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From: South African Coalition for Transitional Justice (SACTJ)

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RE: Comments: The Promotion of National Unity and Reconciliation Act, 1995:
Education Assistance and Medical Benefits Regulations

I. INTRODUCTION

The South African Coalition for Transitional Justice (SACTJ or the Coalition) submits the following comments regarding the May 11, 2010 General Notice 282 published in the Government Gazette. The SACTJ consists of the Khulumani Support Group, Centre for the Study of Violence & Reconciliation, Institute for Justice and Reconciliation, Human Rights Media Centre, South African History Archives, International Center for Transitional Justice, Freedom of Expression Institute and the Trauma Centre for Victims of Violence and Torture.

The SACTJ is an umbrella body of organizations working to advance the rights of victims of past conflicts and to hold the South African government accountable to its obligations. The member organisations are committed to helping secure the rights of victims of apartheid-era human rights violations, raising awareness about these rights and holding government accountable to its obligations. The Coalition focuses on issues that impact the rights of victims of apartheid-era abuses including pardons, prosecutions, reparations and disappearances.

South Africa's experience confronting the legacies of apartheid has played a ground breaking role in the development of the field of transitional justice. However, South Africa has to date failed to provide accountability in many deserving cases or to deliver adequate reparations to victims who sacrificed so much for the liberation of the country. While the promulgation of these regulations does reflect at long last an acknowledgment on the part of government that action is needed on the question of reparations, these proposals are seriously defective in many respects.

II. EXECUTIVE SUMMARY

The Coalition objects to the Notice 282 regulations on procedural, constitutional, and international law grounds. The Coalition's first main objection is the failure of the Department of Justice and Constitutional Development (DoJ) to meaningfully involve victims in the conceptualisation and drafting process. All victims have the right to public participation, and despite their substantial efforts to engage with government over the past

twelve years, they have consistently been denied any meaningful opportunities to participate and partner with government.

The Coalition's second main objection is the failure of the DoJ to extend these educational and medical benefits to all victims of gross human rights violations, as contemplated in the Promotion of National Unity and Reconciliation Act of 1995 (the TRC Act or the Act)—the enabling law behind these regulations. This closed list policy is inconsistent with the plain and just interpretation of the Act. The Act contains no provisions that support a closed list of victims eligible for reparations; it only stipulates the type of harm that a person must have suffered in order to be considered a victim. Furthermore, the closed list policy conflicts with the purpose of the Act, which seeks to rehabilitate and restore the human and civil dignity of victims.

Moreover, our Constitution promotes social, economic, and community rights. This closed list policy is contrary to the Constitution preamble, which commits to healing the divisions of the past and establishing a society based on social justice. It is also contrary to the Constitution section 1 values of accountability, responsiveness, and openness. A closed list policy is offensive to victims' constitutional right to equal protection under the law. The DoJ's differentiation between victims bears no rational connection to any legitimate government purpose. It moreover amounts to unfair discrimination since it impairs the fundamental human dignity of thousands of victims who are not on the closed list.

Further, the failure to extend reparations to all victims of apartheid violates South Africa's obligations under international law, reflected in a number of human rights instruments that South Africa has ratified. The Universal Declaration of Human Rights as well as the International Covenant on Civil and Political Rights provides that every person who has been a victim of gross human rights violations is entitled to an effective remedy. South Africa lags behind countries such as Brazil, Peru, Guatemala, and Sierra Leone, which have established ongoing victim registration procedures. Other countries such as Argentina and Chile have repeatedly extended or reopened victim registration procedures.

The Coalition is also concerned that the many unnecessarily complicated administrative procedures contained in the Notice 282 regulations will potentially render the proposed assistance inaccessible to many.

Therefore, the Coalition respectfully submits the following comments and recommendations, including: that the DoJ undertake an open and transparent process of consultation and dialogue with civil society to revise the Notice 282 regulations so as to be more responsive to victims' needs; that the DoJ allow all those who are victims of gross human rights violations under the criteria specified in the Promotion of National Unity and Reconciliation Act to access these educational and medical benefits; that the DoJ establish ongoing victim registration procedures and take affirmative steps to register all victims of gross human rights violations.

III. COMMENTS

1) The Failure to Meaningfully Involve Victims in the Law-Making Process Undermines Their Constitutional Rights.

Between 1999 and the present date, the Khulumani Support Group (Khulumani)—an organization of survivors and families of victims established in 1995—and other groups have

engaged in a range of activities to persuade the government to address the needs of victims. All these efforts have fallen on deaf ears.

i) Highlights from 12 years of campaigning.

Activities have included multiple marches to Parliament, the Union Buildings and the Ministry of Justice. Meetings have been held with the Department of Justice and Constitutional Development (DoJ), and numerous letters and memoranda have been addressed to the Office of the President, the Ministry of Justice and the Public Protector. Khulumani and other groups have issued many press statements and hosted workshops, conferences and a reparations indaba to which government representatives have been invited.

In 2001, the Ministry of Justice handed a draft reparations policy to cabinet. Khulumani requests for a copy were ignored. A Promotion of Access to Information Act (PAIA) request was lodged and refused. The appeal was refused.

Khulumani organized a national reparations indaba in April 2001 in Cape Town. Representatives from Special Pensions Unit, DoJ, Department of Arts and Culture, and Department of Finance (President's Fund) attended. All serious requests raised were ignored by government.

After President Mbeki's announcement on reparations to a joint sitting in Parliament on April 15, 2003, officials in the DoJ drafted regulations for the payment of reparations. An Ad Hoc Parliamentary Committee on Reparations was appointed, and Khulumani was given only 6 days notice to provide its submission. Both Houses of Parliament accepted the report of the Ad Hoc Committee, which was formulated without wide consultation with civil society and without the participation of Khulumani.

In August 2003, a National Civil Society Dialogue on Reparations was held involving 30 civil society organizations as well as government representatives, including the Minister of Justice. Amongst other recommendations, Khulumani argued for the creation of a Victim / Reparations Desk within government. Following that workshop, Khulumani convened a panel of experts to develop Victim-Centred Policy Proposals. These were presented to a legal team in the Office of the President and to the Director General of Justice on October 29, 2003—the fifth anniversary of the handing over of the TRC report to President Mandela on October 29, 1998. There was no response from the President or the Minister of Justice to these proposals.

During the course of 2004, Khulumani convened focus groups of victims in every province to assess what had happened in their lives during the first decade of democracy. These were sent to every Member of Parliament. Only 2 MPs responded. A booklet of victims' reflection was produced to illustrate their needs and widely distributed to critical stakeholders over the next few years. The TRC Unit expressed unhappiness with the booklet. Victims transformed these reflections into a Charter for Redress that was presented to the TRC Unit and government.

Once the TRC Unit was set up towards the end of 2005, Khulumani made repeated attempts to hold a meeting with the Unit. The head of the Unit advised that it would take up to a year for the Unit to begin its work. Khulumani delivered its reparations proposals to the Unit and unsuccessfully sought a roundtable on the proposals. Khulumani then called upon the Justice Minister and Deputy Minister to respond to their proposals. Khulumani was advised by the Deputy Minister that Khulumani would have received a response if there had been any value in the proposals.

Efforts to build an effective working relationship with the Unit continued, and Unit staff members were invited to every advocacy initiative organized by Khulumani. The Unit sent one representative to all these events. Khulumani also made submissions to the TRC Unit on their exhumations policy and to Parliament on proposals to amend the Special Pensions Act. Khulumani made a PAIA request for the audited statements of The President's Fund and monitoring reports to Parliament by the Unit.

The advocacy efforts over many years have resulted in no substantive engagement between the TRC Unit and organized victim communities in South Africa. This led various organisations concerned with transitional justice to come together in a formal coalition, the SACTJ. During July 2010, the Coalition held a workshop in Johannesburg titled "Towards Implementation of Reparations for Apartheid Victims & Survivors." One member of the TRC Unit, who was prohibited from speaking to the group, attended part of the workshop. Amongst the topics of discussion was the TRC Unit's mandate, as well as its policy on the President's Fund. The workshop group resolved to express its concerns in a written document to the TRC Unit. It was agreed to conduct a national consultation on reparations between civil society and the government. In a letter dated July 27, 2010, the Coalition sought a meeting with the DoJ and registered its position that the drafting of regulations concerning the disbursement of funds from The President's Fund without victim participation, violates both the principles of the Constitution and of the TRC.

Member organizations of the Coalition met with representatives of the DoJ and the TRC Unit on November 4, 2010. The coalition called for a national consultation between government and civil society to deal with the unfinished business of the TRC. The DoJ conceded that it had been exceedingly slow in delivering on matters related to the urgent needs of victims and advised that there were still no empowering regulations on providing identified victims or their dependants with access to education or medical care. The meeting attendees noted that, prior to this meeting, not a single policy consultation had taken place between government and civil society organizations that worked with victims. The DoJ expressed that it too had concerns with its draft Community Rehabilitation proposals, because they had been compiled in the absence of any needs assessment.

The meeting concluded with the following agreements: The DoJ committed to including the Coalition in all policy discussions and plans going forward. The DoJ stated that the Coalition "will be part of the process of putting regulations in place" and that a consultation would be held between the DoJ and the organizations in the SACTJ with a special focus on consultation on community rehabilitation proposals. The DoJ agreed that it was not appropriate for government to be deliberating on these matters on its own. The meeting attendees acknowledged that the TRC had stated that processes would have to be created to address the reality that it had reached only around 21,000 victims. The DoJ agreed that regulations might be able to deal with the many persons who qualify in terms of the TRC's criteria but who were not on the TRC list. The DoJ stated that it would explore new ways of expanding the inclusion of victims. In particular, the DoJ stated that it would now be possible to work together with civil society on policies related to education and health, given that civil society organizations were collaborating in such substantial ways.

The one day workshop with the DoJ took place at its Head Office in Pretoria on December 13, 2010. Agenda items included a focus on the President's Fund, approaches to fulfilling government's reparations obligations to victims—including medical and

educational assistance and government's draft proposals on Community Rehabilitation—and presentations on data on identified victims. The main conclusions of the discussions were that it would be possible for government to collaborate with civil society to resolve the unfinished business of the TRC; that every victim of an apartheid gross human rights violation needs formal recognition; that reparations need to address the serious disadvantages that continue to characterize the lives of many victims; and that an inclusive process of victim identification and verification needs to be undertaken from scratch. The DoJ suggested that there should be presentations to the Portfolio Committee on Justice and Constitutional Development in Parliament. The Coalition later learned that the TRC Unit had presented the regulations presently open for public comment to this Portfolio Committee, which had indicated that it too wished to hear the perspectives of victims themselves. The Coalition was, however, never invited, and the present regulations were gazetted in the absence of such consultations.

