham Hotspurs at a cost of R1 billion.

Hence the acknowledgment that whistle-blowers are an essential feature of any anti-corruption machinery. A call was made for urgent intervention from the Minister of Justice and Presidency on protection and support for whistle-blowers.

**Adv Tseliso Thipanyane, former CEO, South African Human Rights Commission.** Described the extent of corruption in SA presenting a risk to our constitutional democracy, and that the Zondo commission came about through the bravery and courage of whistle-blowers. If society does not protect whistle-blowers, they will not be around to reveal any potential future capture.

He suggested a range of remedies for the protection and support of whistle-blowers,

- including financial and legal support,
- reforms to the PDA,
- institutional support from relevant chapter 9 bodies, e.g. South African Human Rights Commission and the PP office,
- institutionalising governance reports from key departments, such as DOJ and AG, to include reports to parliament for discussion and debate, and inclusion of minutes for the public to monitor and hold accountable.

**Adv Malini Govender, Regional Head, Specialised Commercial Crimes, NPA.** Due to NPA not having investigative capacity, NPA partners with other relevant law enforcement bodies, eg. SIU, PP. Hence the relative successes during the Covid / Personal Protective Equipment corruption. Need to look at advancing from whistle-blower protection to witness protection, by providing evidence and testifying. A potential accountability tool could be the enforcement of performance agreements, and linking to remuneration.

---

### PANEL 3: NON-PROSECUTION RESOLUTION OF CORRUPTION CASES

**Michael-James Currie (moderator), John Oxenham, Colette Ashton, Hermione Cronje**

**Michael-James Currie, Director at Primerio, International Bar Association Anti-Corruption Committee.** Mike provided opening remarks about non-trial resolutions (NTRs) as a potential tool in fighting corruption in the private sector. In this regard, Mike highlighted his role as African Regional Representative of the International Bar Association's Anti-Corruption Committee and further noted his role in the Project Rollout initiative by the Anti-Corruption Committee to promote the OECD Anti-Bribery Recommendations, published by the OECD in 2021<sup>15</sup> (of which NTRs make a key feature). Mike addressed that the topic of NTRs is no longer novel and that instead of debating whether they should feature in South African legislature, we should address the manner in which NTRs are implemented, through use of empirical evidence from studies done around the world, particularly those done by the OECD. With reference to the recent statement by the US DOJ's Assistant Attorney General, Currie commented on the role of corporate citizens in their ability to fully cooperate with a relevant government agency with private resources, including forensic auditors and legal teams. The ability of a law enforcement agencies to partner up with corporations instead of fighting against them is a key benefit of an NTR regime.

**Colette Ashton, Director of Accountability Now** provided a broad description of NTRs. She described NTRs as a type of public-private cooperation that the UNCAC and OECD recommends be part of a system of anti-corruption enforcement. Her presentation is based on her Master's thesis, titled "Dismantling 'The Machine': a Role for Non-Trial Resolutions in Anti-Corruption Enforcement in South Africa".<sup>16</sup>

Colette described that amnesty for corruption is another type of public-private cooperation that has been used in several countries worldwide and specifically in lesser developed countries including Nigeria, Mongolia and Tunisia. NTRs are distinct from amnesty in that they are widely used; they have been the subject of extensive empirical research (including by international organisations like the United Nations Office on Drugs and Crime (UNODC) and the Financial Accountability, as well as the Transparency and Integrity for Achieving the 2030 Agenda (FACTI) panel. This research shows that NTRs are a driver of increased anti-corruption enforcement. NTRs are endorsed by the Organisation

---

<sup>15</sup> <https://www.oecd.org/corruption/2021-oecd-anti-bribery-recommendation.htm>

<sup>16</sup> Supervised by Dr Abiola Makinwa <https://www.iaca.int/media/attachments/2022/06/27/colette-ashton-mt-23-june-22.pdf>

for Economic Cooperation and Development (OECD) Working Group on Bribery and widely accepted by civil society organisations like Transparency International as legitimate instruments.

NTRs are designed to provide greater accountability for high-level corruption by incentivising the cooperation of companies and lower-level implicated parties with law enforcement to provide information that can be used in the prosecution and conviction of high-level individuals. In addition, NTRs are designed to incentivise business to self-police corruption and improve their anti-corruption detection and prevention measures. Amnesty for corruption has none of the abovementioned advantages.

