**Summary input of**

**Khulumani Galela Reparations Movement as as interested party to the Commission of Inquiry on TRC Cases**

**We fully support, and welcome, the mandate of the Commission of Inquiry; indeed, we believe it is long overdue.**

“The Commission is appointed **to investigate matters of public and national interest concerning allegations regarding efforts or attempts having been made to stop the investigation or prosecution of Truth and Reconciliation Commission (“TRC”) cases.”**

To assist this process, Khulumani Galela Reparations Movement seeks to give input to the Commission as victims, veterans, survivors and descendants of apartheid gross human rights violations, to advance its understanding of these matters, the extent of political interference aimed at blocking prosecutions of perpetrators, and the effects of this interference on our members, who are victims, veterans, survivors, and families who have suffered from gross human rights violations.

**1. Expanding the scope of the Inquiry beyond the 300 cases that form the Founding Affidavit:**

As victims, survivors and descendants of persons who suffered gross human rights violations under apartheid, we are concerned that the process to investigate possible political interferences with truth recovery, justice and redress has been framed primarily around a limited number of incidents which clearly block prosecutions planned against perpetrators of gross human rights violations – the 300 cases presented by the TRC for further investigation and prosecution after perpetrators failed to obtain amnesty.

The TRC Final Report Vol 5 describes how this problem arose as a result of the basic structure and capacity of the TRC:

The Commission recognised early on that it would not be able to investigate all the cases before it. It decided, therefore, to focus on specific ‘window’ cases – representative of a far larger number of violations of a similar type and involving the same perpetrator groupings.

One of the reasons for this decision was the necessity to corroborate and verify allegations made to the Commission by victims of gross human rights violations, particularly in the light of the decision to pay financial reparations. Payment could be made only to those who had been clearly verified by the Commission as being victims of gross violations of human rights. This left little time for proactive investigations into unsolved apartheid-era violations.

The Investigation Unit (IU) was also severely restricted in its inability to access military archives and classified records.[[1]](#footnote-1)

In focusing on these 300 cases, the Constitutional Damages case brought in January 2025 presents strong evidence describing: political interference blocking specific prosecutions; attempts by government officials to provide a blanket amnesty for perpetrators; and pressures brought upon the democratic government to drop further investigations.

These incidents are none-the-less presented as separate from, and without reference to, the numerous areas where victims have been denied the opportunity to state their experiences, resulting in the denial of truth recovery, justice, and redress, and also in the failure of the state to identify perpetrators who did not apply for amnesty and/or did not tell the full truth, and hold those perpetrators to account.

As a result, the case as currently framed does not include equally compelling evidence, that range from the untimely closure and suppression of evidence and input from “victims hearings”, to a multitude of other actions which deliberately prevented victims from presenting their cases during the TRC; as well as incontrovertible evidence that after the closure of the TRC there was a deliberate decision and concerted action by the post-apartheid government that government would provide no mechanisms to assist victims who had been unable to access the TRC to place their evidence in the public domain, or before the courts.

Khulumani Galela Reparations Movement maintains that there is well-documented and compelling evidence of actions by certain members and sections of government to suppress and limit evidence of gross human rights violations submitted by victims, survivors, and their communities; both during the TRC, and after the closure of the TRC. These acts to restrict victims’ testimonies, we submit, occurred simultaneously with, were directly linked to, and reinforced, the process of closing down prosecutions of perpetrators.

This evidence includes:

* well-documented public records that clearly demonstrate that the negotiations (both public and private) that established the TRC deliberately prioritized ensuring amnesty for perpetrators from the apartheid regime rather than ensuring justice, redress and reparation for victims, and even truth-telling.
* extensive evidence indicates that key actors within government limited time and resources available for the Victims’ Hearings section of the TRC (which focused on victims’ accounts of gross human rights violations); this constituted the first step in a deliberate process of covering up the identities, actions, motivations and chains of command of perpetrators.
* the same actors who later closed down perpetrators’ cases were key roleplayers in restricting and closing down victim’s hearings, and subsequently limiting victims’ access to justice, redress and reparations.