During the first quarter of 2011, correspondence was addressed to the DoJ and TRC Unit to follow up on different agreements reached at the November and December 2010 events. The TRC Unit responded each time that their consultations with different departments were taking longer than expected, and they asked each time for more patience. Without any further communication, let alone the sharing of drafts for discussion purposes, the DoJ went ahead and promulgated the regulations. On Friday, May 13, 2011, the Coalition was first made aware of the publication of the DoJ proposals on health and education benefits in the Government Gazette on Wednesday, May 11, 2011. In a further letter to the TRC Unit, the Coalition expressed its great dismay and deep disappointment at the gazetting of the proposals without the promised follow-up engagement and agreed-to national consultation.

- ii) The following conclusions can be drawn from the attempts by civil society to engage with government.

The experiences outlined above demonstrate a clear lack of intent on the part of the authorities to engage meaningfully, or at all, with interested parties. The first meaningful consultation with groups representing victims only took place in November 2010. Notwithstanding promises to involve these organisations in the drafting of regulations, the DoJ, without any further reference to the groups in question, went ahead and gazetted draft regulations. This conduct is entirely consistent with the government's dismissive approach to victims over the past 12 years. The Coalition is concerned that this step may be an act of bad faith and an indication that the DoJ is simply going through the legally required motions with the intention to forge ahead without meaningful consultation with victims.

The mere ability to lodge submissions does not in our view constitute meaningful consultation. Meaningful consultation would not have involved a secret drafting process. It would not have involved ignoring the very groups which the DoJ had promised to involve in the drafting process and then merely inviting them to comment as members of the public. Past and current practice suggests that by the time laws and regulations appear in the Government Gazette fundamental changes are probably unlikely. At this stage, government departments behind such drafts are often simply pursuing a defence of their drafts. Our Constitutional Court has held that the democracy our Constitution demands is not merely a representative one, but is also, importantly, a participatory democracy.¹ In particular it has

¹ Doctors for Life Int'l v. Speaker of the Nat'l Assembly and Others 2006 (6) SA 416 (CC) (S. Afr.).

held that “meaningful opportunities” must be provided “for public participation in the law-making purpose.”²

Importantly, the Court has held that public involvement includes “a continuum that ranges from providing information and building awareness, to partnering in decision-making.”³ The Court itself stipulated that “[m]erely to allow public participation in the law-making process is, in the prevailing circumstances, not enough. More is required. Measures need to be taken to facilitate public participation in the law-making process.”⁴ Before simply gazetting what the DoJ would like to make law, it ought to have engaged with those who would be affected by the new provisions through road shows, regional workshops, radio programmes and publications. Khulumani and the Coalition would have made perfect partners in such a programme.

In the context of South Africa’s historic project of national unity and reconciliation, the Constitutional Court has specifically ruled in favour of an open and participatory approach to understanding our democracy and dealing with the need for reconciliation that underlies it.⁵ The Court noted that “given our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational.”⁶ The Court added that decision making in such a context that excluded victims was “entirely inconsistent with the principles and values that underlie our Constitution,” such as the “principles of accountability, responsiveness and openness.”⁷

We submit that the DoJ has chosen not to provide meaningful opportunities for public participation in the regulation-making process, notwithstanding its general invitation to the public to make comments. It has specifically decided not to partner with relevant organizations in the decision-making process. In the context of designing reparations for victims of our past conflicts, it was obliged to do so. There can be no doubt that the objectives of such a process include the promotion of national reconciliation and national unity. In the circumstances the DoJ’s exclusion of victim participation, and in particular its persistent rejection of attempts by Khulumani and the Coalition to partner with it, are wholly irrational. We submit that such exclusion betrays the principles and values of the TRC and is entirely inconsistent with the principles of accountability, responsiveness and openness that underpin our Constitution.

² *Id.* at 468 para. 129.

³ *Id.*

⁴ *Id.* at 468 para. 130.

⁵ *Albutt v. Centre for the Study of Violence and Reconciliation and Others 2010 (5) SA 293 (CC) (S. Afr.).*

⁶ *Id.* at 318 para. 69.

⁷ *Id.* at 319 para. 71.

2) *The Failure to Extend Reparations to Victims Outside the “Closed List” is Unconstitutional.*

The Notice 282 regulations relating to education define “victim”⁸ as “a person who has been *found by the Commission* to be a victim as defined in paragraphs (a) and (b) of section 1 (1) of the Promotion of National Unity and Reconciliation Act 34 of 1995” (The TRC Act or the Act). The Annexure Request Forms for educational assistance state: “This request form may only be used if: you have been *identified as a victim*” by the TRC (emphasis added). The Notice 282 regulations relating to medical benefits use the term “*listed victim*,” which is defined as a person who has been identified as a victim in Volume 7 of the Truth and Reconciliation Commission of South Africa Report.⁹ The Annexure Request Form for medical benefits contains the additional requirement that the victim’s name be “*listed in Volume 7 of the Truth and Reconciliation Commission of South Africa Report*” (emphasis added).

i) A closed victims’ list is inconsistent with the TRC Act

The restriction of reparations to a closed list, or only those found by the TRC to be victims, is inconsistent with the terms of the Act. The Act merely stipulates in section 1 (1) that a victim must have suffered certain harm.¹⁰ Consistent with international norms of the time, such as the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)* the Act tied the concept of “victimhood” to harm, defining “victims” broadly to include not only the direct targets of the human rights violations, but also potentially the victims’ families and the extended communities of harm that surround them. Nowhere in the Act is there any reference or indeed any contemplation that reparations, which includes any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition¹¹ will be restricted to only those found to be victims by the Commission. While the Committee on Reparation and Rehabilitation was authorised to recommend recommendations in respect of individuals who applied for reparations in terms of section 26 of the Act,¹² it was also

⁸ Regulations Relating To Assistance To Victims In Respect Of Basic Education § 1 and Regulations Relating to Assistance To Victims In Respect Of Higher Education And Training § 1, Government Notice (GN) R282/2011 (S. Afr.) (emphasis added).

⁹ Regulations Relating To Medical Benefits For Victims, § 1.

¹⁰ “[V]ictims’ includes- (a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights- (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted; (b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such persons intervening to assist persons contemplated in paragraphs (a) who were in distress or to prevent victimization of such persons.” Act 34 of 1995 § 1 (1) (S. Afr.).

¹¹ *Id.*

¹² Promotion of National Unity and Reconciliation Act 34 of 1995 § 26 (S. Afr.) (“Applications for reparation. (1) Any person referred to the Committee in terms of section 25 (1) (a) (i) may apply to the Committee for reparation in the prescribed form. (2) (a) The Committee shall consider an application contemplated in subsection (1) and may exercise any of the powers conferred upon it by section 25. (b) In any matter referred to the Committee, and in respect of which a finding as to whether an act, omission or offence constitutes a gross violation of human rights is required, the Committee shall refer the matter to the Committee on Human Rights Violations to deal with the matter in terms of section 14. (3) If upon consideration of any matter or application submitted to it under subsection (1) and any evidence received or obtained by it concerning such matter or application, the Committee is of the opinion that the applicant is a victim, it shall, having regard to criteria as

required to make recommendations in respect of victims more generally in terms of section 4 (f) (i) of the Act.¹³ Recommendations made in terms of section 4 (f) (i) have to be dealt with by Parliament in terms of section 27.¹⁴ Neither of these sections stipulates nor suggests that such reparations are to be confined just to persons determined by the Commission to be victim.

While the Commission recommended payments in money by way of urgent interim reparation and individual reparation grants only to persons found by the Commission to be victims,¹⁵ it recognized that reparations by way of health, education and other health services needed to go beyond those recommended for individual monetary grants.¹⁶ Although the TRC adopted a ‘closed list’ policy in order not to unduly burden government (which it claimed effectively limited the payment of individual grants to those who made statements to the Commission before December 15, 1997), it recognized that there were many thousands of victims who, for a variety of reasons, were unable to access the Commission.¹⁷ Indeed, the Commission itself noted that since the “Commission stopped taking statements in December 1997, hundreds of people have come forward to make statements. Unfortunately the Commission had to make the painful decision to restrict the list of victims to those who came forward before the cut-off date.”¹⁸ In its introduction to its list of victims the Commission stressed that the “list is not intended to be exhaustive of all those who may be defined as victims of Apartheid”.¹⁹ The Commission was also notified by victim groups that they had collected more than 8,000 statements between December 1997 and January 2002 from victims who were unable to access the Commission.²⁰

The cut-off date for the submission of statements of December 15, 1997 was determined as a practical measure, given the Commission’s available resources and

prescribed, make recommendations as contemplated in section 25 (1) (b) (i) in an endeavour to restore the human and civil dignity of such victim.”).

¹³ *Id.* at ch. 2, § 4 (f) (i) (“4(f) make recommendations to the President with regard to- (i) the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; (ii) measures which should be taken to grant urgent interim reparation to victims.”).

¹⁴ *Id.* at ch. 2 § 27 (“Parliament to consider recommendations with regard to reparation of victims. (1) The recommendations referred to in section 4 (f) (i) shall be considered by the President with a view to making recommendations to Parliament and making regulations. (2) The recommendations referred to in subsection (1) shall be considered by the joint committee and the decisions of the said joint committee shall, when approved by Parliament, be implemented by the President by making regulations. (3) The regulations referred to in subsection (2)- (a) shall- (i) determine the basis and conditions upon which reparation shall be granted; (ii) determine the authority responsible for the application of the regulations; and (b) may- (i) provide for the revision and, in appropriate cases, the discontinuance or reduction of any reparation; (ii) prohibit the cession, assignment or attachment of any reparation in terms of the regulations, or the right to any such reparation; (iii) determine that any reparation received in terms of the regulations shall not form part of the estate of the recipient should such estate be sequestrated; and (iv) provide for any other matter which the President may deem fit to prescribe in order to ensure an efficient application of the regulations. (4) The joint committee may also advise the President in respect of measures that should be taken to grant urgent interim reparation to victims.”).

¹⁵ TRC of S. Afr. Report, Volume 5, ch. 5, ¶¶ 33 & 45.

¹⁶ *Id.* at ¶¶ 190–93.