Colette provided examples of key statements made in support for NTRs:

- “Negotiated settlements are absolutely critical in dealing with corruption. They contribute to quicker finalisation of cases.” *Jonathan Benton, former head of financial crime for UK Serious Fraud Office.*
- “(W)ith corruption enforcement, perfect is often the enemy of good. Only in the *actual effective enforcement* of (anti-corruption) rules is the rule of law upheld...” *Dr Abiola Makinwa, global academic expert, FACTI panel advisor.*
- “The power to allow the defendant to settle without a finding of guilty is a powerful card in the hands of the prosecutor. They can use that power to extract concessions from corporate defendants. The potential collateral damage from a finding of guilt can be so enormous that any corporation given the choice will accede to many things that prosecutors want in exchange for being allowed to avoid a guilty plea.” *Peter Solmssen, former GC Siemens, first global NTR.*

**John Oxenham, Director at Primerio, and SA Representative, ICC Fraudnet.** Oxenham spoke about the role of business in NTRs by drawing comparisons between NTRs and leniency regimes in relation to competition cases. In this regard, he reminded the audience of the position that South Africa faced just over 20 years ago on the competition law front. He described how South African competition law enforcement authorities found much difficulty in effectively discovering, investigating and prosecuting cartel cases due to their secret nature as well as a lack of skillset by the authorities. As a result of these difficulties, the authorities recognised a need to enable corporations to become allies in order to begin uncovering nefarious activities.

Oxenham then described the Corporate Leniency Policy (CLP) adopted by the South African Competition Commission and described the implications of this to the infamous the bread cartel of 2007<sup>17</sup> and subsequent litigation of which he acted for the first ever leniency applicant under the CLP regime.

Through the analysis, Oxenham noted the role of players involved in wrongdoing in providing evidence to the relevant authorities, and how this is the single most effective mechanism to detect and prosecute wrongdoing. Specifically, in relation to the bread cartel, the evidence collected from the leniency applicant (which included over 30 witnesses from the applicant at the trial) resulted in the prosecution and fining of a key player in the cartel, who had opted to fight the case rather than cooperate with the Competition Commission.

Through an analysis of this case as well as recent legislative developments (namely the introduction of criminal liability for individuals involved in cartels as well as class action litigation), Oxenham described the hallmarks of effective leniency regimes (which can be applied to a successful NTR regime). These hallmarks are well described by Christina Volpin as culminating the 6 C's (clarity, commitment, credibility, confidentiality, cooperation and context).

Oxenham was asked about the primary consequences which corporations typically take into account when deciding whether to come forward and cooperate with an agency in respect of wrongdoing. In this regard, corporations are advised by the risk of detection, the risk of other players implicating the corporation, the enforcement track record of the respective agency, the quantum of recently imposed fines, risks to the process, and the ability for individuals to obtain immunity from subsequent prosecution. Oxenham noted the need for certainty as well as reliance on international best practice.

---

<sup>17</sup> <http://www.saflii.org/za/cases/ZACT/2010/9.html>

These are key considerations which ought to be taken into account in the development of a NTR regime for South Africa.

**Hermione Cronje, former Investigative Directorate Head of the NPA** provided remarks on her previous experience in the Asset Forfeiture Unit and the impressive body of jurisprudence that has come about as a result of the work of leading players in the asset forfeiture field. In regards to NTRs, Hermione explained one of the key criticisms of an NTR and described that an NTR is not a means by which wrongdoers can 'get off the hook free of charge' but rather the idea that wrongdoers can acknowledge their wrongdoing and not suffer any stigma of a prosecution or conviction. Hermione commented on South Africa's development of its conviction-based and non-conviction-based asset recovery mechanisms and noted that the development of the non-conviction-based asset recovery mechanisms ended up being more developed due to the fact that there were not many convictions taking place in any case.

Hermione further remarked that the debate on NTRs applies to corporations mainly and cannot be applied in consideration of amnesty (e.g., from state capture cases). Corporations can be fined, e.g., Glencore in the USA. If you end up prosecuting a corporation, lots of employees lose their jobs. So, there are other considerations as to how to hold corporations accountable that are not applicable to human beings.