We therefore propose that that the Commission recognizes that the 300 cases referred to in the Founding Affidavit form an important sub-section of the investigations required by the Commission’s mandate. It is of public and national concern that we consider the long history of “efforts or attempts … to stop the investigation or prosecution of Truth and Reconciliation Commission (‘TRC’) cases”.

* This begins, but cannot end, with the strong evidence presented in the Founding Affidavit of pre-TRC negotiations and alleged agreements between incoming post-apartheid government officials and senior members of the apartheid regime, aimed at ensuring that the in-coming government action would offer protection to identified perpetrators from prosecution.
* It must include numerous studies of the TRC’s functions and outcomes demonstrate conclusively that government players intentionally acted to block, limit, and reject the TRC recommendations and decisions that should have led to further identification and prosecution of perpetrators,
* Records also show deliberate action to restrict reparations to a bare minimum, and offer these minimal reparations only to those persons who testified before and were qualified as victims by the TRC (the so-called “closed list”) – a fraction of those who could have sought justice, redress and reparation under the Act.

**We therefore ask that the Commission should define its task to fully investigate all measures which led to shelving, or failing to register, cases against perpetrators which fall under the provisions of the TRC Act; including systemic, repetitive and egregious measures taken with the assistance and/or collusion of sections of the post 1994 government to limit the number of gross human rights violations heard before the TRC (which began before 2003, but was entrenched into government administration by President Mbeki’s speech to Parliament in April 2003; to subsequently deny any persons not appearing before the TRC to the right of redress, justice, and truth promised by the Consitution and the Act; and thus to effectively remove perpetrators, including senior figures in the apartheid regime, of the need to plead for amnesty, tell the full truth, or be held accountable for those acts.**

* Define its mandate to investigate blocking “TRC Cases” to include all cases that should have been brought against perpetrators by the TRC to ensure accountability, truth-telling, and redress in terms of the Act; NOT as only the 300 cases referred to the NPA/ police for investigation and prosecution following refusal to give amnesty and closure of the TRC.
* Investigate evidence of the broad restrictions and limitations imposed on the the TRC, that prevented the majority of perpetrators and their crimes from being identified or held to account (and thus never gave evidence asking for amnesty.
* Investigate the formal imposition of the “closed list” in 2003, which effectively barred victims from a state-supported mechanism to seek justice, redress and reparation, and thus ensured that the vast majority of perpetrators remained un-named and unaccountable.

**We have extensive evidence to demonstrate that:**

* The TRC was empowered to provide amnesty directly (not merely make recommendations for amnesty), while victims accounts of violations led to recommendations for reparation and redress (which the state did not follow);
* The TRC amnesty hearings supplied perpetrators pleading for amnesty had with legal support, while even where victims of the violations in questions did attend amnesty hearings they were not provided space or legal resources to challenge or refute perpetrators claims;
* The TRC downplayed categories violations of gross human rights that were considered legal actions under the apartheid state, and/or which the TRC decided would not be shown to be “politically motivated” (notably rape and gender violence, and in arson in some circumstances); leaving the victims with the burden of proof that this was a politically motivated violation;
* Government closed down victims hearings after 18 months, while extending perpetrator amnesty hearings for a further two years after victims hearings were closed, thus preventing a large portion of victims from stating their experiences and identifying crimes and perpetrators accountable for those crimes.
* The government imposed the “closed list” following closure of the TRC in 2003, against the recommendations of the TRC and objections by civil society. The imposition of the closed list denied hearing, redress or justice to victims who were unable to attend the TRC, or prove their stories from lack of evidence combined with the TRC’s lack of investigative capacity to confirm stories. The imposition of the closed list ensured that the vast majority of perpetrators were not formally identified; and that perpetrators who failed to seek amnesty or did not tell the truth or the whole truth would not be held accountable for their actions.

**2. Constitutional damages:**

The Commission Terms of Reference further require it to “inquire into, make findings, report on and make recommendations concerning” – “…1.4 **whether, in terms of the law and fairness, the payment of any amount in constitutional damages to any person is appropriate**.”