¹⁷ TRC of S. Afr. Report, Volume 6 S 5, ch. 7, ¶ 36.

¹⁸ TRC of S. Afr. Report, Volume 7, p. 2.

¹⁹ TRC of S. Afr. Report, Volume 7, p. 3.

²⁰ TRC of S. Afr. Report, Volume 6 S 5, ch. 7, ¶ 36.

timeframes to complete its work. That this date has now become linked to the determination of who may receive reparations and who may not is entirely coincidental. There is nothing in the Act that requires such an arbitrary dateline for the purposes of qualifying for reparations. The TRC Report discloses no special or important detail about this particular date beyond stating that it was a “painful decision” not to be able to take more statements. The Commission then, in our respectful view, erred when it attempted an explanation to justify its closed list policy. It claimed that it adopted a ‘closed list’ policy since it was “anxious not to impose a huge burden on the government.”²¹ This reasoning was manifestly faulty. If the Commission had more time and resources it would have pursued more statement-taking, and the list would have in all probability been several thousand stronger, requiring it to recommend reasonable reparations in respect of all on the list. It would not have held back simply to preserve the national fiscus.

The Commission recognized that many victims were “not able to access the Commission” because “some people learnt too late about the process or the Commission was not able to make contact with them. Others were unable to gain access to a statement-taker.”²² It noted further reasons “why many people did not come forward to tell their stories. Some were afraid; some chose not to participate because they did not support the process, particularly the concept of granting amnesty.”²³ The TRC ultimately warned that the “consequence of ignoring this group of people has potentially dangerous implications for South Africa, as communities may become divided if some receive reparation that is not accessible to others who have had similar experiences.” The Commission then recommended that the ‘closed list’ policy should be reviewed by government, in order to ensure justice and equity.” It noted that, “in many other countries which have gone through similar processes, victims have been able to access reparation many years after the truth commission”.²⁴ Sadly this call has not been heeded by government, which still persists in maintaining that only

²¹ *Id.* In terms of any alleged practical burden, it should be noted that Social security grants are now distributed by the South African Social Security Agency (SASSA) that successfully oversees the distribution of some 12 million grants every month. The distribution infrastructure and network has now been developed and can be used for reparations grants distribution.

²² TRC of S. Afr. Report, Volume 7, p. 2. An example of an important category of victims who were excluded from having statements taken by the TRC were the many individuals who were diagnosed as mentally disturbed following their incarceration without trial, in solitary confinement often accompanied by interrogation and usually also by torture. The state has added obligations to assist these individuals resulting from its adoption of the International Convention of the Rights of Persons with Disabilities.

²³ TRC of S. Afr. Report, Volume 7, p. 2.

²⁴ TRC of S. Afr. Report, Volume 6 S 5, ch. 7, ¶¶ 36–37. As other governments in transition have recognized, it is often necessary to revisit past policy decisions to better reflect the facts as they are understood today. An example from Chile highlights the need for clear guidelines and wide publication of the nature of a justice mechanism and the scope of victims that fall under its reparative umbrella. The Valech Commission of Chile, which was mandated to bring to light cases of political imprisonment and torture, learned by hearing complaints after it had publicized its first report that it had not adequately communicated that children could also come forward to provide statements about suffering from illegal detention and torture. The Commission reopened the application process and admitted many new statements from minors who had been victims of human rights abuses, but who had not learned of the opportunity to come forward sooner. See Cristián Correa, Julie Guillerot, Lisa Magarrell, “*Reparations and Victim Participation: A Look at the Truth Commission Experience*,” in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, pp. 383-414 (Brill Academic Publishers 2009).

those on the TRC's so-called closed list qualify for reparations. It does so without offering any explanation or justification.

The use of the date of December 15, 1997, which happened to be the end of the TRC's statement-taking period, to determine who qualifies for reparations and who does not, is arbitrary. Its only bearing was in relation to the Commission's own practical deliberations. If it had been the intention of the legislature to limit reparations only to those who managed to make statements during the course of the statement-taking period of the TRC, it would have been a simple matter to provide for such a limitation. The framers of the law, however, must have anticipated that such a task could not be fully completed by one body with a very limited lifespan and imposed no such restriction.

ii) The regulations are inconsistent with the purpose of the enabling law.

These regulations were promulgated under the empowering provisions of the Promotion of National Unity and Reconciliation Act, yet they betray the purpose of the Act, which amongst other objectives was to provide "measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights."²⁵ Confining reparations to those who appear on the TRC's closed list created during a short and arbitrarily designated time period denies rehabilitative and restorative opportunities to many thousands of victims. It also makes it impossible to achieve a complete picture of the gross violations of human rights committed in South Africa's past, another key objective of the Act. Such a lapse reflects the failure of the DoJ to consider the real purpose and import underpinning the Act.

As currently drafted, victimhood has been effectively reduced by the proposed regulations to a matter of administrative paperwork. The only question under consideration is whether an individual is listed in a specific volume of the Report issued by South Africa's Truth and Reconciliation Commission or in a "finding" of that body? No matter the reason or cause, victims who did not participate in a TRC hearing or who did not share in previous grants of urgent interim reparations are barred from applying for educational or medical benefits, not because they did not suffer, but merely because they have not previously been "found" or "identified" by the TRC. "Harm," "loss," "suffering," "impairment" and other consequences of the human rights abuses committed during the apartheid era are rendered essentially irrelevant.

We submit that all persons who suffered harm as a result of a gross violation of human rights are entitled to reparation under the provisions of the Act. The only requirement is the meeting of the criteria laid down in the definition of a "victim" as set out in section 1 of the Act.

iii) The regulations are inconsistent with a just interpretation of the enabling law that does not encroach on existing rights.

"Statute law is not unjust, inequitable or unreasonable. This presumption goes to the root of what most citizens believe a legal order should at any rate seek to achieve while it avoids, as far as is humanly possible, individual hardship."²⁶ It is "a well-established rule in the construction of statutes that where an Act is capable of two interpretations, that one should be preferred which does not take away existing rights, unless it is plain that such was

²⁵ *Id.* at pmb1. (S. Afr.).

²⁶ LM DU PLESSIS, STATUTE LAW AND INTERPRETATION 322 (W A Joubert, founding ed. 2001).

the intention of the Legislature.”²⁷ A closed victims’ list policy imposes a great and unjust hardship on the thousands of victims of gross human rights violation who meet the criteria under the enabling Act. This policy encroaches on a number of their rights. As will be explained in more detail below, it violates victims’ rights to equal protection under the law. It also violates their rights to human dignity, life, security of person, expression, and just administrative action.²⁸ The government should, therefore, favour the more just interpretation of the enabling Act, which does not impose or contemplate a closed victims’ list policy.

- iv) A closed victims’ list policy violates the spirit of the Constitution as expressed in the preamble.

The preamble to the Constitution recognizes “the injustices of our past” and honours “those who suffered for justice and freedom in our land.” It commits to healing “the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”²⁹ Restricting reparations to those on a closed list serves the opposite ends. It does nothing to recognize the injustices sustained by many who did not make it onto the closed list. Such a policy stands as a stark rejection to many not on the list who made great sacrifices for the liberation of South Africa. It fails to acknowledge the truth of their stories. It is a denial of social justice. The policy aggravates divisions and denies the human rights of thousands of victims—a far cry from the honour that the Constitution promises.

The Commission received statements from 21,290 people, of whom 19,050 were found to be victims of a gross violation of human rights.³⁰ In addition, 2,975 victims emerged from the amnesty process.³¹ The TRC itself noted that given “the enormous number of statements, it has not been possible in the time available . . . to investigate every case.”³² This suggests that not even all those who made statements before December 15, 1997 had their cases properly considered for purposes of victim findings.

In contrast, and as of 2009, Khulumani had collected records of some 44,931 people who complained of gross human rights apartheid-era violations.³³ As stated in the TRC Report, the consequence of ignoring those who did not make it onto the closed list has potentially harmful and devious implications for South Africa.³⁴

- v) A closed victims’ list policy violates the section 1 constitutional values.

Under the Constitution, the Republic of South Africa is founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; and a democratic government to ensure accountability, responsiveness, and openness.³⁵ The

²⁷ *Tvl Investment Co. v. Springs Municipality* 1922 AD 337, 347 (S. Afr.).

²⁸ *See* S. AFR. CONST. 1996 ch. 2, §§ 10, 11, 12, 16, 33.

²⁹ S. AFR. CONST. 1996 pmbl.

³⁰ TRC of S. Afr. Report, Volume 7, p. 1–2.

³¹ *Id.* It is not clear whether this figure is part of the 19,050 identified victims or in addition thereto.

³² *Id.*

³³ KHULUMANI SUPPORT GROUP, KHULUMANI APARTHEID REPARATION DATABASE REP. 4 (2009).

³⁴ TRC of S. Afr. Report, Volume 6, § 5, Ch. 7: Recommendations, ¶ 36 (Mar. 2003). For example, in Chile, it has been reported that payment of individual reparations to some members of indigenous communities and not to others had an adverse effect on internal harmony in those communities. *See* LISA MAGARRELL, INT’L CTR. FOR TRANSITIONAL JUSTICE, REPARATIONS IN THEORY AND PRACTICE 6 (2007).

³⁵ S. AFR. CONST. 1996 ch. 1, § 1.

process adopted for the compilation of the Notice 282 regulations does not adhere to these values.

As mentioned above, the DoJ chose not to engage in any meaningful manner with victims or groups representing their interests. The government appears only to have considered issues relevant for its own purposes, namely questions of efficiency and costs. There is no evidence that the state's obligation to provide reparations to all victims of gross human rights violation was ever seriously considered. This failure to grapple with its statutory obligations is inconsistent with its obligations under section 1 of the Constitution, namely to adhere to the rule of law and to ensure accountability and responsiveness in governance.

Instead of relying on a very limited victim registration period the government ought to have reached out to as many victims as possible. It is apparent that the DoJ failed to consider ways in which victims not on the closed list could be identified and offered educational and medical assistance. Limited and arbitrarily-imposed time periods for victim registration has been rejected by many countries going through transitions, as is detailed below. Those behind these regulations failed to take into account relevant considerations by avoiding input from civil society organizations who repeatedly tried to present more reasonable reparation proposals. There is no evidence that legitimate concerns and submissions—such as Khulumani's reparation policy proposals and presentations from Oct. 29, 2003 through Dec. 13, 2010—were ever considered.