---

## PANEL 4: SUPPORTING THE ESTABLISHMENT OF AN INTERNATIONAL ANTI-CORRUPTION COURT TO COUNTER KLEPTOCRACY AND TRANSNATIONAL CORRUPTION CASES

**Justice Richard Goldstone (moderator), Mwila Bwanga, Dr Marianne Camerer, Lord Peter Hain**

**Justice Goldstone, former judge of the Constitutional Court**, sketched the background and the motivation for the establishment of an International Anti-Corruption Court (IACC) to counter kleptocracy and transnational corruption. Washington-based Global Financial Integrity found that from 2000 to 2009, developing countries lost \$8,44 trillion to illicit financial flows. Kleptocracy, the theft of state funds by nation's leaders, accounts for a substantial part of global corruption, thereby endangering and compromising the United Nations' Sustainable Development Goals viz. shelter, food and security for the poorest of the poor and putting at risk the peace, stability and sustainability of the planet.

To achieve their dishonest aims, kleptocrats capture the state, including key aspects of the criminal justice system. An international anti-corruption court could freeze the stolen assets, repurpose and repatriate them to the countries from where stolen, where they can then be used in development that supports the poor and vulnerable. The US-based civil society organisation Integrity Initiatives International was formed to fight corruption, with its main project the establishment the International Anti-Corruption Court (IACC), whose task should be to prosecute and punish kleptocrats, and to recover their illicit assets<sup>18</sup>. Around 300 world leaders including 32 Nobel laureates have signed a declaration calling for the creation of the IACC. Lessons from the International Criminal Court (ICC) could be used as best practice for the IACC.

**Dr Marianne Camerer, Senior Lecturer, Nelson Mandela School of Public Governance, UCT**, believes that the IACC could be an important institution to promote accountability, and strengthen multilateralism. She stressed however, the importance for accountability advocates of learning lessons from the functioning of the International Criminal Court (ICC), in order to avoid certain pitfalls.

Other networks like International Consortium of Investigative Journalists (ICIJ) who produced the Panama Papers<sup>19</sup> with their focus on facts, can provide much needed evidence that will be required to

---

<sup>18</sup> <http://integrityinitiatives.org/about-the-iacc>

<sup>19</sup> <https://www.icij.org/investigations/panama-papers/>

have effective and successful prosecutions in any court, domestic or international. As well as supporting investigative journalists, what is essential in order to promote accountability is to effectively protect whistle-blowers that raise their concerns about corruption.

**Mwila Bwanga, Executor Director BeRelevant Africa** – one of the youngest leaders to contest elections in Zambia, Mr Bwanga campaigned on basic issues of food, health, education and the African Union Agenda 2063<sup>20</sup>. He participated in the USA young leaders program. Whilst the ICC was viewed with suspicion by some African leaders, the IACC is likely to be viewed more positively and accepted only if Africans are at the forefront of its establishment.

**Lord Peter Hain, former UK parliamentary member, and anti-apartheid leader.** Lord Hain is a strong antic-corruption crusader, and supports the idea of an IACC. He believes that prior to the establishment of the IACC, pressure must come from governments to pursue the corrupt. Hence he has been lobbying various governments internationally for support against corrupt and unethical practices, including against private sector, e.g. Bain, Hogan Lovells. He believes more pressure must be put on the USA, India, UAE and Hong Kong governments to combat illicit financial flows and the complicity of the bank sector. Having led the banning of Bain in the UK, he is advocating engagement with Hogan Lovells.

**Paul Hoffman, SC, and Director of Accountability Now**, discussed two case studies to illustrate the utility and effectiveness of an IACC, viz. Jacob Zuma and Vladimir Putin.

He sketched the history of the rise to power of former President Jacob Zuma, with former President Thabo Mbeki dismissing him in 2005, for the alleged corrupt relationship with his former financial advisor Shabir Shaik. This followed the 783 charges against Zuma by the NPA for fraud, corruption, racketeering and money laundering. At the ANC elective conference in Polokwane in 2007, Zuma was elected as ANC President, against Mbeki who was seeking re-election for a 3<sup>rd</sup> term, and then the resolution to disband the DSO / Scorpions. Then followed a decision by the Pietermaritzburg High Court in 2008 to drop charges against Zuma, paving the way for the NDPP to drop charges against him, and then his election as President of SA in 2009.

