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## BRIEFING NOTE – TRUTH AND RECONCILIATION COMMISSION

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*“if we do not deal with the past it will haunt and may indeed jeopardise the future.”<sup>1</sup>*

### 1. INTRODUCTION

Friday 15 April 2016 marked the **20th anniversary** of the first public hearings of the Truth and Reconciliation Commission (TRC).

In July 1995 South Africa’s new Parliament passed the **Promotion of National Unity and Reconciliation Act 34 of 1995** authorising the formation of the Truth and Reconciliation Commission (TRC or Commission).<sup>2</sup> According to the preamble of the Act, the objectives of the Commission were:

<sup>1</sup> TRC Report Volume 6 - Report of the Reparation and Rehabilitation Committee (Accessed at [http://www.justice.gov.za/trc/report/finalreport/vol6\\_s2.pdf](http://www.justice.gov.za/trc/report/finalreport/vol6_s2.pdf))

<sup>2</sup>Barkoukis L and Villa-Vicencio C Truth Commissions A Comparative Study (Accessed at <http://www.ijr.org.za/img/trc/South%20Africa.pdf>)



*'(a) Establishing as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period 1 March 1960 to 1994, as well as the perspectives of the victims and motives and perspectives of the persons responsible for the Commission of the violations by conducting investigations and holding hearings;*

*(b) Facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of the Act;*

*(c) Establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are victims and by recommending reparation measures;*

*(d) Compiling a report providing as comprehensive as picture as possible of the activities and findings of the Commission.'*<sup>3</sup>

In brief, the TRC:<sup>4</sup>

- Took statements from 22 000 individuals between 1996 to 1998 (These statements described human rights violations that impacted on some 44 000 people);
- Heard testimony in application for amnesty from over 5 000 perpetrators of gross human rights violations – a process which continued until 2001;
- Handed its final report to Government in March 2003. This report;
  - named some almost 17 000 people as victims and survivors of gross human rights violations,
  - granted amnesty to nearly 700 perpetrators,
  - handed a further 350 names to government for prosecution, and
  - identified 477 people as forcibly “disappeared” during the political struggle.
- Proposed that Government provide **reparation and rehabilitation** to cover a number of interrelated areas.

<sup>3</sup> Mogale N, Ten years of democracy in South Africa: Revisiting the AZAPO decision (Accessed at [http://www.pulp.up.ac.za/pdf/2007\\_05/2007\\_05.pdf](http://www.pulp.up.ac.za/pdf/2007_05/2007_05.pdf))

<sup>4</sup> <http://www.khulumani.net/reparations/item/1033-what-is-the-asikaqedi-campaign.html>



### 1.1 The TRC's - Reparations and Rehabilitation Committee (RRC)

The TRC's final report noted that reconciliation was not possible without reparations.<sup>5</sup> The TRC's Reparations and Rehabilitation Committee (RRC) was mandated to seek input regarding the types of reparations should be adopted and implemented.<sup>6</sup> The RRC policy recommendations sought to provide reparation and rehabilitation options at the individual, community and national level.<sup>7</sup> Financial reparation would be given only to those formally declared victims by the Commission.

The proposed reparation and rehabilitation policy had five key components:<sup>8</sup> (i) Urgent Interim Reparations;<sup>9</sup>(ii) Individual Reparation Grants;<sup>10</sup> (iii) Symbolic reparation/legal and administrative measures;<sup>11</sup> (iv) Community rehabilitation programmes;<sup>12</sup> and (v) Institutional Reform.<sup>13</sup> Further recommendations included the restructuring of the inherited apartheid debt (to free up resources for a concentrated development agenda), the establishment of a business reparations fund, and a once off wealth tax.<sup>14</sup>

The Commission acknowledged that:

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<sup>5</sup> The case for formal reparations was further detailed in the Constitutional Court's Azapo judgment which upheld the validity of the TRC's amnesty process, but linked it to the need for a comprehensive reparations program for victims.