In defiance of the section 1 requirements of transparency, responsiveness and openness, the DoJ has remained silent as to how these regulations were compiled and approved. Despite several inquiries from civil society organizations, the names of the members of the joint committee responsible for drafting these regulations remain a mystery. Equally puzzling, is the process of approval adopted by the Portfolio Committee on Justice and Constitutional Development and Cabinet. We are advised that Ms. Dene Smuts (MP) informed one of the member organisations of the SACTJ that the Portfolio Committee had asked for civil society contributions and a presentation before the regulations were adopted, yet this opportunity was never presented to civil society. In contrast, the TRC Unit's Mr. Mokushane Thapelo insisted that 'there was no need for public consultation prior to the draft regulations' and confirmed that all consultations had been internal to government.³⁶ To date, victims do not know whom the joint committee or the Portfolio Committee consulted with in drafting these regulations. Some 13 years after the TRC made its recommendations victims, as usual, are kept in the dark on deliberations that are relevant and important to them.³⁷

As detailed in the President's Fund Report for the 2009-2010 financial year, the South African government had given once-off individual grants of R 30,000 to 15,956 out of 16,837 TRC-approved victims.³⁸ The DoJ has not provided a comprehensive list of victims who have received this financial compensation previously, so under the proposed reparations program some formally recognized victims will receive further reparations, while those victims of gross human rights violations not on the TRC list continue to be left with no assistance. The

³⁶ The response dated June 2, 2011 by Mr. Thapelo Mokushane to the SACTJ's May 27, 2011 request for information.

³⁷ The TRC Report containing reparation recommendations was presented to President Nelson Mandela on October 29, 1998.

³⁸ DEP'T OF JUSTICE AND CONSTITUTIONAL DEV., PRESIDENT'S FUND ANN. REP. 4 (2010).

TRC Unit's Mr. Thapelo Mokushane in his June 2, 2011 response to the SACTJ's May 27, 2011 request for information revealed that certain victims have received preferential treatment and have already been able to access medical and educational assistance from the Department of Education and Department of Health by way of ad hoc referrals from the TRC Unit. Khulumani has records of other victims who have been denied this avenue of relief without explanation,³⁹ while thousands more are completely ignorant of the possibility. The DoJ must make explicit criteria that the TRC unit employs to make ad hoc referrals, the process and criteria that is then used to evaluate such referrals, as well as the process of appealing an adverse outcome. The preferential treatment given to some victims, seemingly based on personal and political affiliations, needs to be stopped and replaced with a transparent process that is just and open to all victims.

While the responsiveness of the government to the comments on the Notice 282 regulations remains to be seen, it is clear that the regulations as currently formulated will not address the actual needs of thousands of victims of gross human rights. This is simply because the process of drafting specifically excluded meaningful consultation and participation by victims and the organizations that represent them. There can be little doubt that such regulations cannot stand as reasonable and justifiable in an open and democratic society based on freedom and equality.

vi) A closed victims' list policy violates the Equal Protection Clause and other fundamental rights protected in the Bill of Rights.

A closed victims' list policy benefits only a specified group of apartheid victims who managed to submit statements before a certain date and denies thousands of similarly situated individuals—who also suffered gross human rights violations. Those similarly situated victims who did not make the list are extremely disadvantaged as a consequence and are denied equal protection under the law.⁴⁰ It does not appear that those behind the regulations have applied a contextual consideration to the actual effects of the regulations on comparable people. The regulations differentiate between classes of victims, based only on the question as to whether they were able to access the TRC statement-taking department before a certain date. It is entirely unclear what legitimate governmental purpose is served by such differentiation. We submit that no legitimate government purpose is served and that government will act irrationally if it proceeds with such regulations as presently formulated.

Not only does such differentiation bear no rational connection to any legitimate government purpose, we submit that such unequal treatment moreover amounts to unfair discrimination. This is because the DoJ policy treats people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.⁴¹ It also seriously impacts their ability to live their lives to their full potential and to care for their families.

The differentiation is exacerbated by the position of the excluded victims in society. The bulk of the excluded victims make up some of the most seriously marginalized people in

³⁹ For example, Khulumani has documented the Ribiero family's rejected application for assistance to the TRC Unit and the Department of Education, as well as their continued efforts and follow-ups, which have gone ignored by the government.

⁴⁰ S. AFR. CONST. 1996 ch. 2, § 9.

⁴¹ See *Prinsloo v. Van der Linde* 1997 (3) SA 1012 (CC) at para. 31 (S. Afr.).

South African society.⁴² Differentiation that places additional obstacles before persons already disadvantaged is manifestly unfair.⁴³ That such differentiation is done under a law that was meant to address cruel inequalities of the past and heal bitter divisions, adds insult to injury. There can be no question that several rights of the excluded group of victims have been seriously impaired, such as their rights to life, freedom and security of the person, health care and education. More particularly their rights to fundamental dignity are denied. Their exclusion from the reparations scheme denies them their inherent or intrinsic worth as human beings. They are effectively told that they are not worthy of respect and concern.⁴⁴ The Constitutional Court has held that respect and importance of human dignity requires that the exercise of power, particularly the power of government, must be premised on the inherent worth of human beings. The legality of any official action must be assessed in terms of whether human dignity is undermined in any way.⁴⁵

Not only is their intrinsic worth as human beings eroded, but also their position as human beings within their communities and wider society is seriously demeaned. The closed list policy dishonours the respect, dignity, value and acceptance of this group of victims in that their personal standing with their families and the wider community is degraded.

The Constitutional Court has also conceptualised human dignity as part of “ubuntu” or humaneness, in which the community or group plays an indispensable role. This view equates dignity with compassion and caring for the vulnerable persons in the community. Ubuntu is accordingly characterised as social justice and emanates from the communal nature of traditional African societies.⁴⁶ This approach is seen as more compatible with “the overall spirit and purpose of the Constitution” which promotes not only individual rights, but also social, economic and community rights.⁴⁷ We submit that the differentiation is offensive to the concept of “ubuntu” or humaneness in that the authorities are indifferent to the very real impact on the excluded group of victims in the narrow pursuit of maximizing efficiencies and minimizing costs. In so doing the government, instead of displaying compassion and caring as required by the new constitutional order, displays indifference or contempt to the position of the excluded victims. The regulations accordingly serve to undermine the social, economic and community rights of the victims who did not make it onto the closed list.

We submit that on either analysis, the closed list policy adopted in the regulations, violates the inherent dignity of excluded victims as individual human beings and as members of the wider community.

When viewed against the benefits afforded to perpetrators of South Africa’s past conflicts, the dismal reparations policy of the government has added considerable trauma to

⁴² In this regard it should be noted that the definition of “gross human rights violations” *in itself* already excludes economic and social rights violations inherent in apartheid itself -- there are no reparations for being relegated to living in townships without any basic social services, no reparations for exclusion from certain schools and employment. Secondly, it should be noted that certain categories of victims fear stigmatization (e.g. victims of sexual violence) or reprisal from perpetrators and therefore require confidential, alternative approaches than the open, public registration we seek for the excluded in general.

⁴³ Harksen v. Lane 1998 (1) SA 300 (CC) at paras. 50–52 (S. Afr.).

⁴⁴ S v. Makwanyane 1995 (3) SA 391 (CC) at para. 44 (S. Afr.).

⁴⁵ Dawood v. Minister of Home Affairs 2000 (3) SA 936 (CC) (S. Afr.).

⁴⁶ Per Mokgoro J in S v. Makwanyane *supra* para. 308.

⁴⁷ GE Devenish, Constitutional Law, Law of South Africa at para. 41–42; Motala and Ramaphosa, Constitutional Law, at 224–225.

the lives of victims. The authorities have bent over backwards to accommodate perpetrators by affording them a generous offer of conditional amnesty; extending the cut-off date for the committal for political offences; extending the life of the Amnesty Committee by some 5 years to ensure that each and every last matter before it was properly handled; establishing a misguided prosecution policy that provided for a backdoor amnesty for those who had not applied for amnesty;⁴⁸ providing for a special dispensation for political pardons again to benefit those who did not make use of the TRC process; and by an effective blanket amnesty through simply not prosecuting those perpetrators who were denied amnesty or who did not apply. In contrast, those victims who were not able to make use of the TRC process are simply shown the door. Such contrasts in treatment are inimical to the compacts that gave birth to our constitutional democracy. They certainly do not serve the national projects of national reconciliation and unity.

Indeed reparation was seen as a “*quid pro quo*” or a means for “alternative redress” for the losses that victims would have to endure as a result of the amnesty process.⁴⁹ While the life of the Amnesty Committee was happily extended for years to ensure the full completion of its work, no thought was given to a similar extension of the life of the TRC statement-taking department.⁵⁰ The reparations provided so far can hardly be described as a “*quid pro quo*” or a means for “alternative redress.” There ought to have been an appropriate balance struck between benefits afforded to perpetrators and victims. This much has been recognized by the Constitutional Court,⁵¹ which has repeatedly stressed the delicate interplay of benefit and disadvantage that underlies the Act’s provisions as well as their effect and intent.⁵²

⁴⁸ Prosecution Policy and Directives Relating to Prosecution of Criminal Matters Arising from Conflicts of the Past (Dec. 1, 2005) (found unconstitutional in *Nkadimeng v. Nat’l Dir. of Pub. Prosecutions* 2008 Case No. 32709/07 (High Ct. Transvaal Provincial Div.) (S. Afr.)).

⁴⁹ *Azanian Peoples Organisation (Azapo) and Others v. President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC) at para. 65 (S. Afr.).

⁵⁰ The Office of the United Nations High Commissioner for Human Rights has highlighted that overly restrictive application deadlines has been a common problem for many reparations programs. See: Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools for Post-Conflict States: Reparations Programmes” (New York: United Nations, 2008), page 17. In Brazil for instance, the initial length of time open for victims to submit applications for reparations was criticized for being too short. The government introduced subsequent legislation reopening the period to allow for those persons who hadn’t come forward earlier to apply and for the government to have the opportunity to publicize the law more broadly through communications and outreach. See: Ignacio Cano and Patrícia Salvão Ferreira, “Reparations Program in Brazil,” in Pablo de Greiff (ed.), *The Handbook of Reparations* (New York: Oxford University Press, 2006) at page 138. The OHCHR further highlighted that short application deadlines have a disproportionately negative impact on female victims and minorities who have traditionally been marginalized or excluded from political processes and take longer to overcome distrust or reluctance to be involved with official justice mechanisms. See: Office of the United Nations High Commissioner for Human Rights, “Rule-of-Law Tools for Post-Conflict States: Reparations Programmes” (New York: United Nations, 2008), page 17.