This led to litigation by opposition parties and civil society including Bob Glenister. He suggested that had it been possible to go to an IACC instead of litigating fruitlessly until 13 October 2017, the fate of Zuma may well have been quite different from two terms as RSA president; he may have been imprisoned. The resultant multiple crises faced by SA's peoples today are a result of Zuma's presidency, with the Zondo commission clearly implicating him in corruption and state capture.

Similarly, in the case of Russian President, Vladimir Putin, great wealth has been amassed by the oligarchs whom Putin leads and much of it is squirreled away in Swiss Bank accounts and elsewhere outside Russia. A freezing order, to use Bill Browder's terminology, could have been obtained the day after Putin invaded Ukraine. That might have saved Ukraine from the bloodstained path it is currently suffering, as well as the global economic crisis as a result of the war. Many of the resulting hardships are borne by the poor and vulnerable in Ukraine and globally, thereby putting at risk the National Development Plan goals in SA, and the United Nations' Sustainable Development Goals globally.

The principle of complementarity by going to an IACC would have trumped Zuma's Stalingrad approach of continuously delaying his day in court and evading accountability, as well as Putin hiding his ill-gotten wealth in Swiss banks. Hence Hoffman strongly advocated for a carrot and stick approach in dealing with corruption, viz. the carrot of improving domestic anti-corruption policies, and the stick being the IACC, thereby heeding the doctrine of complementarity.

---

<sup>20</sup> <https://au.int/en/agenda2063/overview>

## CLOSING REMARKS

### **Paul Hoffman SC (moderator), Professor Somadoda Fikeni, Archbishop Thabo Makgoba, Koogan Pillay**

**Paul Hoffman, SC, and Director of Accountability Now**, believes that the current circumstances in SA demand that a best practice solution to serious corruption be sought, and that is a Ch9IC<sup>21</sup>.

It may be possible to comply with the STIRS criteria in other ways. In 2014 it was thought, by the majority in Glenister 3, that the tweaked Hawks would suffice. This has not worked at all. No serious corruption prosecutions have ended in success as a result of a Hawks investigation (The Nulane matter is crumbling away in the Free State High Court). The problem is that without a STIRS compliant investigation a successful prosecution is well-nigh impossible. The government concedes that the Hawks are not up to scratch and seeks a work around solution by upgrading the ID and giving it investigative powers. This won't work because the NPA is hollowed out and infested with saboteurs. The right way forward is a stand-alone, genuinely permanent entity that is STIRS compliant. The independence of the NPA is subject to the final responsibility of Minister Lamola. That is not the sort of independence that is required by law, so, the new entity should not be housed in the NPA. The natural and obvious home for it is Chapter 9. Independence is then guaranteed constitutionally, and the reporting lines are to parliament, not the executive branch of government.

**Professor Somadoda Fikeni, Chair of the Public Service Commission (PSC)**. Professor Fikeni remarked that following state capture, institutions have been weakened. Hence there is a need to urgently professionalise the public service. Professionalism and competence are critically important to withstand any change in administration.

Chapter 13 of the National Development Plan focusses on building a capable and ethical state. Following the International Anti-Corruption Day event in December 2022, where Chief Justice Zondo gave a keynote address, the PSC undertook to convene a two-day workshop on whistle-blowers and investigators. The conference revealed that R2,5 billion was raised through the Asset Forfeiture Unit - hence funds are available for whistle-blowers. The question remains how to access these funds.

The rules-based system of compliance and conformance needs to be complemented by a values-based system of ethics and consciousness. Professor Fikeni has met with various strategic partners, e.g. Ethics Institute of South Africa (Father Smangaliso Mkhathshwa) and Professor Wiseman Nkhulu, on the role of education institutions, e.g. universities and business schools, on how to teach ethics, learn progressive values and unlearn bad habits.

Extreme inequality and poverty also key drivers of our socio-economic crises. A case study was shared that poor people have to connect power illegally to sustain their families, while Eskom fails to respond to service delivery issues. Given State Capture, and having witnessed the impact of coalitions and abuse by politicians, a forum of chapter 9, 10 and 13 organisations has been convened to work with civil society to insulate citizens from, and rebuild institutions and ethical leaders. A further case study revealed that this happens in other parts of the world; consider Belgium, which was 540 days without political leadership, but citizens were insulated by a professional public service.