<sup>6</sup> South African History Archive (SAHA)TRC Category 4 – Reparations (Accessed at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=4](http://truth.wvl.wits.ac.za/cat_descr.php?cat=4))

<sup>7</sup> Ibid

<sup>8</sup> A Summary Of Reparation And Rehabilitation Policy, Including Proposals To Be Considered By The President (Accessed at <http://www.justice.gov.za/trc/reparations/summary.htm#why>)

<sup>9</sup> Urgent interim reparation was defined as assistance for people in urgent need, to provide them with access to appropriate services and facilities.

<sup>10</sup> This is an individual financial grant scheme. It was recommended that each victim of a gross human rights violation receive a financial grant, according to various criteria, paid over a period of six years. Only people who made statements to the Commission; or where referred to in someone else's statement can be considered for reparation.

Reparation will be given only to those formally declared victims by the Commission. The Commission will decide if someone is a victim by looking at all the information they have on the gross human rights violation suffered by that person. It may be possible, in certain circumstances, that the relatives and dependants of victims will also qualify for reparation

<sup>11</sup> Symbolic reparation encompasses individual benefits (such as measures to assist individuals to obtain death certificates, assist with exhumations, expedite outstanding legal matters and expunge criminal records); community benefits (such as Renaming of Streets and Facilities, Memorials/Monuments, and Culturally appropriate Ceremonies); and national benefits (such as renaming of Public Facilities and a Day of Remembrance and Reconciliation). The RRC noted that symbolic reparations such as monuments and museums are important but should ideally be linked with endeavours that improve the everyday lives of victims and their communities. One way of combining the two aims is to involve victims prominently in the design and/or manufacture of monuments and in the running of museums. There are already good examples of this in the country.

<sup>12</sup> These are proposals for setting up community-based services and activities which can promote the healing and recovery of individuals and communities affected by human rights violations (such as health services and training of Community-based Counsellors; education and housing)

<sup>13</sup> These proposals will include measures which will promote good governance, accountability and the prevention of human rights violations in civil society and the state.

<sup>14</sup> South African History Archive (SAHA)TRC Category 4 – Reparations (Accessed at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=4](http://truth.wvl.wits.ac.za/cat_descr.php?cat=4))



*“There were very many victims of apartheid and, certainly, those who came before the Commission are only a subset of a much larger group. This is why, when balancing individual and socially oriented reparations, the Commission sought to address the specific needs of those who came before it in order to contribute to the wider truth about the nation’s history, whilst at the same time addressing the broader consequences of apartheid. It is almost impossible to design a reparation programme without leaving some gaps.”*<sup>15</sup>

Although these recommendations were detailed in the volumes of the Final Report released in 1998, no reparations policy was adopted until the final volumes of the report were completed in 2003.<sup>16</sup> In the interim, however, and at the instigation of the RRC and victim groups Urgent Interim Reparations (UIR) were paid out to those found to be in need of immediate assistance.

Ultimately though it was the President and Parliament who would decide what to do with the TRC proposals around reparation, and how to implement them. A final reparations policy was only adopted in 2003 when President Mbeki presented to Parliament government’s proposed reparations programme.<sup>17</sup>

## 1.2 Presidents Fund

Notably the Promotion of National Unity and Reconciliation Act also required the President and the Ministers of Justice and Finance to establish a **President’s Fund**.<sup>18</sup> The Fund would be used to provide reparation and redress to victims and survivors of apartheid gross human rights violations.<sup>19</sup> The Office of the President’s Fund is located within the Department of Justice and Constitutional Development.<sup>20</sup>

According to the Presidents Fund 2014/15 Annual Report the fund contained an amount of **R1.27 billion** as at 31 March 2015<sup>21</sup>

<sup>15</sup> TRC Report Volume 6 - Report of the Reparation and Rehabilitation Committee (Accessed at [http://www.justice.gov.za/trc/report/finalreport/vol6\\_s2.p df](http://www.justice.gov.za/trc/report/finalreport/vol6_s2.p df))

<sup>16</sup> South African History Archive (SAHA)TRC Category 4 – Reparations (Accessed at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=4](http://truth.wvl.wits.ac.za/cat_descr.php?cat=4))

<sup>17</sup> Approximately R44 million was paid out to 14,000 victims and family members. (Accessed at [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=4](http://truth.wvl.wits.ac.za/cat_descr.php?cat=4))

<sup>18</sup> The President’s Fund was established in terms of section 42 of the Promotion of National Unity and Reconciliation Act 34 of 1995

<sup>19</sup> Government set aside R800 million from the National Treasury in 2003 when the reparations fund was set up.