⁵¹ See *Du Toit v. Minister for Safety and Security and Another* 2009 (6) SA 128 (CC) at para. 53 (S. Afr.); *Citizen v. McBride* 2011 Case No. CCT 23/10 (CC) at para. 54 (S. Afr.).

⁵² *Citizen v. McBride* 2011 Case No. CCT 23/10 (CC) at paras. 63 & 65 (S. Afr.).

3) *The Failure to Extend Reparations to all Victims of Apartheid Violates South Africa's Obligations under International Law.*

The closed victims' list policy violates a number of international law instruments and is contrary to current best practices under customary international law. The government's obligation to uphold the right of *all* victims of human rights abuses to fair and adequate compensation for their losses and suffering is well established in international law, and this was explicitly recognized by the TRC in its recommendations.⁵³ "Customary international law is the law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."⁵⁴ South Africa is also bound by the provisions and jurisprudence of the international instruments it has signed.

Firstly, the closed victims' list policy is contrary to the Universal Declaration of Human Rights. Article 8 states: "**Everyone** has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."⁵⁵ Next, a closed victims' list violates the International Covenant on Civil and Political Rights. Article II, section 3(a) reads: "Each State Party to the present Covenant undertakes: to ensure that **any person** whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."⁵⁶ Under the current policy, thousands of victims of gross human rights violations pursuant to the Promotion of National Unity and Reconciliation Act criteria would be left without an "effective remedy." The closed victims' list policy also runs against recent interpretations of the Rome Statute of the International Criminal Court, which defines apartheid as a crime against humanity and provides for reparations for victims of such crimes—including restitution, compensation and rehabilitation.⁵⁷

Similarly, the Inter-American Commission of Human Rights (IACHR) recognizes the right of all victims of human rights violations to compensation.⁵⁸ The Inter-American Court of Human Rights has held that "in cases of human rights violations the **duty to provide reparations lies with the State**, and consequently while victims and their relatives must also have ample opportunities to seek fair compensation under domestic law, this duty **cannot rest solely on their initiative and their private ability to provide evidence**."⁵⁹ A closed victims'

⁵³ TRC of S. Afr. Report, Volume 5, Ch. 5: Reparation and Rehabilitation Policy, ¶ 11 (Oct. 1998).

⁵⁴ S. AFR. CONST. 1996 ch. 14, § 232.

⁵⁵ Universal Declaration on Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (emphasis added). The Universal Declaration of Human Rights has been accepted as customary international law. See TRC of S. Afr. Report, Volume 5, Ch. 5: Reparation and Rehabilitation Policy, n.2 (Oct. 1998). See also: UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 7 June 2011]

⁵⁶ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966) (emphasis added) (signed by S. Afr. on Oct. 3, 1994).

⁵⁷ Rome Statute of the International Criminal Court arts. VII & LXXV, July 17, 1998, 2187 U.N.T.S. 90 (signed by S. Afr. on July 17, 1998).

⁵⁸ See Principal Guidelines for a Comprehensive Reparations Policy, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.131, doc. 1 at ¶ 12 (2008) [hereinafter Inter-Am. Comm'n Reparations Guidelines].

⁵⁹ Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings, Inter-Am. Ct. H.R., OEA/Ser. L/V/II.129, doc. 6 ¶ 97 (2007) (emphasis added).

list benefits only the group of victims who were able to provide evidence of their suffering to the TRC and denies other victims the opportunity to seek reparation.

Furthermore, the IACHR advises that an administrative reparations program “should reflect the outcome of an *open and transparent process of dialogue and consultation with civil society* and the state institutions involved,” as this “will lend legitimacy to the policy and ensure its continuity, irreversibility and institutionalization.”⁶⁰ The Commission notes that the State must create opportunities for victims and their representatives “to participate in the decisions regarding implementation of mechanisms and policies on reparation” and “to explain their views and inform the State of their specific needs”—specifically to “prevent measures that could be discriminatory.”⁶¹ The South African government has denied such a process to thousands of victims in promulgating these discriminatory regulations without consulting victims or those who represent their best interests, such as members of the SACTJ. In his response to the SACTJ’s request for information, Mr. Thapelo Mokushane of the DoJ’s TRC Unit stated that the government saw no need to notify victims, undertake a public information process, or consult with civil society organizations before the regulations were drafted. This position is plainly in conflict with the right to public participation discussed above, especially in light of the widespread lack of knowledge in the general public regarding the TRC process, its recommendations, the President’s Fund and its purpose, and the closed victims’ list policy. This lack of knowledge is exacerbated by the fact that the government has yet to release a popular version of TRC report.

Moreover, in the IACHR’s view, a State must be especially vigilant of respecting the rights of groups whose human rights are most at risk, including women, children, indigenous peoples, social leaders, and organizations that defend human rights. These rights include “the right to adequate reparation for the harm caused, through individual measures of restitution, compensation and rehabilitation.”⁶² These are precisely the groups of victims that will be most affected by the South African government’s closed victims’ list policy. In fact, these were also the groups that the TRC specifically noted were underrepresented in the TRC’s Volume 7 list.⁶³

In this regard it is worth highlighting that even those who did participate in the proceedings of the TRC may not be represented in the victim lists that are now being accorded such weight by the Government. Women victims are but one such group. Their plight exemplifies the realities facing so many of the unrecognized victims. Although special hearings were held to focus on women’s issues, and women were generally represented in testimony over the full course of the hearings, women victims and their personal stories of abuse rarely became part of the public record. The reasons for this are many, but the realities

See also Case of the La Rochela Massacre, Judgment on the Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 220 (May 11, 2007).

⁶⁰ Inter-Am. Comm’n Reparations Guidelines at ¶ 4 (emphasis added).

⁶¹ *Id.* at ¶ 13.

⁶² Violence and Discrimination against Women during the Armed Conflict in Colombia, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II, doc. 67 ¶¶ 1 & 236 (2006).

⁶³ TRC of S. Afr. Report, Volume 7: Victim Findings: Foreword, 6-9 (Aug. 2002) (specifically noting the silence in the TRC summaries regarding “military operatives of the liberation movements,” “prominent political activists and leadership figures,” those who were imprisoned and detained, victims of rape, “women who were left behind to fend for themselves and who experienced the brutality of the Apartheid system,” and “women who went into exile to join the liberation movements.”).

and potential impact going forward are profound: “over three-quarters of the women’s testimonies and 88 per cent of the men’s testimonies were about abuses to men. Only 17 per cent of the women’s testimonies and 5 per cent of the men’s were about abuses to women, with the remainder about abuses to women and men.” Sexual abuse, in particular, was rarely discussed. As a result, women and the crimes committed against them were most assuredly under-reported and are under-represented in the TRC’s victim tallies. Given these facts and the other well-known inadequacies of the available victim lists, they should not be used to define the present and future.⁶⁴

It is telling that in countries with less capacity and resources than South Africa, reparations and other victims’ assistance programs involving health care have been offered to victims without requiring participation in a truth-seeking process or being officially listed in a truth commission report. In Sierra Leone, victims of sexual violence and children were not compelled to participate in the truth-seeking process and were still able to access government assistance.⁶⁵ In Nepal, while a caste-based system of discrimination exists, the State has offered health care benefits to victims in the absence of a truth-seeking process or a closed victims’ list.⁶⁶ In Peru and Chile, community support groups and group therapies have been implemented, and emphasis in the reparation plan has been placed on training community members to deliver this type of mental health service.⁶⁷

Countries such as Brazil, Peru, Guatemala, and Sierra Leone, in order to fulfil their obligation to reach and register all victims of human rights violations, have established ongoing victim registration procedures.⁶⁸ In other countries that have limited the victim

⁶⁴ TRC of S. Afr. Report, Volume 4, Chapter 10, Special Hearing: Women, page 291-292 (paragraph 24).

⁶⁵ See Mohamad Suma & Cristián Correa, Int’l Ctr. for Transitional Justice, *Report and Proposals for the Implementation of Reparations in Sierra Leone* (2009), <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf>; Justice in Perspective, http://www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=30&Itemid=19 (last visited May 31, 2011).

⁶⁶ See World Health Organization, http://www.searo.who.int/en/Section313/Section1523_6862.htm (last visited May 31, 2011) (Nepal’s “national health policy aims at improvement in the health conditions of the people of Nepal through extension of primary health care system to the rural population with a view to provide the benefits of modern medical facilities through trained health care providers; active involvement of private sector and NGOs in health services; and adequate training and community participation.” An explicit goal is “[t]o improve the health status of the most vulnerable groups, particularly those whose health needs often are not met—women and children, the rural population, the poor, the underprivileged, and the marginalized population.”). See also: *From Relief to Reparations: What Can Still Be Done for Transitional Justice in Nepal*, Report written by Ruben Carranza, Director, Reparative Justice Program, ICTJ; with input from ICTJ Nepal office, for the UN Office of the High Commissioner on Human Rights (OHCHR). Pending publication, 2011

⁶⁷ See Magarrell, *supra* note 30, at 12.

⁶⁸ See Naomi Roht-Arriaza, *Reparations, Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 171 (2004) (“In Brazil, . . . a 1996 law . . . sets up a commission to process ongoing claims.”); Milagros Salazar, *Rights—Peru: At Last, Reparations for Civil War Victims*, GLOBAL GEOPOLITICS & POLITICAL ECONOMY (Feb. 9, 2011), <http://globalgeopolitics.net/wordpress/2011/02/09/rights-peru-at-last-reparations-for-civil-war-victims/> (noting that Peru’s victims’ registry is not yet completed); Due Process Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, 1, 7-30 (2007), <http://www.dplf.org/uploads/1190403828.pdf> (describing in detail the ongoing Guatemalan reparation process, as well as pending court and commission negotiations); Justice in Perspective, *supra* note 64 (noting that the National Commission for Social Action (NaCSA) has been designated by the Sierra Leone government to implement reparations. “The NaCSA is therefore in the process of establishing a Special Unit for Reparations

registration periods such as Argentina and Chile, these procedures are frequently reopened or extended.⁶⁹ In Chile, twenty years after the restoration of democracy and fifteen years after the registration of victims of enforced disappearance and killings had been finalized; the government reopened the victim registration process. In general, the international community recognizes that truth commissions are only capable of registering a small fraction of victims. In Argentina, Chile, Peru, Guatemala, and Sierra Leone, victim registration processes were undertaken after the commissions published their reports, consistently exceeding the number of victims registered through the truth commission process.⁷⁰

4) The current definitional and eligibility standards proposed in the draft regulations are likely to exclude victims who have suffered harm as a result of human rights abuse and are in dire need of the educational and medical benefits being offered.