**Archbishop Thabo Makgoba, Anglican Archbishop of Cape Town**. The Archbishop spoke about leaders who have sold out on the promise of the Constitution, and amassed enormous wealth corruptly and immorally, leaving behind the majority of citizens. This requires a reboot of our politics and instruments of governance. This calls for a new struggle to regain our moral compass, end economic inequality toward achieving equality of opportunity, thereby realizing the promise of our Constitution. This needs to be inclusive of all citizens, especially our future leaders, the youth who have become disillusioned with politicians and politics.

At the centre of this new struggle is the fight against corruption, which will be worse than the struggle against apartheid. The latter required much sacrifice and suffering, hence the protection and support

---

<sup>21</sup> <https://accountabilitynow.org.za/submission-to-the-constitutional-review-committee/>

of whistle-blowers is paramount, as well as the protection of law enforcement from political interference, to prevent another state capture.

This new struggle should be focused around a multi-stakeholder forum, constituting an alliance of leaders from business, government, labour and civil society and must include the youth and proclaim that enough is enough. The struggle should be for a new society of equality of opportunity, where the wealth of new economic growth is shared equitably amongst our children and future generations.

**Koogan Pillay, Former Project Manager of the National Anti-Corruption Strategy (NACS)**, closed off the meeting with key summary positions from the various panels, and possible ways forward to address the precarious challenges facing our country.

OR Tambo (in whose honour the venue of the event is named) was commended for his visionary leadership that produced the world-renowned SA Constitution, together with his brother in arms, SA's first democratic president Nelson Mandela, for signing the Constitution into effect in 1994.

The ideals of transformation in the Constitution still need to be fully realized, viz, freedom, equality and dignity. Chief Justice Zondo was scathing in his final state capture report, on the extent of fraud, looting and corruption, and the deficit in integrity and accountability impacting the majority of citizens' access to their basic Human Rights, as enshrined in the Constitution. President Ramaphosa himself lamented the great sense of shame, embarrassment and betrayal by the governing party.

Hence the indictment against society at large for allowing the legacy of Tambo and Mandela to be trashed, as South Africa remains the most unequal society after 28 years of democracy.

Both Chief Justice Zondo and President Ramaphosa lauded whistle-blowers as true patriots and champions of our democracy, yet they continue to lose their lives and livelihoods, and face harassment and persecution from employers in the public and private sectors, while senior leaders/employers alleged to have committed crime, corruption, and various other offences continue to enjoy impunity and live in comfort. Hence the acknowledgment that whistle-blowers are an essential feature of any anti-corruption machinery, and the lack of adequate support and protection for whistle-blowers needs to be addressed urgently.

---

## CONCLUSION AND WAY FORWARD

Due to the current environment in SA's democratic history, and the multiple crises engulfing and threatening the future of the country, and the role of strong accountability institutions, like the criminal justice system, and the rule of law, key stakeholders strongly urged for a follow-up meeting, possibly a closed round table, 2 – 3 days, intensive and extensive deliberation, with experts, including many in the room, to take their deliberations forward, toward narrowing consensus, and moving towards reviewing, redrafting, amending policy towards effective implementation, thereby achieving the 'better life for all,' envisaged by Tambo and Mandela in the Constitution of 1994. Some also suggested the time may be right for a CODESA 3.

Specific possibilities emanating from the rich panel discussions, for heeding the president's call as a civil society collective to prevent SA from total failure include the following:

### PANEL 1

A multi-stakeholder forum would be the next step, as per the Archbishop's endorsement. Such a forum would review the differing inputs, views and interpretations (from the Constitutional Court Glenister judgements, Zondo state capture report and the NACS) in an effort to advance convergence and consensus on anti-corruption legal framework between various key stakeholders.

Hence the recommendation is a follow-up closed round-table / workshop, which is to look holistically and contextually at the Constitutional Court Judgement, Glenister 2 and 3, majority and minority, the NACS and the Zondo state capture report.

Following the closed round-table / workshop, it is suggested to take the debate to parliament or a public debate with Judge Dennis Davis, who hosts 'Constitutionally Speaking,' on the TV Channel eNCA.