<sup>20</sup> The DG: Justice is the Accounting Officer for the Fund.

<sup>21</sup> Presidents Fund Annual Report 2014/15 p13. In 2-13/14 the Audit Committee raised concerns about the delay in the disbursement of funds held as these have been accumulating over the years. P10



### Comment

The Committee may be interested in establishing the amount contained within the Presidents Fund as at 31 March 2016 as well as a breakdown of any funds used during the 2015/16 financial year.

## 2. REPARATION MEASURES APPROVED BY PARLIAMENT

In 2003 the Final TRC Reports were tabled and President Mbeki presented to Parliament government's proposed reparations programme.

In compliance with section 27 of the Promotion of National Unity and Reconciliation Act Parliament established an Ad Hoc Committee to consider the recommendation of the State President and the final TRC Reports. **Subsequently Parliament approved the following reparation measures, in line with government's adjusted proposals, namely:**<sup>22</sup>

- Individual, once-off reparations of R30,000;
- Medical, educational, housing benefits and other forms of social assistance;
- Symbols and monuments; and
- Community rehabilitation.

The Department of Justice and Constitutional Development (DoJ&CD) was mandated to monitor the implementation of these programmes, and report to Cabinet on an ongoing basis.<sup>23</sup> A Unit to oversee the implementation of these recommendations was established in the Department in 2005.

Although the Department reports that once-off Repartitions Grants have been paid and Regulations on educational assistance have been implemented - the Regulations for health, housing and community rehabilitation still need to be finalised. The Department reported that Regulations on Community Rehabilitation would be finalised during the 2015/16 financial year - to enable the Department to implement 18 community rehabilitation projects.<sup>24</sup> Work cannot start on any of the community rehabilitation projects until the Regulations have been finalised and a 'needs analysis' process has been completed in the identified communities.

<sup>22</sup> Presidents Fund Annual Report 2014/15

<sup>23</sup> [http://www.justice.gov.za/legislation/notices/2008/20081212-gg31723\\_1539.pdf](http://www.justice.gov.za/legislation/notices/2008/20081212-gg31723_1539.pdf)

<sup>24</sup> DoJ&CD Briefing to the Portfolio Committee on Budget and Strategic plans 2015 (22 and 23 April 2015).



These issues are considered in further detail in the table below:

FORMS OF REPARATION	PURPOSE	PROGRESS
<b>1. Reparations Grants</b>	A once-off individual grant of <i>R30 000</i> to be paid to individuals or survivors <b>designated</b> by the TRC. <sup>25</sup>	Through the work of the TRC just over 21,000 individual victims were designated eligible for reparations and afforded a Truth Reparations and Rehabilitation (TRR) number, allowing them to apply for the agreed Final Reparations Grant. <sup>26</sup> Of these, 16 837 have applied for the once-off grant of R30000. <sup>27</sup>  The Justice Department reports that this aspect of the reparation measure has been completed. <sup>28</sup> AS at 31 March 2015 13 victims had been declared untraceable, nine of which are residing abroad. <sup>29</sup>
<b>2. Symbols and Monuments</b>	Systematic programmes to project academic and formal records of history, cultural and art forms, as well as erecting symbols and monuments that commemorate the freedom struggle, including new geographic and place names.	This aspect of the reparation measure is being implemented under the auspices of the Department of Arts and Culture.  According to the Presidents Fund Annual Report 2014/15 no funds have been utilised from the Fund (as at 31 March 2015) for this aspect of the reparation measure. <sup>30</sup>
<b>3. Medical, benefits,</b>	Programmes to provide for education assistance medical benefits, and the	<b><i>Regulations on assistance to families of missing persons</i></b> , whose remains were exhumed and reburied. <sup>31</sup>

<sup>25</sup> Regulations were promulgated and gazetted on 12 November 2003. The TRC's Reparation and Rehabilitation Committee announced that only those who had received formal recognition of their victim status by the TRC, could apply for reparation. This has been called "the closed list" policy. NGO's such as the Khulumani Support Group have criticised this approach.