The draft regulations establish a series of rigid definitional and eligibility standards that victims and their relatives and dependents will need to meet if they are to receive educational and medical benefits. Some of these standards disqualify classes of victims and their families, sometimes in distinctly perverse ways, and often disadvantaging similarly situated victims and their relatives and dependents, while privileging others. We will examine each of these standards in turn.

- i) The proposed regulations limit the class of beneficiaries by conditioning eligibility on proof of “support” or dependency rather than on harm-related need.

Although “dependency” is not defined in the regulations, and it is unclear if the drafters had some specific regulatory definition in mind when they make reference to a “dependent” or to various situations of “support” (e.g. South Africa’s tax code), dependency

within the NaCSA, and a Special Fund for War Victims, with a database of identified war victims and an outreach programme to publicize its work.”).

⁶⁹ See Roht-Arriaza, *supra* note 67, at 170-72 (“In the wake of military dictatorships during the 1970s and 1980s in Chile, Argentina and Brazil, the newly-elected civilian governments of those countries agreed to institute reparations programs for victims of the human rights violations of their prior dictatorial regimes In Chile [i]n 1992, the Congress created the Corporation for Reparation and Reconciliation to provide compensation and rehabilitation to victims’ families Anyone whose name appeared in the commission’s report, *or who was later added by the corporation*, was considered a “victim,” and *no additional proof was required*. Scholarships provided for the children of those killed or disappeared allowed for secondary or university study until the child turned thirty-five; some eight hundred children make use of the subsidy, which includes tuition and a living allowance. Free medical and psychological care, through the Ministry of Health’s “Program of Reparation and Integral Health Care,” *was available to a broader group of victims’ relatives and to survivors of the violations.*) (emphasis added) (“The subsequent civilian regime [in Argentina] appointed an independent commission to investigate the disappearances The government then passed a series of *reparations measures of ever-increasing scope*,” recognizing political prisoners whose suits for compensation had been closed by courts, and allowing the families of the disappeared to remarry or claim inheritance rights without having to concede that the disappeared person was dead and providing lump-sum compensation. “The Argentine law extended to survivors of the detention camps as well, and later informally extended to those who had been officially exiled or unofficially detained. . . . Finally, in 1999, the Argentine Congress created a special fund to facilitate the identification and reunification with their families of children kidnapped or born while their mothers were captive during the years of dictatorship.”) (emphasis added).

⁷⁰ See TRC of S. Afr. Report, Volume 6, § 5, Ch. 7: Recommendations, ¶ 37 (Mar. 2003) (“It needs to be noted that, in many other countries which have gone through similar processes, victims have been able to access reparation many years after the truth commission process has been completed.”).

is a central component of a number of the regulations. Although the proposed approach varies slightly as between educational or medical benefits, a common thread runs through many of the regulations with some odd results: certain relatives of victims must establish a relationship of support either with the victim or someone else, or show “dependency” to qualify to receive benefits. These dependency standards privilege certain victims over others, even though they and their families may have suffered just as much as other victims’ families. Oddly enough, by conditioning eligibility on dependency in many of its provisions, the draft regulations may punish those very relatives and family members who have actually done the most to achieve some level of self-sufficiency and financial independence, even if it is far below that which they would have achieved in the absence of the abuse.

In relation to the education benefits various questions arise: What is the basis for the requirement of ‘support’ by the victim in relation to grandchildren? What about where the victim is deceased and would have supported the person if alive? Why is it limited to a grandchild? The proposed regulations in relation to medical benefits provide a more inclusive definition of – ‘any other person to whom a listed victim has or had a legal or customary duty to support’. What is the justification for defining relationships of “support” differently in respect of medical benefits as opposed to educational benefits?

Similar questions arise in relation to the proposed medical benefits: the definition of relative of a listed victim – includes a parent or someone who exercises parental control over victim, a person married to a victim, a child of a victim or any other person to whom a listed victim has or had a legal or customary duty to support. The regulations regarding higher education include a person that was married to a victim where the victim is deceased. Why are the medical benefits not extended to such persons? Why do they then have to be financially dependent on someone else? In relation to the eligibility of relatives of listed victims, medical benefits are only afforded when the victim is alive and the relative is financially dependent on the listed victim or the listed victim is deceased and the relative is dependent financially on another person. The second limb makes no sense – if the person was financially dependent on the victim and the victim dies, the person is most likely to be in need of medical benefits if they have no other person to turn to for financial assistance.

Both the Basic and Higher Education and Training Regulations cut off benefits to the grandchildren of victims if they are not in a relationship of “support” with the victim.⁷¹ As a cost-saving and policy matter, it may have seemed fiscally appealing for the drafters to draw the line in this way. However, by doing so, they have effectively disadvantaged some grandchildren and their caregivers, while benefitting others. A quick review of the applicable language shows how. The Basic Education Regulations (BER) limits eligibility to those relatives of victims who are:

“(a) a child of a victim, irrespective of whether or not the child was born in or out of wedlock or was legally adopted; and

(b) a child of a person as contemplated in paragraph (a), if the victim supports that child.”

The Higher Education and Training Regulations (HET) limits eligibility to those relatives of victims defined as follows:

⁷¹ The relevant definition never uses the word grandchild or grandchildren. However, grandchildren would certainly fall within these definitions and would most assuredly be impacted, as would any other child who fits within these definitions.

“(a) a person who is, or where the victim is deceased, was married to a victim, under any tradition, or a system of religious, personal or family law;
(b) a child of a victim, irrespective of whether or not the child was born in or out of wedlock or was legally adopted; or
(c) a child or a person as contemplated in paragraph (b), if the victim supports that child.”

Under both provisions, the children of victims are eligible to receive the fullest range of educational assistance, subject to certain common income restrictions. Similarly, spouses of deceased or living victims may be eligible for higher education and training, although not, as one would expect given their likely age, for basic educational assistance.

However, the “child of a person” or a “child of a victim” will not necessarily be treated uniformly under these provisions. (See subparagraphs (b) and (c) above. For ease of reference, we will use the words grandchild or grandchildren in this discussion, although it is possible that someone other than a grandchild may be covered by this language.) Grandchildren may be treated differently depending on their or their parents’ relationship with the victim. If grandchildren remain in the “support” of the victim, they would be eligible for educational benefits. However, the grandchildren of deceased victims and grandchildren in the care of a spouse or other relative of a victim would apparently not be eligible, because they would not be in the “support” of the victim.

In sum, a grandchild who is cared for by his grandparents, one of whom is a victim, would be entitled to receive benefits, but a grandchild who is cared for by a grandparent, who is perhaps the spouse of a deceased victim, would not be entitled to educational benefits unless that spouse were found to be an indirect victim in their own right by the TRC under 1(1)(b). This approach privileges dependency over need with potentially harmful consequences.

If the objective is to ensure that living victims are relieved of the burden of financing their grandchildren’s education, if they are actively engaged in their care and upbringing, then the draft regulation succeeds. But if the objective is to ensure that all the grandchildren of victims, whether the victims are deceased or alive, are guaranteed educational opportunity, because of the indelible harm wrought on the family as a whole by the wrongs committed in the past, then this provision fails. This approach is likely to disadvantage women in particular. Widows of victims who may have suffered harm indirectly and who now may be caring for the grandchildren of victims will not be able to obtain assistance, unless they too have been adjudged a victim under Section 1(1)(b).⁷² Need, degree and type of harm and family circumstances are ignored. Relations of support and dependency become determinative.

In similar fashion, the proposed Medical Regulations require relatives to jump through several hurdles to establish eligibility for medical benefits, one of these requires a showing of dependency. First, to be eligible, a relative must fall within one of four categories of eligible relatives:

“(a) a parent of, or somebody who exercises or exercised parental responsibility over a listed victim;

⁷² Oddly enough, in the proposed medical regulations, the drafters created another design twist, adding a new classification of relatives: “any other person to whom a listed victim has or had a legal or customary duty to support.” Would this include grandchildren? Who else would it include?

(b) a person married to a listed victim under any law, custom or belief;
(c) a child of a listed victim, irrespective of whether the child was born in or out of wedlock or was adopted; or
(c) any other person to whom a listed victim has or had a legal or customary duty to support.”

Next, a relative of a listed victim must establish dependency: “A relative of a listed victim may only request medical benefits if, at the date of the request – the listed victim is alive and the relative is dependent financially on the listed victim; or the listed victim is deceased and the relative is dependent financially on another person.” As with the educational provisions, this language conditions benefits on dependency not need and may bar classes of relatives from receiving benefits. A few examples:

- A widow of a listed victim who is not dependent financially on either the victim or another person;
- A child of a listed victim who is not dependent financially on either the victim or another person;
- A parent of a listed victim who is not dependent financially on either the victim or another person.

By categorically excluding all of these potential beneficiaries – a widow, child or parent if they are not dependent on another – the regulations deprive classes of potentially needy individuals of even those medical benefits that may be linked to the human rights violations, including psychological treatment, despite the fact that all of them may have suffered trauma as a result of their connection to a victim.

The potential inconsistencies in coverage are telling:

Would the 16-year old son of a deceased victim be denied medical benefits if he is not living with a relative or other adult? (His siblings might be receiving benefits if they have remained living at home.)

Would the widow of a listed victim who is working and is financially independent (but only barely) be denied medical benefits even if she is caring for hers and the victim’s children? (Her children would be entitled to medical benefits, but she would not under the current draft regulations.)

In essence a spouse, child or parent who is essentially self-sufficient but not necessarily well-off, may not be eligible even if they have suffered profound trauma, if they have not been identified in volume 7 as victims in their own right.

- ii) Means-testing based on a household’s collective income may lead to disqualification of applicants in genuine need

The availability of assistance for victims and relatives of victims depends on the financial need of the beneficiary based on criteria which may not be an accurate predictor of genuine financial need and vulnerability. Means-testing based on a household’s collective income in the BER and HER “Conditions for Assistance” may lead to the disqualification of applicants in genuine need of financial assistance.

The “Conditions for Assistance” of the Basic Education Regulations (BER) and Higher Education Regulations (HER) (Regulations 9 and 10 respectively) require that the applicants’ household have a net monthly income (the household’s collective income after deducting for certain specified expenses) of less than or equal to R8,000 for applicants for assistance with basic education, or R12,000 for applicants for assistance with adult education.