KGRM affirms that as victims, survivors, family members and activists affected by these issues, we have a direct interest in the Commission’s investigation, conclusions and recommendations about the payment of constitutuional damages to victims and survivors for state actions aimed at blocking, hindering, and replacing the TRC’s recommended outcomes.

We in principle support the Founding Affidavit’s call for constitutional damages as a direct result of the actions of the state under investigation, notably in stating that:

* “the state reneged on both of its constitutional obligations in relation to the post-TRC process. It failed to prosecute and has provided wholly inadequate reparations. Its cruel and misguided “closed list policy” excluded many thousands of victims from the benefits of reparations. R2 billion in the President’s Fund remains unspent. Successive post-apartheid governments have destroyed the social compact struck with us.”

We further believe that the state’s failure to carry out Constitutional and government commitments to expose the full truth about apartheid human rights violations, and to ensure reconciliation and redress for all who suffered from those further contributed to destruction of the social compact, and further undermined human dignity.

Beyond destroying the social compact that formed the foundation of our democratic dispensation, the state’s failure to both recognise, and provide redress and reparation for apartheid crimes, has caused untold and ongoing harm to individuals, families and communities, by withholding resources and capacity to rebuild lives damaged and destroyed by those crimes.

We note that the 1996 ruling of the Supreme Court in favour of the TRC providing amnesty to perpetrators in return for truth telling (in “***AZANIAN PEOPLES ORGANISATION (AZAPO) AND OTHERS v THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA,*** CCT 17/96 Constitutional Court 25 July 1996) concluded that the offer of amnesty was in line with the (then interim) Constitution on the grounds first, that it would ensure that “truth be told” (giving incentive for perpetrators to tell the truth, which they might otherwise refuse to do); and because the Act provided appropriate reparation to victims who would no longer bring claims against perpetrators:

“The Court said that Parliament was entitled (*by the Act*) to adopt a wide concept of reparations. This would allow the state to decide on proper reparations for victims of past abuses having regard to the resources of the state and the competing demands thereon. Further, Parliament was authorised to provide for individualised and nuanced reparations taking into account the claims of all the victims, rather than preserving state liability for provable and unprescribed delictual claims only.”

It seems likely that without the quid pro quo of reparations for victims, the Court might have been less accepting of the amnesty provisions. We argue that the post-TRC failure of the state to provide appropriate ‘individualized, and nuanced reparations taking into account the claims of all victims’ could invalidate the Court’s grounds for agreeing that granting amnesty to perpetrators under the Act would be in line with the Constitution.

Moreover, the acts by government to deny justice, redress and reparation are on-going, and continue to cause damage and harm for those still unrepaired. After two decades of calling upon government to honour commitments to redress, repair, and restore our human dignity, Khulumani Galela elderly members undertook to demonstrate outside our Constitutional Court, calling on government to meet with us to repair the damage caused by government’s refusal to reopen measures to redress apartheid crimes. Government promised repeatedly to deal with the matter; but failed to do so, or even to inform us that the measures agreed upon had been unilaterally withdrawn by administrative act. As a result, our elderly and frail members continue to risk well-being, health and even life by holding their ground outside Constitutional Court; currently for a year and ten months continuously. Government still refuses to meet with us; and government officials have further worsened our situation by denying us basic human rights such as water and sanitation at ConCourt.

For this, our members seek Constitutional Damages.

However, we question whether the plea in the Founding Affidavit, that seeks Constitutional Damages to provide civil society organisations with resources to take further actions to prosecute perpetrators of apartheid crimes, and for memorialization, is the appropriate plea in current circumstances. A key consideration for awarding Constitutional damages is “Whether the alternative remedy is effective or appropriate in the circumstances”; and whether a common law remedy is available and feasible for the matter. It would seem reasonable that the common law remedy to the state’s failure to investigate and prosecute perpetrators in the 300 cases identified by the TRC would be for the state to urgently and at state expense put into place full, competent, and appropriate investigation and prosecution in these cases; given the time delay and the potential difficulties this would cause to follow-up on cases, the state must also cover expenses of victims and survivors bringing charges, providing evidence, and full participation in the case.

1. Op Cit., TRC final report vol 5 page 205 [↑](#footnote-ref-1)