<sup>26</sup> Khulumani Support Group Accountability After Abuses: Organizing survivors to Organizing survivors to expand reparations to heal individuals and communities (Accessed at [www.khulumani.net/khulumani/documents/category/13](http://www.khulumani.net/khulumani/documents/category/13))

<sup>27</sup> Presidents Fund Annual Report 2014/15 p5

<sup>28</sup> Presidents Fund Annual Report 2014/15 p5

<sup>29</sup> The Presidents Fund Annual Report 2014/15 notes that - Funds for the outstanding beneficiaries have been reserved in the Fund, should the beneficiaries come forward to claim their reparation grants.

<sup>30</sup> Presidents Fund Annual Report 2014/15 p5

<sup>31</sup> These were promulgated and gazetted on 07 May 2010.



FORMS OF REPARATION	PURPOSE	PROGRESS
education, housing and other forms of Social Assistance	provision of housing, to address the needs of victims identified by the TRC.	<p>As at 31 March 2015, assistance had been granted to <b>65 families</b> who applied for contributions towards re-burial expenses in terms of the Regulations and were paid a total amount of R1 079 500.<sup>32</sup> The Justice Department reports that Amendments to the Regulations are being considered to extend the nature of services being provided.<sup>33</sup></p> <p><b><i>Regulations for financial assistance for Basic and Higher Education.</i></b><sup>34</sup> The closing date for applications was 31 March 2015.<sup>35</sup> The Justice Department reports that <b>750 applications</b> were received - of these <b>596 applicants were eligible for assistance</b>. 331 applications for basic education and 265 for higher education, have been submitted to the respective Education Departments for further processing as directed by the Regulations.<sup>36</sup></p> <ul style="list-style-type: none"> <li>In terms of the Basic Education Regulations victims and their relatives<sup>37</sup> and dependants qualify for assistance if the annual gross income of the applicant's household does not exceed R132 000.<sup>38</sup></li> </ul>

<sup>32</sup> No breakdown is provided of the years these applications were made and granted. The 2010/11 Presidents Fund Annual Report noted that 37 families of persons who have been exhumed and reburied applied for social assistance. The 2011/12 Annual Report indicated this had increased to 45 families. The 2012/13 Annual Report indicated this had increased to 47 families. The 2013/14 Annual Report indicated this had increased to 63 families.

<sup>33</sup> Presidents Fund 2014/15 Annual Report p5

<sup>34</sup> After extensive delays these Regulations were promulgated on 03 November 2014.

<sup>35</sup> The advertisement states that to qualify, applicants must have:

- Been declared a victim by the TRC (the benefit is extended to their relatives, including children and grandchildren).
- Been informed in writing by the TRC that they had been declared victims of apartheid and their names were published in Volume 7 of the TRC Report.

Once verified, the applications and supporting documents will be submitted to the administrator in the Department of Basic Education or Higher Education and Training and National Student Financial Aid Scheme (NSFAS) for further assistance.

<sup>36</sup> The assistance will be available for a period of five years from the date of commencement of the Regulations. (Accessed at <http://www.sanews.gov.za/south-africa/educational-help-trc-victims>)

<sup>37</sup> Relatives are defined as parents of, or persons who exercise or exercised parental control over, a victim; a person married to a victim under any law, custom or belief; or a child of a victim, irrespective of whether or not the child was born of unmarried persons or was legally adopted.

<sup>38</sup> The 'dependants' of victims are defined as persons to whom a victim has or had a legal or customary duty to support, such as a grandchild of a victim.