### PANEL 2

Professor Fikeni's proposal for a two-day workshop, coming out of the IACD December 2022, for whistle-blowers and investigators, will be useful in assisting the DOJ towards expediting urgent policy reforms for support and protection of whistle-blowers (also endorsed by Archbishop Makgoba) as well as consequences for perpetrators / enablers of state capture (as called for by Minister Lamola). International benchmarks and best practice will also assist in expediting (as per Professor Cachalia, who stated policy reforms were urgent and needed 'yesterday').

These could include the successes achieved by the USA and the EU, among other jurisdictions, as also endorsed by former US President Obama that whistle-blowers play a crucial role in the monitoring and evaluation of policy implementation, feedback and complaints from the citizens, and has application in all sectors, notably also in the key challenge areas such as crime, corruption, racism, bullying, poverty alleviation, unemployment, GBV, and should be institutionalised as part of Government's Batho Pele implementation.

### PANEL 3

Innovative instruments should be implemented by looking at international best practice to achieve the Constitution's objective of transformation and social justice. These practices include NTRs, as recommended by the 2021 OECD Recommendations<sup>22</sup>. These would counter the perverse incentives / tactics employed such as golden handshakes, non-disclosure agreements, "Stalingrad tactics"<sup>23</sup> to

<sup>22</sup> <https://www.oecd.org/corruption/2021-oecd-anti-bribery-recommendation.htm>

<sup>23</sup> <https://www.judgesmatter.co.za/opinions/using-stalingrad-tactics-to-delay-justice/>: "This is a strategy of wearing down the plaintiff by tenaciously fighting anything the plaintiff presents by whatever means possible and

evade accountability or to achieve indefinite suspension on pay at citizens' expense. This should help to look at social justice from a different lens – viz. recoup the stolen resources, estimated in excess of R1,5 trillion, towards the development of the people and the constitutional promise of a better life for all.

## PANEL 4

Justice Goldstone's findings correlate with the studies done by the partnership of former President Thabo Mbeki and Professor Iraj Abedian with regards to illicit financial flows and the impact to states and their peoples. A follow up two day closed round table / workshop will be useful, to explore how to take forward towards expediting.

Due to the impact of corruption on the achievement of NDP policy goals and the UN SDGs, we recommend strategic partnering with Integrity Initiatives International, to include multilaterals, like the UN, UNODC, UNDP, EU to fast track the notion of the IACC to advance global peace, prosperity, equality and justice for all – as pronounced by the Archbishop at this event.

## LESSONS LEARNT - 30 YEARS OF DEMOCRACY

Given the contribution from the esteemed participants, and the crisis facing SA, it is recommended that a workshop be convened on lessons to be learnt from the last 30 years of democracy, on how to strengthen and institutionalise good governance, to reclaim the ideals of Mandela's and Tambo's vision of the Constitution of 1994. These should include various policy and strategic interventions, e.g. The Kgalema Motlanthe High Level Panel Report of 2017<sup>24</sup>, various commissions of inquiry, including the TRC, Annual Nelson Mandela lectures delivered by various international experts, among others.

Key partners should include in addition to the above esteemed participants,

- Justice Albie Sachs who walked alongside Mandela and Tambo, with regard to drafting and implementing the Constitution,
- Former President Thabo Mbeki who led the African Renaissance vision,
- The UN Deputy Secretary-General, Amina Mohamed, who delivered lectures on values-based leadership at previous Mandela / Tutu lectures,
- Archbishop Makgoba, for his courage in publicly declaring it is time for a new people-centred politics and society, as envisioned by our Constitution drafters, and
- Lord Peter Hain for his international crusade against corruption, his embracing of whistle-blowers as human rights defenders, and advocating new inclusive ways of doing business.

---

*"The fight for freedom must go on until it is won; until our country is free and happy and peaceful as a part of the community of man, we cannot rest" – Oliver Tambo*

*"This rot is across the board. It's not confined to any level or any area of the country. Almost every project is conceived because it offers opportunities for certain people to make money. A great deal of the ANC's problems are occasioned by this"- Kgalema Motlanthe*

---

appealing every ruling favourable to the plaintiff. Here, the defendant does not present a meritorious case. This tactic or strategy is named for the Russian city besieged by the Germans in World War II."

<sup>24</sup>

[https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf)