

**Concept Note for the Workshop on Dealing with the Past
The Unfinished Business of Truth and Reconciliation Commission in
South Africa**

Date: 15-16 April 2019

Venue: Sunnyside Park Hotel, Parktown, Johannesburg

1. Summary

The Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act) established the Truth and Reconciliation Commission (TRC) to investigate politically motivated gross human rights violations perpetrated between 1960 and 1994. The intent was to prevent such atrocities from reoccurring and to unify a divided nation scarred by past conflicts in accordance with restorative justice approach. TRC's role was primarily to uncover human rights abuses during the apartheid era through public hearings and by doing this, to contribute to the victims' right to truth. In its final Report, the TRC stressed that amnesty should not be seen as promoting impunity but "*a bold prosecution policy*" should be put in place to hold the perpetrators to the account. The TRC also formulated a reparation policy that included both individual and collective reparations, the implementation of which by the Government has been limited.

The historic compromises made during South Africa's negotiations for a peaceful transition demand that justice be pursued for serious apartheid-era crimes, such as murder or torture. The constitutional and statutory design of the amnesty process in South Africa specifically envisaged that criminal investigations, and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or failed to apply for amnesty. This has laid at the heart of the compact struck with victims but has never happened.

Although the TRC recommended at least 300 cases for investigation and prosecution, there have only been two prosecutions in the last 15 years. The recent inquests into the deaths in detention of anti-apartheid activists have brought into the spotlight information on how both the South African Police Services (SAPS) and the National Prosecuting Authority (NPA) colluded with political forces to ensure the deliberate suppression of the bulk of TRC apartheid era cases. This coupled with the attempts by the Executive to grant pardons to the perpetrators of apartheid-era crimes as well as administratively expunge their crimes and the failure by the Government to fully implement reparations recommended by TRC, have left the victims feeling betrayed, traumatized and with little hope for justice.

Despite the significant and continued challenges, the findings from the Timol's inquest, in particular the indictment of Joao Rodrigues for his role in Timol's murder coupled with the appointment of a new National Director of Public Prosecutions (NDDP), have reinvigorated hope of the apartheid victims and their families that justice might be served at last. Although the Rodrigues trial has been characterised by delaying tactics and active obstruction, including the Rodrigues's defence team requesting the permanent stay of prosecution, the trial is hoped to establish an important precedent in the prosecution of apartheid-area crimes. The outcome of the Rodrigues trial is particularly important for the families who, emboldened by the outcome of the Timol's inquest, filed another 20 cases (including in relation the Cradock 4 and Pebco 3 murders) before the NPA and the Hawks in January 2018.

In light of the above, the Foundation of Human Rights (FHR) in partnership with the South African Coalition on Transitional Justice (SACTJ) is organizing a workshop which is aimed at critically assessing the legacy of the South African TRC in particular with regard to the fulfilment of victims rights to truth (including a right to access to archives), justice, reparations and guarantees of non-recurrence. The workshop will bring together stakeholders, families of victims, lawyers working with victims and their families from South Africa to engage in a two-day discussion on the current normative framework underpinning transitional justice and contextualizing the achievements and shortcomings of the TRC process as well as the process that unfolded following the closure of the TRC in South Africa. The discussion will particularly focus on "unfinished business of TRC" having regard to the current political, social and economic context, in particular a prevailing inequality, increasing criminality and rampant corruption best demonstrating itself in "state capture". The workshop will also create a space for the apartheid-era victims and their families to speak to their experiences with TRC and its legacy, the tireless struggle to achieve justice and receive reparations, and the impact that the lack of justice and reparations have had on their life.

The final day of the workshop will provide participants with the opportunity to develop a strategy and roadmap on the way forward and also assist the Coalition to identify opportunities to continue the search for truth recovery, reparations and in particular identify creative ways of pursuing criminal accountability for serious crimes, even after decades since they had been committed. This internal workshop will also provide a foundation for an international colloquium on the "unfinished business of TRC" which is anticipated to be held in May 2019. The international colloquium will put an emphasis on the lessons learnt from other jurisdictions in terms of pursuing criminal accountability for gross violations of human rights.

2. Background

A. The South African Truth and Reconciliation Commission

The TRC Act has been probably one of the most comprehensive documents establishing a truth commission to date. It established the TRC and vested it with strong powers and broad functions, in particular the TRC was mandated to investigate politically motivated gross human rights violations perpetrated between 1960 and 1994. The South African TRC's mandate was, however, limited to the investigation of violations related to civil and political rights with the omission of sexual and gender-based violence, which was not explicitly included in the Act but was, nevertheless, investigated by TRC under "severe ill-treatment". The Commission was one of the first truth commissions set up globally and it had become a precursor in developing many of the rules which typically characterize truth commissions today. In this regard, by a way of example, the TRC Act did not provide for the integration of gender perspective into the Commission work and hence, it was in the hands of the Commission itself to establish relevant rules on the subject (e.g. women-only hearings). The TRC also had the power of search and seizure, the power of subpoena and was the first to hold public hearings.

South Africa's TRC was the first truth commission to offer amnesty to individuals who fully disclosed in public their involvement in politically motivated crimes. The amnesty proceedings were held in public before the Amnesty Committee composed solely of judges, thus resembling a judicial process to some extent. Both amnesty applicants and the victims affected by the amnesty application had a right to a legal representation (in the case of applicants the state provided a free legal representation if necessary), and the victims had a right to oppose the amnesty application.

The South African TRC also formulated a number of recommendations related to both individual and collective reparations, and institutional measures that included reforms within the military, state intelligence or detention centres, to list a few.

B. Criminal Accountability for Apartheid-Era Crimes in South Africa

a) Political Interference and Lack of Accountability

In the Final Report released on 21 March 2003 the TRC stressed that amnesty should not be seen as promoting impunity. It highlighted the imperative of "*a bold prosecution policy*" in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.¹ Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from

¹ Vol 6, Section 5, Ch 1 at para 24

apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those refused amnesty. Sadly, this has not happened.

Even though the TRC had handed over a list of around 300 cases to the NPA with the recommendation that they be investigated further, with a view to prosecution, virtually all of them were abandoned. All these cases involved gross human rights violations such as torture, murder and enforced disappearances in which amnesty was either denied or not applied for.

The reason for the NPA inaction on the TRC cases was first exposed in the 2015 legal proceedings launched by Thembi Nkadimeng who sought to compel the NPA to make a prosecutorial decision in the 1983 murder of her sister, Nokuthula Simelane, by Security Branch officers.² This application disclosed evidence of gross political interference in the operations of the NPA, *as per* the supporting affidavits of former NDPP, Adv Vusi Pikoli and Senior Counsel Anton Ackermann, former Special Director of Public Prosecutions in the Office of the NDPP and former head of the Priority Crimes Litigation Unit (PCLU). The aforesaid NPA officials were instructed and cajoled by cabinet ministers and the then Commissioner of the SAPS to stop all work on the TRC cases.

A secret Amnesty Task Team was established in 2004 to address *“the absence of any guarantee that alleged offenders will not be prosecuted”*,³ which resulted in amendments to the NPA’s Prosecution Policy to allow for a backdoor amnesty as well the launch of President Mbeki’s Special Dispensation on Political Pardons (for more details see point ‘b’). Both initiatives had to be stopped in the courts.⁴ The Nkadimeng case disclosed a memorandum addressed by Pikoli to the then Justice Minister, Bridgett Mabandla, in which Pikoli concludes that there had been improper interference in relation to the TRC cases and that he had been obstructed from taking them forward. He complained that such interference impinged upon his conscience and his oath of office.⁵

As a result, when Imtiaz Cajee approached the NPA in 2003 to investigate the death in detention of his uncle Ahmed Timol no investigation took place. The NPA pretended that the matter had been investigated when in fact it was not.⁶ Had it been investigated the lead interrogators of Ahmed Timol could have been held to account, since the last suspect only

² Thembisile Phumelele Nkadimeng vs. National Director of Public Prosecutions & 8 Others, Gauteng Division Case Number 35554/2015.

³ Undated Secret Report: Amnesty Task Team.

⁴ Nkadimeng v National Director of Public Prosecutions [2008] ZAGPHC 422; Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 (3) SA 293 (CC).

⁵ ‘Prosecution Of Offences Emanating From Conflicts Of The Past: Interpretation Of Prosecution Policy And Guidelines’ dated 15 February 2007 (classified secret).

⁶ The speaking to one journalist does not amount to an investigation. See “History, suppressed: What didn’t get revealed at the Timol inquest” by Kevin Bloom published in the Daily Maverick on 22 September 2017.

died in 2012. This amounted to a travesty of justice. Indeed, the NPA had to be threatened with litigation to have the Timol inquest reopened in 2017.⁷

The developments that emerged in the context of the proceedings on a stay of prosecution brought by Joao Rodrigues further confirmed the political interference in the TRC cases.⁸ Adv Raymond Christopher Macadam, Senior Deputy Director of Public Prosecutions in his affidavit dated 1 November 2018 revealed that in 2003 he met with Ackerman and with Special Director of the Directorate of Special Operations (DSO), Adv MG Ledwaba. Macadam recalled that the meeting was “*unpleasant as Ledwaba made it clear in no uncertain terms that the DSO would not investigate any TRC matters and that these should all be referred to SAPS.*”⁹ As a result, Macadam and Ackerman requested the Detective Service of SAPS to initiate the investigations but were informed that it was a responsibility of the DSO, and the SAPS investigation can only be conducted following the clear instructions from the President. Consequently, Macadam and Ackerman tried to persuade Ledwaba to reconsider his decision refusing investigations and prosecutions of TRC cases but were unsuccessful. In his affidavit, Macadam confirmed that a moratorium had been placed on all TRC investigations and prosecutions until the guidelines (amendments to the Prosecutorial Policy allowing for a lack of prosecutions in the case where the perpetrator had met the TRC amnesty criteria) were developed for TRC cases. In 2017, Macadam also discovered a number of documents further indicating the political interference, including a secret memorandum by Adv Pikoli to then Minister of Justice.¹⁰

The proceedings related to the application by Rodrigues to stay his prosecution has also uncovered how, till the very end, the NPA seemed to have been trying to hide the instances of political interference. In the course of the proceedings, it turned out that NPA seemed to have intentionally withheld the Macadam’s affidavit dated the 1st November 2018 instead of submitting it with its answering affidavit on the 8th December 2018 when it had a first opportunity to do so. It submitted the Macadam’s affidavit only on the 4th February 2019 following the pressure by the Mr Cajee supplementary affidavit pointing out that the NPA had withheld the affidavit of Adv Macadam.¹¹

⁷ Para 114 and sub-paras read with annexes IC21 – 24 of the answering affidavit of Imtiaz Cajee, *Rodrigues v NDPP & Others*, Case No.: 76755/18, Gauteng Division.

⁸ The High Court of South Africa, *Rodrigues v NDPP et al*, Permanent Stay of Prosecution, Fourth Respondent Heads of Arguments, Case No. 76755/18, 18 Feb 2019.

⁹ Annexure SA1, NPA SAA, p 797 para 19. See also letter addressed by Ledwaba to Leask dated 15 July 2003 reflecting this decision (Annex RCM3 pp 812 – 813) as cited in The High Court of South Africa, *Rodrigues v NDPP et al*, Permanent Stay of Prosecution, Fourth Respondent Heads of Arguments, Case No. 76755/18, 18 Feb 2019, at 24.

¹⁰ The High Court of South Africa, *Rodrigues v NDPP et al*, Permanent Stay of Prosecution, Fourth Respondent Heads of Arguments, Case No. 76755/18, 18 Feb 2019.

¹¹ *Ibid*, paras 28-31.

b) Pardons

In a move to “*promote national reconciliation and unity*” and deal with the “*unfinished business*” of the TRC, in 2007 former President Mbeki established a Special Dispensation to process applications for pardons by offenders who had not participated in the TRC amnesty process but who had claimed their offences were politically motivated.¹² He also extended the process to those whose crimes were committed after apartheid up to 16 June 1999, when non-violent channels for political action were available to all South Africans. President Mbeki established a Reference Group made of representatives from 15 political parties to make recommendations to him. The Reference Group recommended 149 individuals for a pardon, including apartheid era police minister, Adriaan Vlok, and police commissioner, Johann van der Merwe who had received suspended sentences for their role in the attempted murder by poisoning of former South African Council of Churches head, the Rev Frank Chikane in the late 1980s.¹³ President Mbeki had also declared that the process would comply with the principles and values of the TRC, in particular the requirement to disclose the full truth and the political motive for a crime.

Initially, the Reference Group refused to allow victims and the public access to their information, and did not permit victims to participate in the process or make representations to them. Consequently, in 2009 the SACTJ composed of human rights organizations approached the High Court in Pretoria and obtained an interdict against Acting President Kgalema Motlanthe from granting such political pardons without seeking the views of victims and interested parties. The truth requirement in the special pardons process was also upheld by the Constitutional Court in *Albutt* as a fundamental precondition.¹⁴ Because these pardons were designed to complete the “*unfinished business*” of the TRC, Chief Justice Sandile Ngcobo held “*the principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation. As with the TRC process, the participation of victims and their dependants is fundamental to the special dispensation process.*”¹⁵ As a result of the judgment by the Constitutional Court, the Department of Justice and Constitutional Development (DOJ&CD) allowed the victims and their families to participate in the process by granting them 30 days to respond to the published list of applicants, without however, contacting them directly or providing further information on the process or applications.

¹² <https://www.iol.co.za/news/politics/mbeki-hailed-for-presidential-pardons-379770>

¹³ <https://www.ictj.org/news/zuma%E2%80%99s-presidential-pardons-process-%E2%80%9Cunconstitutional%E2%80%9D>

¹⁴ *Albutt v Centre for the Study of Violence & Reconciliation* 2010 (3) SA 293 (CC) at par 59 – 61, 65, 67 and 70 – 72.

¹⁵ *Ibid.*, par 61.

All subsequent administrations, including President Zuma,¹⁶ have been trying to move the pardon process forward, however, with the opposition from SACTJ, victims and their families, the process has effectively stalled.

c) Inquests

Despite pressure on the NPA, by 2004 it was clear that the NPA did not want to pursue the TRC cases. The FHR then secured the services of Mr Frank Dutton, one of South Africa's eminent investigators, to do an analysis of all of the amnesty data with a view to selecting key cases to pursue prosecutions. Mr Dutton provided the FHR with a list of 26 cases which have now been whittled down to 12, and which the Foundation is supporting taking forward.

The Timol inquest supported by the Foundation, generated a lot of interest from the public in general who avidly followed each day's testimony on social and traditional media. A request by the presiding judge that anyone having information of what transpired on the infamous 10th floor at John Vorster Square should come forward led to the court issuing a subpoena for Captain Sans to appear in court to explain his involvement in torture referred to in affidavits deposed to by other detainees.

Ahmed Timol was an anti-apartheid activist who had been viciously tortured and murdered by the notorious Security Branch of the South African Police (SAP) on the 10th floor of Police Headquarters at John Vorster Square. In 2017, following the re-opened inquest into the death of Ahmed Timol, Judge Mothle overturned the inquest from 1972 and confirmed the version that the Timol family had maintained for decades.¹⁷ Judge Mothle found that Ahmed Timol did not commit suicide in 1971 but was gruesomely tortured and murdered by Security Branch.¹⁸ Judge Mothle also recommended three individuals for prosecution, including Joao Jan Rodrigues – a 79-year old Captain in SAP, now retired. The Judge recommended that Rodrigues be tried for his role in the murder of Ahmed Timol, as he was alleged to be present in the interrogation room when Timol was tortured and then allegedly helped the Security Branch to cover the murder.¹⁹ Despite the findings of the 2017 inquest, it took the NPA nine months to charge Rodrigues with accessory murder and perjury.²⁰ Moreover, soon after his indictment in July 2018 Rodrigues filed the notice of motion for a permanent stay of prosecution and withdrawal of charges arguing on the constitutional

¹⁶ <https://www.ictj.org/news/zuma%E2%80%99s-presidential-pardons-process-%E2%80%9Cunconstitutional%E2%80%9D>

¹⁷ High Court of South Africa, Gauteng Division, *The Re-Opened Inquest into the Death of Ahmed Essop Timol*, Judgment, 12 October 2017, Case No. IQ01/2017. See also e.g. News24, *Timol Judgment Brings to the Family* (12 October 2017) available at <https://www.news24.com/SouthAfrica/News/timol-judgment-brings-closure-to-family-20171012> (last visited 9 January 2019).

¹⁸ *Ibid.*, *Inquest Judgment IQ01/2017*, par. 316, 318, 320(6), 320(11).

¹⁹ *Ibid.*, pars. 328 – 334.

²⁰ Daily Maverick, *Apartheid cop gets bail for Ahmed Timol murder, 47 years later* (30 July 2018) available at <https://www.dailymaverick.co.za/article/2018-07-30-apartheid-cop-gets-bail-for-ahmed-timol-murder-47-years-later/> (last visited 24 January 2019).

grounds that he was too old to face prosecution and attend the trial, and that the delay in investigation and prosecution in the Timol matter was too lengthy.²¹

Emboldened by the outcome of the reopened Timol Inquest, human rights activists placed 20 more cases (including in relation to the Cradock 4 and Pebco 3 murders) before the NPA and the Hawks in January 2018. Although the Hawks appointed investigating officers it was subsequently discovered that the officers leading the investigations were former Security Branch or associated therewith. The most senior investigator had been allegedly implicated in the torture of a political detainee in the 1980s. This detainee, together with his wife, were subsequently shot dead by the Security Branch, after he sued the SAP for damages. Although the two officers have since been removed from these investigations following complaints, it is hardly surprising that no progress has been made in any of these 20 cases. As recent as 2018 it is still business as usual with the TRC cases ultimately controlled by forces from the past.

C. Reparations

Whereas the South African TRC has developed a relatively good policy on both individual and community reparations, their implementation has been far from successful. By a way of example, the South African TRC recommended individual grants amounting to R20.000 a year for a period of six years but President Thabo Mbeki decided on a one-time payment of R30 000 per victim or surviving family without providing rationale for such a decision.

In a situation of transition, decision makers often ask themselves a question on how to define and count the victims of gross human rights violations. A similar issue arose in South Africa, where ultimately it was decided that the TRC would be responsible for developing a database and registering the victims. The registration in this database comes with a number of advantages i.e. eligibility for individual reparations. Many observers, activists and victims argue, however, that a so-called 'closed list of victims' discriminates against those who feared or were too traumatized to come forward at the time when the TRC was operational. In South Africa, a victim-based organization, the Khulumani Support Group, has been known for its advocacy work around the re-opening of the TRC victims list and has even created its own, alternative list of apartheid victims who have not be included in the TRC list.

Moreover, while the TRC handed in the recommendations on how to deal with community reparations and rehabilitation to the President already in 1998, the Government failed to act on these recommendations until July 2018. In 2018, the DOJ&CD published regulations on community reparations without any prior consultation with the affected communities.

²¹ Mail&Guardian, *Apartheid cop accused of 'delay tactics' to avoid murder trial* (15 October 2018) available at <https://mg.co.za/article/2018-10-15-apartheid-cop-accused-of-delay-tactics-to-avoid-murder-trial> (last visited 24 January 2019).

Furthermore the DOJ&CD arbitrarily selected seven communities who would receive R30million each by the end of March 2019 under a pilot phase. This decision was opposed by civil society and the SATJC because dealing with community reparations in a piecemeal fashion without buy-in from all the relevant stakeholders can lead to disputes from communities who were not included in the pilot phase. Furthermore, the publication of regulations before the finalisation of a policy on community reparations and rehabilitation was an irregular step.

D. Archives

Seeking information from archives is instrumental for victims to realize their right to know the truth. The legal and normative justification for promoting and protecting human rights archives rest largely on the concepts of the 'right to know' and the corresponding 'duty to record'. Principle 14 of the United Nations Updated Principles to Combat Impunity, establishes that the right to know implies that archives must be preserved and measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law.²²

In South Africa, the TRC amassed its own archive and also sought to preserve other archives so that it could use it in its own work to corroborate evidence it gathered but also to establish the former state's own records of a particular event or case. The TRC faced a number of challenges in terms of access to information. Already at the beginning of its work it found out that tons of state documents were shredded by the apartheid government. It also faced difficulties in accessing military archives and in order to end the impasse between the TRC and military, the latter established nodal points to whom TRC would make requests for documentation – a solution that proved to be a total disaster.

The TRC formulated extensive recommendations on the access to information and archives particularly in relation to the TRC archives, destruction of documents, and on retrieving and archiving state documents.²³ Regarding the TRC records, the Commission recommended that they be transferred to the National Archives when the codicil to the Final Report is made public. Moreover, the TRC said that all records should be accessible to the public unless compelling reasons exist for denying such access and that DOJ&CD should make a public statement of intent to transfer archive and issue guidelines for basic access these records.²⁴ However, it required a number of never-ending legal battles in courts and out of court

²² Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

²³ http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/McKinley%20-%20FOI%20in%20South%20Africa.pdf

²⁴ Ibid.

settlements by the NGO, the South African History Archives (SAHA) to get information on the list of documents that were transferred by DOJ&CD from TRC to the National Archives (TRC archives remain legally a property of DOJ&CD), information on the 38 groups of military intelligence records that were withheld from the TRC by the Department of Defence, or access to TRC records that were classified as confidential. Despite the tireless work of SAHA and constitutional provisions ensuring the right to information, an access to National Archives, including the TRC records remains significantly restricted in South Africa.

Attorneys representing the families of the victims killed in detention have had to, with great difficulty, make up incomplete court files using the services of private investigators, search archives kept at universities, and in some instances, rely on files kept by counsel who represented the families at inquests. It has become increasingly difficult to retrieve documents pertaining to the TRC records from the archives. Access to these documents has been deliberately impeded by poor filing of the documents and of late, the staff at the archives have requested that attorneys submit an application in terms of the Promotion of Access to Information Act (PAIA) to gain access to public documents. The PAIA procedure is cumbersome, time consuming and an administrative nightmare in that officials can just ignore requests leaving the requester with the final option of pursuing a High Court application to compel officials to grant access to the documents in question.

E. Guarantees of Non-Recurrence

While the concept of guarantees of non-recurrence of violations had been developed only in the late 1990' when the United Nations adopted the Principles to Combat Impunity,²⁵ the South Africa TRC was mandated already in 1995 to *"make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures which should be taken or introduced in order to prevent the commission of violations of human rights."*²⁶ This sentence is in fact the reflection of what today is called *"the guarantees of non-recurrence"*. In 2015, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff made an attempt to provide a conceptual clarity on *"guarantees of non-recurrence"*.²⁷ He developed a policy framework that has been premised of three types of non-recurrence interventions, namely those at the level of state institutions, civil society, and the spheres of culture and personal dispositions, also recognizing their complementary nature.²⁸

²⁵ ECOSOC-Commission on Human Rights (ECOSOC-CHR), The Administration of Justice and the Human Rights of Detainees. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. L. Joinet, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 (hereinafter 'Joinet Principles').

²⁶ Section 4(h), TRC Act of 1995.

²⁷ *Human Rights Council (HRC), Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/30/42, 7 September 2015.*

²⁸ *Ibid.*

In its Final Report, the South African TRC recommended a number of context-specific institutional reforms aimed at reforming security sector institutions as well as legal and constitutional system. By a way of example, the TRC recommended reforms within prisons, intelligence services, South Africa National Defence Force, SAPS and formulated a number of measures to be undertaken in terms of a legal system e.g. access to justice for the victims of crimes or abolition of informal courts.²⁹ The South African TRC, however, did not recommend vetting of security forces, which probably reflected the compromise negotiated during the transition.³⁰ It could be argued that the lack of vetting and absence of transformation in a number of state institutions i.e. NPA or higher education institutions have contributed to a number of challenges that South Africa has been facing today i.e. corruption, state capture, political interference in the independent institutions or student protests.

3. Implementation

The FHR's mission since its inception in 1996 has been to address inequality and promote and entrench human rights values as enshrined in the South African Constitution. In 2014 FHR launched a Socio-Economic Rights for All Programme (SEJA), also known as *Amarightza* aimed at bringing together CSOs in South Africa to work with Government departments, the independent Chapter Nine institutions as well as other relevant stakeholders in order to enhance the participatory democracy, raise awareness of human rights, in particular the socio-economic rights, and to mainstream human rights-based approach. One of the key indicators under the SEJA programme is an improvement of a sector co-ordination and policy design on constitutional development (Key Result Area 5). In order to achieve this goal, the FHR has been supporting research on the barriers faced by vulnerable and marginalized groups in accessing justice, and development of effective remedies (Key Result Area 5.1.(iv)).

4. Outputs

The FHR has since its inception funded civil society organisations working in the field of dealing with issues linked to political crimes perpetrated during the apartheid period and was actively involved in advocacy and policy development work around issues related to accountability for past crimes. This has included support to victims groups, those dealing with the archives, reparations, and prosecutions. Addressing impunity and building accountability has thus been a key element of the work of the FHR in partnership with members of the SACTJ.

In particular, the Foundation has been engaged in the following initiatives:

²⁹ <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>

³⁰ *Ibid.*, pars 17-19.

- In 2001, it assisted the TRC to finalize its Final Report to Government.
- It has supported Khulumani Support Group – the organisation representing victims to pursue its submission to the Government of South Africa on reparations, and also supported the preparatory work for their litigation under the Aliens Tort Claim Act in the USA against foreign companies.
- It engaged with the NPA to secure prosecutorial guidelines. It also provided support to the Legal Resources Centre and South African Litigation Centre in this regard.
- It supported litigation against the President opposing his use of presidential pardons to provide another opportunity for amnesty.
- The Foundation also provided the initial grant to the Missing Persons Unit at the NPA in order for the Unit to recruit staff and begin its work. Today, its exhumation work contributing to truth recovery is acknowledged in the region.

5. Problem Statement

The adoption in 2005 of the Updated Principles to Combat Impunity by the General Assembly of the United Nations,³¹ sets out a holistic framework to transitional justice that addresses both the duties of states and rights of victims through the promotion of a series of mutually reinforcing initiatives in the field of truth, justice, reparation and guarantee of non-recurrence, with the view to promoting accountability and maximizing victims' satisfaction.

The historic compromises made during South Africa negotiations for a peaceful transition demand that justice be pursued for serious apartheid-era violations, many of which constitute international crimes. This was encapsulated in the postscript to the Constitution of the Republic of South Africa Act 200 of 1993 and subsequently in the Promotion of National Unity and Reconciliation Act 34 of 1995. The failure to investigate and prosecute those who were not amnestied, and poor implementation of reparations recommended by TRC represent a deep betrayal of all those who participated in good faith in the TRC process. It completely undermines the very basis of South Africa's historic transition. The failure is wholly inconsistent with the spirit and purpose of South Africa's constitutional and statutory design in dealing with crimes of the past.

The Foundation is of the view that truth recovery, criminal justice, reparation and non-recurrence processes are important mechanisms to ensure accountability in South Africa. The TRC Act provided that if amnesty had been denied or not applied for, the law should follow its course with perpetrators responsible for violations being prosecuted. The Foundation is also of the view that links need to be made between the perpetrators of apartheid and the institutional culture of impunity that remains a key element of how certain elements of the state function, such as the security forces and intelligence. At the heart of the matter is whether these institutions were ever dismantled from its apartheid structures. These are important questions which the new South Africa is dealing with.

6. Objectives of the Workshop

- a) To reflect on the legacy of TRC in South Africa by taking stock of the current political, social and economical context in South Africa;
- b) To critically assess the achievements and shortcomings of the TRC process in South Africa, in particular in view of victims right to truth, justice, effective remedy and guarantees of non-recurrence;

³¹ Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

- c) To take stock of the full implementation of the TRC recommendations in respect of reparations, criminal accountability, the preservation and access to the archives and measures to achieve institutional reform to date in the years following the handing over the final reports in 2003;
- d) To examine the use of inquests as a creative way of seeking truth about the events and a form of accountability, and to formulate a 'looking forward strategy' in this regard;
- e) To discuss the possible ways forward in terms of TRC's recommendations on community reparations and rehabilitation, and their prompt implementation;
- f) To examine and critically assess the state of the National Archives in South Africa, in particular challenges in accessing the archives; to analyse the role the archives could play in ensuring criminal accountability, truth, reparations and guarantees of non-recurrence, and to formulate best practices and lessons learnt in this regard;
- g) To create a space for the apartheid-era victims and their families to speak to their experiences with TRC and its legacy, the tireless struggle to achieve justice and receive reparations and the impact the lack of justice and reparations have had on their life.

7. Expected Outcomes

The following outcomes are expected:

- a) To critically assess the successes to date in respect of truth recovery, reparations, archives, criminal accountability and measures to achieve the guarantee of non-recurrence;
- b) To identify the outstanding issues in respect of the Government's delivery in terms of their obligations i.e. reparations;
- c) To identify challenges facing the National Archives and the role they can play in seeking justice for the victims of apartheid, and formulate relevant recommendations for their improvement;
- d) To develop a strategy and road map going forward in term of criminal accountability, truth recovery, archives and guarantees of non-recurrence having regard to new and creative ways of seeking justice for the victims;

- e) To develop a strategy going forward in term of individual and community reparations.

8. Date and Venue of Workshop

The Workshop will be held between the 15th and 16th of April 2019 in Johannesburg. This will be followed by an International Colloquium to be hosted in May 2019.