FORMS OF REPARATION	PURPOSE	PROGRESS
		<ul style="list-style-type: none"> <li>In the case of the Higher Education and Training Regulations victims and their relatives and dependants, qualify for assistance if the annual gross income of the household does not exceed R198 000.</li> </ul> <p>The Justice Department reports that R350 million was ring-fenced in the President's Fund for both basic education and higher education and training assistance. A total of R70 million has been set aside for 2015—R50 million for higher education and R20 million for basic education.<sup>39</sup></p> <p><b><i>Regulations for medical benefits (have not been finalised – status unclear)</i></b></p> <p>In 2013/14 Draft Regulations in respect of medical benefits for victims and their relatives and dependants were revised to accommodate the suggestions made by the Minister of Finance. The revised Regulations will provide for assistance in respect of health services that cannot be supplied by public health establishments.<sup>40</sup></p> <p>Changes were effected to draft Regulations to focus on <i>special health services</i> in line with the agreement reached between the Justice Department and the Department of Health. The revised draft Regulations were submitted to the Health Department for comments. The draft Regulations cannot be finalised, however, before the Department of Health has amended the National Health Act, 2003. Both the Director-General and the Minister of Health have been requested to expedite the matter.<sup>41</sup></p> <p><b><i>Regulations for housing (have not been finalised – status unclear)</i></b></p>

<sup>39</sup>Khoza A, Victims of apartheid to benefit from government's R350 million education fund (Accessed at <http://www.news24.com/archives/witness/victims-of-apartheid-to-benefit-from-govts-r350mln-education-fund-20150430>)

<sup>40</sup> Presidents Fund Annual Report 2013/14 p6

<sup>41</sup> Presidents Fund Annual Report 2014/15 p5





FORMS OF REPARATION	PURPOSE	PROGRESS
		<p>In 2013/14 in response made to remarks by the Provincial Human Settlement Departments on the draft Regulations relating to housing assistance, a needs analysis was conducted to obtain a clear picture of the housing requirements of the victims and their dependants.</p> <p>A list of TRC identified victims in need of housing assistance including repairs or renovations to existing infrastructure has been compiled. This information was submitted to the Departments of Human Settlements and Military Veterans to compare with their database. Feedback was received from both Departments and the Justice Department is analysing the data to assess the housing needs of the victims. A policy on housing assistance for victims will be prepared and used to finalise the draft Regulations.<sup>42</sup></p>
<b>4. Rehabilitation of Communities</b>	<p>One hundred and twenty eight communities were listed by the TRC as having suffered intense acts of violence and destruction.</p> <p>18 Communities have been identified for some form of rehabilitation. Need analysis are being conducted in these communities.</p> <p>Draft regulations on community rehabilitation were published for public comment in November 2013 to regulate</p>	<p><b>Regulations for Community Rehabilitation</b> (have not been finalised – the status of these Regulations remains unclear).</p> <p>18 Communities have been identified initially for rehabilitation.<sup>43</sup> These are:</p> <ol style="list-style-type: none"> <li>1. Alexandra</li> <li>2. Athlone</li> <li>3. Balfour</li> <li>4. Beaufort West</li> <li>5. Bhambayi Settlement</li> <li>6. Bisho</li> <li>7. Crossroads</li> <li>8. Duncan Village</li> </ol>

<sup>42</sup> Presidents Fund Annual Report 2014/15 p6

<sup>43</sup> An amount of approximately R500 million has apparently been identified for this purpose.



FORMS OF REPARATION	PURPOSE	PROGRESS
	the use of monies in the President's Fund for purposes of community rehabilitation.	<p>9. Galeshewe  10. Ga-Nchabaleng  11. Lulekani  12. Mamelodi  13. Mmabatho  14. Mphopomeni  15. Nelspruit  16. Swanieville  17. Tumahole  18. Welkom</p> <p><b>Role of the Independent Development Trust (IDT)</b></p> <p>The Justice Department finalised a memorandum of understanding with the Independent Development Trust (IDT), in the 2010/11 financial year, in respect of conducting needs analysis in the 18 communities identified for rehabilitation.<sup>44</sup> The objective of the "community engagement needs-analysis phase of the rehabilitation programme" was to identify the rehabilitation projects preferred by the communities.<sup>45</sup> All plans have to be approved by the Justice Minister.<sup>46</sup> The IDT will also be responsible for the implementation of all projects. Implementation will only begin, however, as soon as the Community Rehabilitation Regulations have been promulgated.</p>

<sup>44</sup> Presidents Fund Annual Report 2010/11 p5

<sup>45</sup> Programmes aimed at community rehabilitation could include the repair/renovation or provisioning of health clinics, recreation centres, community conflict resolution centres, school buildings, school equipment, ablution facilities as well as electricity and water supply.

<sup>46</sup> <http://www.sabinetlaw.co.za/justice-and-constitution/articles/trc-community-rehabilitation-regulations-published>



FORMS OF REPARATION	PURPOSE	PROGRESS
		<p>A needs analysis has been conducted in Alexandra and Mamelodi (Gauteng) as well as Bambayi and Mpophomeni (KwaZulu-Natal). In the 2014/15 financial year further needs analysis were carried out in Tumahole, Thabong (Free State), Paballelo, Seoding, (Northern Cape), Lulekani and Ga-Matlala (Limpopo). The target to complete 4 needs analysis in four TRC listed communities was not met. <i>(The ongoing failure to finalise TRC recommendations is particularly troubling given that 2016 marks the 20th year since the commencement of the TRC process in April 1996).</i><sup>47</sup></p> <p>Draft Regulations relating to community rehabilitation were published in November 2013 for public comments by 31 January 2014.<sup>48, 49</sup> According to the proposed regulations, a community rehabilitation project must be aimed at <i>“healing the divisions of the past caused by human rights violations and establishing a society based on democratic values, social justice and fundamental human rights, and improving the quality of life of the people of that community...”</i><sup>50</sup> In the 2013/14 Presidents Fund Annual Report the Justice Department noted that comments received have been evaluated and further options are being explored to address some of the concerns raised during the comment process.<sup>51</sup></p> <p>In the 2014/15 Presidents Fund Annual Report the Department indicated that on completion of the needs analysis in the remainder of</p>

<sup>47</sup> The TRC recommended a programme of community rehabilitation for the worst affected communities.

<sup>48</sup> Presidents Fund Annual Report 2013/14 p7

<sup>49</sup> TRC Community Rehabilitation Regulations Published 2013-12-04 Department of Justice and Constitutional Development

<sup>50</sup> It can consist of: Infrastructure development; school construction and improvement; health and social services; skills development support; or any other activity aimed at promoting the healing and recovery of a community that has been affected by human rights violations.

<sup>51</sup> Presidents Fund Annual Report 2013/14 p7



FORMS OF REPARATION	PURPOSE	PROGRESS
		the Provinces, the Draft Regulations will be reviewed in conjunction with the relevant stakeholders and finalised. <sup>52</sup>

### Comments/Questions

- **Once- off Reparation Grants.** The Justice Department reports that this aspect of the reparation measure has been completed. However, the following has been reported:
  - The Khulumani Support Group and other transitional justice organisations are now preparing to challenge the legality and fairness of the “Closed List” policy. The Department could be asked to report on whether it is involved in any litigation in this regard?
- **Regulations for financial assistance for Basic and Higher Education.** The Department reported in its 2014/15 Annual Report that 596 applicants were deemed eligible for assistance. The Department should be asked to provide an update for the 2015/16 Financial Year.
- **The Department should be asked to provide a report on progress in respect of the:**
  - Regulations for Medical Assistance
  - Regulations for Housing Assistance
- **Draft regulations on Community Rehabilitation.** Draft Regulations on Community Rehabilitation were published for Public comment in November 2013. The Department then reported that the Regulations on Community Rehabilitation would be finalised during the 2015/16 financial year to enable the Department to implement 18 community rehabilitation projects.<sup>53</sup> However, this is contradicted by the 2014/15 Presidents Fund Annual Report which notes that only on completion of the needs analysis in the remainder of the Provinces, will the Draft Regulations be reviewed.<sup>54</sup> The Department should be asked to report on the exact status of the Draft Regulations on Community Rehabilitation and the reasons for the delay in their finalisation.

<sup>52</sup> Presidents Fund Annual Report 2014/15 p6

<sup>53</sup> DoJ&CD Briefing to the Portfolio Committee on Budget and Strategic plans 2015 22 and 23 April 2015

<sup>54</sup> Presidents Fund Annual Report 2014/15 p5



- **Needs analysis for 18 communities identified for community rehabilitation.** The Department reported to the Committee that the target to complete 4 needs analysis in the third quarter of the 2015/16 financial year in four TRC listed communities was not met. The Department should provide a report on the progress with the needs analysis process including any challenges and reasons for delays.
- Recently the **UN Human Rights Commission** in its Concluding Observation Report in respect of South Africa's commitments in terms of the International Covenant on Civil and Political Rights (ICCPR) commended South Africa for the work of the TRC but expressed concern that the recommendations of the Commission had not been fully implemented.<sup>55</sup>

### 3. MISSING PERSONS TASK TEAM

The TRC also recommended the establishment of a task team to investigate the 477 cases of missing persons that were reported to the Commission, but which remained unsolved.<sup>56</sup> The President endorsed this recommendation in April 2003, upon tabling the TRC's Final Report in Parliament. In **2004** a Missing Persons Task Team was established in the Priority Crimes Litigation Unit (PCLU) in the National Prosecuting Authority (NPA).<sup>57</sup>

The DoJ&CD published Regulations in May 2010, to provide a policy for exhumation matters. Stakeholders in the process were identified as the; (a) DoJ&CD; (b) PCLU of the NPA; (c) SAPS; (d) Department of Arts and Culture; (e) SAHRA; and (f) The Freedom Park Trust. provide financial assistance to the affected families, for instance in respect of coffins, travel and accommodation. The Department furthermore organises and conducts the handover of the exhumed remains to the families during special ceremonies, whilst a supporting role is played during the reburial process. Families are also assisted with obtaining death certificates and applications for special pensions and once-off reparation grants, where applicable. Bereavement/trauma counselling is also arranged when necessary.<sup>59</sup>

<sup>55</sup> UN Human Rights Committee (31 March 2016) Concluding Observations on Initial Report of South Africa on the International Covenant on Civil and Political Rights

<sup>56</sup> The TRC divided these cases of missing persons into five categories. For purposes of this policy, the following four are applicable: (a) Enforced disappearances. (b) Missing in exile. (c) Missing during periods of unrest. (d) Cases of indeterminate cause. [http://www.justice.gov.za/legislation/notices/2008/20081212-gg31723\\_1539.pdf](http://www.justice.gov.za/legislation/notices/2008/20081212-gg31723_1539.pdf)

<sup>57</sup> The PCLU of the NPA shall manage and direct the investigation into the cases of missing persons and institute prosecutions, where appropriate in terms of its prosecution policy.

<sup>58</sup> [http://www.justice.gov.za/legislation/notices/2008/20081212-gg31723\\_1539.pdf](http://www.justice.gov.za/legislation/notices/2008/20081212-gg31723_1539.pdf)

<sup>59</sup> Progress on Implementing TRC Recommendations (Accessed at <http://www.ceomag.co.za/#!133-caseinpointdoj/cx3k>)



In 2014 the NPA reported that the task team has exhumed 94 sets of remains. In a further 45 cases it was concluded there was as yet no chance of recovering remains. Of the 94 exhumed remains, 74 were returned to families for burial and five had been identified and would soon be returned.<sup>60</sup>

#### Comment

- The NPA and Justice Department should be asked to provide the Portfolio Committee with an updated report on the work of the Missing Persons Task Team.

#### 4. PROSECUTIONS

It was stated in the Final TRC report that, *“it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity for contravening its obligations in terms of international law.”*

On the completion of its work, the TRC’s Amnesty Committee handed over about 300 cases for prosecution to the NPA.<sup>61</sup> It has been reported, however, that there have been fewer than five prosecutions for apartheid-era political crimes in 20 years since the TRC wrapped up its work.<sup>62</sup>

The issue of prosecutions for apartheid era crimes has received renewed attention recently in light of the prolonged battle for justice by the family of anti-apartheid activist Nokuthula Simelane — which included two court cases.<sup>63</sup> Ms Simelane was only 23 when she was abducted in downtown Johannesburg in 1983, taken to farm near Northam and brutally tortured for five weeks.<sup>64</sup> Her body has never been found. The family had to arrange for its own private investigation to follow up on the TRC’s work.<sup>65</sup> On 8 February 2016 the National

<sup>60</sup> <http://www.timeslive.co.za/thetimes/2014/04/23/give-back-my-dead-son>

<sup>61</sup> Bizos G, Slow trek to justice mars TRC’s legacy (Accessed at <http://mg.co.za/article/2015-10-03-slow-trek-to-justice-mars-trcs-legacy>)

<sup>62</sup> Rabkin F, No coincidence so few post-TRC prosecutions have occurred, (Accessed at <http://www.bdlive.co.za/national/2016/02/11/no-coincidence-so-few-post-trc-prosecutions-have-occurred-says-ntsebeza>)

<sup>63</sup> On 20 May 2015 the sister of disappeared anti-apartheid activist Nokuthula Simelane filed an application before the Pretoria High Court seeking to compel the National Director of Public Prosecutions and the Minister of Justice to refer the kidnapping, torture, disappearance and murder of Nokuthula Simelane to a formal inquest.

<sup>64</sup> South Africa: Family Seeks Justice in South Africa for Anti-Apartheid Activist 32 Years After Her Torture and Disappearance (Accessed at <http://allafrica.com/stories/201505211067.html>)

<sup>65</sup> Rabkin F, No coincidence so few post-TRC prosecutions have occurred, (Accessed at <http://www.bdlive.co.za/national/2016/02/11/no-coincidence-so-few-post-trc-prosecutions-have-occurred-says-ntsebeza>).



Prosecuting Authority (NPA) announced that it will charge four former apartheid security policemen with the murder and kidnapping of Ms Simelane.<sup>66</sup>

#### Comment

- The NPA should be asked to report on its prosecution policy in respect of the cases recommended for prosecution by the TRC.

### 5. SPECIAL DISPENSATION PROCESS

In 2007, former president Thabo Mbeki created the special dispensation process to deal with pardon applications from people convicted for offences they claimed were politically motivated, but who did not participate in the TRC. About 2,000 convicted persons applied for pardon under this special process. In April 2009, the North Gauteng High Court issued an interim order restraining the President from granting any pardons under the Special Dispensation for Political Pardons until the matter of victim participation was settled. On February 23 2010 the Constitutional Court dismissed an appeal against the high court ruling holding that victims must be consulted.

In October 2010 the Justice Department published a list of 149 offenders considered for pardons. Simultaneously the Department launched a three-month process for interested parties to make written submissions supporting or opposing pardons. In November 2010 NGOs requested documents relating to the proposed pardons. In January 2012 NGOs received copies of the applications by and reports on some of the prisoners recommended for pardons. In November 2013 President Zuma informed Parliament the pardon process was delayed by the need to call for public comments. On 30 January 2015 the Justice Minister Mr M Masutha announced the revival of the 2007 special dispensation process. In March 2015 it was reported that NGO's hoped to meet the Justice Department to explain their opposition to resuscitating the 2007 process.<sup>67</sup>

#### Comment

- The Justice Department should be asked to report on the status of the special dispensation process.

<sup>66</sup>Ibid. Willem Coetzee, Msebenzi Radebe, Anton Pretorius and Frederick Mong were to appear in the Pretoria Magistrate's Court on February 26 2016. Mr Coetzee, Mr Pretorius and Mr Mong had applied for amnesty at the TRC for Ms Simelane's kidnapping, but not for her murder. They were refused amnesty for her torture.

<sup>67</sup>De Wet P, Political prisoners and victims still waiting for TRC closure, (Accessed at <http://mg.co.za/article/2015-03-05-trc-plight-of-political-prisoners-and-victims-unfinished-business>)



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