The narrow focus on maximum household income level to the exclusion of important considerations, namely the type of employment held by household members and the meaningful and symbolic role of education in the reparations program, is problematic.

While some means of survival may provide an adequate living, the type of employment held may be physically arduous and not suitable for a long term career. By considering the monthly income levels of a household, an administrator may reject assistance to a household that is making ends meet in the short run, but would need education and training to secure their financial situation in the long run.

Depending on the number of people in the household, each may be individually under-employed, but collectively earn beyond the maximum income to qualify for assistance with education and skills training. If each individual contributes a small amount per month working part-time, the situation may arise where a large household earns just above the maximum net income, disqualifying all members from assistance, but with each person only employed at a minimal level. While education and training may be a means of improving an under-employed person's long-term livelihood and allowing him to seek more gratifying or rewarding employment, the administrator may consider that these individuals are not in a position of financial need and deny assistance.

Statutory law supporting the regulations, such as the Skills Development Act, recognizes how systemic discrimination affects the socioeconomic status of certain vulnerable groups. The narrow focus on household income without taking into account all relevant contextual factors may be inconsistent with one of the general purposes of the statutory framework within which the reparations scheme exists—to improve the socioeconomic circumstances of persons affected by past and present discrimination and human rights abuses. Education plays a key role in a reparations program as a way of symbolically and meaningfully improving the future circumstances of a victim and victim's relatives impacted by gross human rights violations.

There are several points of ambiguity in the proposed regulations relating to how the net household income will be determined.

The regulations do not specify whether the applicant's financial contribution to the household will be included in the "net income per month of the house." This may be a significant detriment to some applicants if their own income is included: if the applicant earns an income, including it in the net resources of the household will inflate the financial wellbeing of the household during the time that the applicant wishes to go to school. Particularly where the applicant is one of the larger financial contributors, this may disqualify him or her from receiving assistance for lack of financial need, even though that income will not be available to the household after he or she returns to school.

The regulations are also unclear on whether the maximum net income remains unchanged where multiple children are living in a household that may qualify to apply for assistance. If that is the case, it would have the effect that several children without assistance may be competing for access to the same surplus monthly income, even if the household earns only slightly above the maximum net income cut-off, possibly requiring families to choose which child may attend school.

Finally, for both the BER and HER, assistance is provided with registration fees, tuition, boarding, transportation, and school uniforms. However, a problem that many households face in sending household members, including children, to school is the lost

opportunity cost of income that the applicant could provide to the family if he or she doesn't go to school. For financially vulnerable families, this lost income is prohibitive for many children who could be in school, but the regulations do not currently provide compensation for the families facing this burden.

iii) The proposed regulations contain ambiguities that may bar otherwise eligible applicants from seeking and obtaining benefits.

The draft regulations contain a number of ambiguities that may disadvantage certain classes of victim relatives:

The definition of a "relative of a listed victim" for medical benefits is defined to include "a person married to a listed victim under any law, custom or belief." The word "married" in this paragraph may be interpreted to mean only those currently "married" to the victim, making it unclear if a spouse who has remarried or divorced would remain eligible for benefits even if they suffered harm indirectly as a result of the human rights violations. This definition stands in sharp contrast to other sections of the proposed regulations. The HER contains the following language: "a person who is, or where the victim is deceased, was married to a victim, under any tradition, or a system of religious, personal or family law."

As detailed above, neither dependency nor support are not defined. What level of financial assistance constitutes support? "Child" is undefined.

iv) The Regulations Proposed Time Limitations are Unduly Restrictive

Educational assistance under the proposed regulations is subject to a series of tight time-constraints. Some of these temporal limitations are likely to detract from the effectiveness of the program.

Both the Basic Education Regulations (BER) and the Higher Education Regulations (HER) contain sunset clauses, setting a five-year limit on the overall duration of the program, as follows: "the regulations apply for a period of five years from the date of commencement thereof."

Educational support must be sustained over time. The program should have been designed in such a way as to allow beneficiaries to complete as full a cycle of education as possible, if the program is to have a genuine impact and be truly reparatory. The shortness of these sunset provisions undercuts this objective. Essentially arbitrary in nature, the sunset provisions do not take into account whether "learners" are successfully enrolled and are perhaps nearing completion of educational programs. The impact becomes particularly evident, when you consider a student who hopes to bundle benefits. As written, the educational programs covers programs that could theoretically cover a time span of 13 years for basic education (Grades R-12) as well as varying lengths of time for adult education and professional training programs. The sunset clauses effectively place a cap on achievement: a learner may only receive assistance for five-years of education.

The Regulations and broader statutory scheme create the expectation that a beneficiary will receive assistance at multiple levels of their education. One of the "Objects" of the HER identified in regulation 2(3), is providing assistance in respect of "more than one category of assistance", which cover basic through advanced degrees of education. The time limitations are inconsistent with this type of assistance, since most individuals will likely only have the time to finish one complete and part of an additional program, depending on what level they are already at.

Further, the South African Skills Development Act for instance, one of the statutes included in support of the regulations, states that its purpose is to “improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.” However, limiting the assistance provided to a 5 year window of opportunity is an arbitrary decision limiting the extent to which disadvantaged persons may meaningfully improve their situation.

Other family circumstances may also intrude, barring beneficiaries from requesting assistance soon enough to help them. For instance, if a family cannot find a way to compensate for the learner’s lost income in the legislatively-established five year period, the person is unlikely to pursue a degree program. In addition, an adult with little or no basic education may need up to 4 years just to qualify for the higher education programs. More information is needed to discuss expected annual income at different levels of education and the costs of tuition for advanced programs, but it should be at least highlighted that those working towards advanced education programs should be able to do so without the disincentive of losing assistance during the most expensive years of education.

In addition to the overall sunset provisions, each individual program puts a cap on the length of time a beneficiary may receive benefits. These individual limits seem less problematic generally, because they seem to closely approximate the number of school terms needed to achieve the degree sought. This may however be problematic for adults who only have time to study part-time and will take longer than the allocated time to complete a given program. The regulations are unclear on this point, but it appears that if an adult follows part-time studies, the same time limit is in force, restricting further the level of education he/she may obtain under the regulations. The time periods vary by degree program:

- Grade R (reception year preceding grade 1): one year
- General Education (7-15 years or 9th grade): five years
- Further Education (grades 10, 11 and 12): 3 years
- Further Education and Training (levels 2 to 4 of the National Qualifications Framework as contemplated in the South African Qualifications Authority Act): 3 years
- Higher Education (above grade 12): 5 years
- Skills Development: (presumably the 5 year sunset)

Regulations 10(3)(1) of the BER and 11(3)(a) of the HER specify a two-month deadline from when the Regulations come into commencement for requesters to apply for assistance for the current year. In practice, this deadline is likely to prove too short. If the two-month cut-off is missed, the beneficiary may miss a large portion of the first of the five year time limit to begin the educational program. It often takes lengthy planning and preparation to make child care and living arrangements for a family before an adult can return to school, which might further detract from the window of opportunity presented to beneficiaries.

- v) The proposed regulations provide little information about the scope and type of medical benefits that are covered under the program. This uncertainty may undermine the effectiveness of the regulations overall if victims are not made aware of the type of assistance they are intended to receive.

Whereas the BER (Regulation 2) and HER (Regulation 3) both outline the “Objects and application of Regulations”, the medical benefits regulations (MBR) are less clear as to

the extent and type of medical assistance to be provided. As currently drafted, the proposed legislation does not provide sufficient guidance about the scope of medical benefits available to victims and their relatives and dependents. Many issues remain outstanding:

Will beneficiaries be entitled to receive treatment only for those conditions that they can show are attributable to the harms suffered? Will beneficiaries be entitled to long-term services or only short-term treatment?

Regulation 4(1) specifies that “medical benefits in the form of health services must be rendered” to beneficiaries of the scheme. The definition of health services (provided in the National Health Act) is broad and includes reproductive care, emergency care, basic nutrition and health services for children, and medical treatment for arrested, detained and accused persons. However, Section B, Question 4 of the application form for medical benefits requests information about “the harm suffered as a result of the conflicts of the past, which information served as the basis on which the TRC identified the person as a victim.” The form further notes that the information will be used to determine whether the person requesting benefits is a listed victim of the TRC or relative of a victim. It is unclear why this question is necessary, given the TRC has already listed which victims have been recognized. This question suggests instead that the information about the original harm suffered may be used as a means of determining whether benefits will be granted or not to an applicant.

The complexity and uncertainty in the application process may discourage applicants from seeking medical services due to the financial risk of having to pay for services following a rejected application. Given that the purpose and scope of the MBR is not fully articulated, applicants will likely be uncertain about whether their applications for medical assistance will be approved or rejected. Without establishing criteria or specific examples of the services that will be compensated, the risk of having to pay the cost of the service itself may be prohibitive for applicants who could never afford the service without assistance.

Some provisions in the regulations are cause for particular concern in the application process. Approval for the treatment is not granted before services are provided. Regulation 6(2) states the health institution must ensure the medical treatment is rendered to the applicant, “despite the fact that the dedicated official must still verify the request.”

Even though the health institution is required to provide the service regardless, the regulations do not specify who will bear the cost of the treatment if the application is rejected.

Regulation 6(4) lists the criteria which the dedicated official must be satisfied are met for the request to be approved, which presumably are the bases for the denial of a request. One of those criteria is whether the applicant is a listed victim or relative of the listed victim as contemplated in regulation 3(1), information which the applicant must provide in the form with supporting documentation. It appears that each time an applicant requests medical assistance, this is the necessary process. While Regulation 5(6) requires the head of the health establishment to “assist a person in completing” the form, and ensure that it is “completed properly,” this may be an undue administrative burden on health care institutions.

5) Aspects Of The Regulations In Notice 282 Are Procedurally Unfair.

The Annexure Request Forms are unnecessarily complicated to complete; these complex administrative procedures may adversely affect many victims. While the medical benefits regulations specifically provide for help by health personnel to the victims in

completing the request forms,⁷³ the educational assistance regulations do not, making the education program potentially inaccessible. For example, the Basic Education and Higher Education and Training Request Forms ask for banking details and bank stamps of several institutions / persons that a victim may have difficulty collecting. Heads of schools should be educated about these forms, and the regulations should stipulate that school personnel must assist victims in completing them. The schools and training facilities with a high concentration of students who are receiving this assistance should be required to hold open house days during which representatives of banks, boarding homes, transportation providers, and uniform stores are all present to help the victims complete all the necessary paperwork efficiently, ensuring each student is ready to begin school as quickly as possible. Mr. Thapelo Mokushane also advised in his response that any assistance to victims would be detailed in the regulations. The lack of any such provisions in the education regulations implies that there may be no intention to provide assistance.

The forms provided for victims and relatives to apply for assistance with education and skills training do not give sufficient opportunity to provide details about contextual factors relating to vulnerability and financial need. The BER Regulation 9(3) and HER Regulation 10(3) require that the administrator take into account which requests are most “deserving,” “if there are not sufficient funds available for a particular year to provide assistance to all the victims or relatives of the victims.” However, the forms themselves do not request information that may be highly relevant for an administrator to make an accurate assessment of the household’s financial circumstances.

Additional measures could be taken to ensure more accessibility. Request forms should be available at all schools and not just on the Department of Education website, as stipulated in the regulations.⁷⁴ It is unclear how victims are expected to submit the Request Form to the Director General.⁷⁵ The regulations should specify that schools and training facilities will be responsible for submitting all necessary paperwork to the Director General, since those who are most in need of this assistance are likely to have the most difficulty accessing the centres where these forms will be processed. The regulations should also include provisions regarding outreach to victims. It is the State’s responsibility to ensure all children who have been affected by gross human rights violations in the past are registered in schools.

In relation to medical benefits, the request process is equally problematic. The state is only required to liaise with the health official regarding whether or not approval is made. There is no obligation to inform the applicant. This kind of paternalistic legislation is disempowering.

The head of the health establishment must submit to the dedicated official the invoices relating to health services within 7 days. There are no consequences for non-

⁷³ Regulations Relating To Medical Benefits For Victims §§ 5-6, Government Notice (GN) R282/2011 (S. Afr.).

⁷⁴ Regulations Relating To Assistance To Victims in Respect of Basic Education § 10 (2) (b), and Regulations Relating To Assistance To Victims In Respect Of Higher Education and Training § 11 (2) (b), Government Notice (GN) R282/2011 (S. Afr.).

⁷⁵ See Regulations Relating To Assistance To Victims in Respect of Basic Education § 10 (3) (a), and Regulations Relating To Assistance To Victims In Respect Of Higher Education and Training § 11 (3) (a), Government Notice (GN) R282/2011 (S. Afr.).

compliance. But does it mean that the state doesn't have to pay if there was no such submission? If so it would be completely unfair and unreasonable.

There is no provision made for someone to apply as a listed victim or relative of a listed victim and then have confirmation that they have been so assessed so that they don't have to go through the same application process again next time they require health services. The form requires the provision of information about the incident in which the victim was involved and the harm suffered as a result of the 'conflicts of the past' which served as the basis on which the TRC identified the person as a victim. It is stated on the form that the information is necessary to determine whether the person is a listed victim or a relative of a listed victim. Given the limit of listed victims to those determined by the TRC, this information is not necessary. That it is not included in the forms regarding applications under the educational regulations evidences this. It should therefore be deleted. Its inclusion suggests that some assessment will be made regarding whether the health services required are related to the injury which afforded 'victim status'. The provision of health services are not limited that way in the regulations and therefore the requirement to provide the information is inappropriate.

The government should store each victim's information and details of assistance received in the past in secure and easily accessible databases. This would make it possible to quickly identify which eligible children have not applied for assistance and target outreach efforts to specific victims. Each victim should be given an official number; this number should not be connected to the TRC process and should allow all victims of gross human rights violations to access educational and medical benefits. In addition, the renewal forms for educational assistance should be much simpler to complete if a person is staying at the same school or training facility, and this should not involve the same long and tedious process of gathering the same particulars. Storing victim information in databases would also make it unnecessary for a victim to have to recount past traumatic experiences, as the Medical Benefits Request Form currently requires.⁷⁶

The Notice 282 regulations lack clarity in several areas. For one, the 5-year limit on the regulations is not explained. Where does this leave a child who begins receiving assistance at grade 1 and is then left with no support after grade 5? The educational assistance program should be focused on achieving completion and graduation. Similarly, the criteria that the head of a health establishment must use to determine which health services are "necessary" and must therefore be rendered in accordance with the regulations is not detailed.⁷⁷ This criteria needs to be made explicit. It should not depend solely on the judgment of the head of the establishment's personal and medical judgment, as he/she would be unlikely to assume risks and is likely to refuse services out of fear that the service may not be covered by these regulations.

6) Other Aspects of the Notice 282 Regulations are Problematic.

⁷⁶ Section B, question 4 asks victims to "provide information about the incident in which the victim was involved and the harm suffered as a result of the conflicts of the past, which information served as the basis on which the TRC identified the person as victim."

⁷⁷ See Regulations Relating To Medical Benefits For Victims § 6 (2), Government Notice (GN) R282/2011 (S. Afr.).

Funding for these reparation regulations is to come from the President's Fund, established by the Promotion of National Unity and Reconciliation Act.⁷⁸ Providing community reparations is one of the main purposes of the Fund contemplated under the Act: "There shall be paid from the Fund all amounts payable by way of reparations towards the rehabilitation of communities."⁷⁹ Victims have endeavoured to ensure that the Fund is managed with this important purpose in mind, and President Mbeki conceded at the ANC's Polokwane conference in December 2007 that the Fund would be retained for community reparation programs to rehabilitate communities that suffered during apartheid and are still in distress. The proposed regulations do not include any community reparation provisions as stipulated in the Act and as recommended by the TRC. The TRC Report reads: "Entire communities suffer the adverse effects of post-traumatic stress disorder, expressed by a wide range of deponents to the Commission. It is therefore recommended that rehabilitation programmes be established both at community and national levels."⁸⁰

The TRC Report goes on to make specific education and health recommendations under the heading of "Community Rehabilitation," which are ignored by the current regulations. These include establishing local treatment centres for physical and emotional needs, community-based survivor support groups, community crisis and trauma skills training, specialised trauma counselling services, and family-based therapy.⁸¹ It is readily apparent that the TRC recommendations do not contemplate limiting health assistance to listed victims. The TRC Report also includes comprehensive mental health recommendations, yet the Notice 282 regulations limit the medical benefits to "health services" as defined in section 1 of the National Health Act,⁸² which does not provide for mental health services.⁸³ Further, the TRC Report also details education recommendations under the heading of "Community Rehabilitation,"⁸⁴ but the DoJ has dismissed the community aspect in promulgating these regulations that distinguish between individuals living together in distressed communities based on an incomplete victims' list.

7) Other Comments Addressing Inadequacies of the Regulations Relating to Assistance to Victims in Respect of Basic Education and in Respect of Higher Education and Training.

- i) In the case of educational benefits, the draft regulations offer no definitive guidelines for determining the class of eligible "victims."

⁷⁸ Act 34 of 1995 § 42 (S. Afr.).

⁷⁹ *Id.* at § 42 (2A).

⁸⁰ TRC of S. Afr. Report, Volume 5, Ch. 5: Reparation and Rehabilitation Policy, ¶ 94 (Oct. 1998). "In consultation with appropriate ministries, community-based services and delivery should be strengthened and expanded to have a lasting and sustainable impact on communities. . . . The activities that emerge from this policy should aim to bring people together, to promote mutual understanding and reconciliation." *Id.* at ¶¶ 50-52.

⁸¹ *Id.* at ¶¶ 100-06.

⁸² Regulations Relating To Medical Benefits For Victims § 1, Government Notice (GN) R282/2011 (S. Afr.).

⁸³ See National Health Act 61 of 2003 § 1 (S. Afr.) ("[H]ealth services' means- (a) health care services, including reproductive health care and emergency medical treatment, contemplated in section 27 of the Constitution; (b) basic nutrition and basic health care services contemplated in section 28 (1) (c) of the Constitution; (c) medical treatment contemplated in section 35 (2) (e) of the Constitution; and (d) municipal health services.").

⁸⁴ TRC of S. Afr. Report, Volume 5, Ch. 5: Reparation and Rehabilitation Policy, ¶ 107-12 (Oct. 1998).

Instead, the draft regulations refer quite ambiguously to “a person who has been found by the Commission to be a victim as defined in paragraphs (a) and (b) of section 1(1) of the Act,” without referencing a specific, extant TRC finding, list or process.

In addition to barring the mass of South Africa’s victims who did not participate in the TRC, the draft regulations may present additional difficulties for even those victims and their families who did participate. Unlike the draft regulations for medical benefits which make reference to a specific TRC volume 7 and list, the draft regulations for educational benefits provide little of the specificity needed for crafting an effective process for determining whether a person has been “found by the Commission” to be a victim. It’s not clear: what records of the TRC will be determinative? Will participation be limited to only those persons who have appeared before the TRC and have been allocated a TRC reference number? Will victims who failed to collect interim reparations grants still be considered eligible to receive benefits?

This lack of specificity is particularly troubling when one considers that the drafters opted to take a very different approach in the medical context, naming a specific volume of the TRC Report. Are there discrepancies between those who have been “found” to be victims and those who have been “identified” as such in volume 7? Are the two categories for all intents and purposes identical or do they in actuality constitute different victim populations?

Will any victims be excluded from assistance if they have not been classified properly? For instance, is it possible that the wife of a deceased victim may have been “found” by the Commission to be an indirect victim, because she suffered the requisite “harm” under section 1(1)(b) of the Act (“intervening to assist” a victim “in distress”), but was not listed as a victim in volume 7 and thus would be ineligible for medical benefits? Conversely, is it possible for a family member to be on the list of victims in volume 7, but not qualify as a victim under section 1(1)(b) and thus be foreclosed from receiving educational benefits?

Without more information about the content of the operative findings that will be consulted to judge eligibility for educational benefits, it is difficult to gauge how equitable the process will ultimately be and whether or not these provisions will eventually exclude some victims who did have a role before the Commission or who might be considered direct or indirect victims under Section 1(1)(a) or (b).

ii) Documentary requirements are too onerous in the current Regulations on Education Assistance

It appears that the documentary proof required of applicants is unnecessarily burdensome. Applicants for education assistance must provide the following documents in support of their application:

- Proof that the victim supports the applicant (if the applicant is a grandchild of the victim), either through affidavit or financial records.
- Certified copies of the applicant’s identity book.
- The letter from the TRC indicating that the person is a victim.
- Banking details of the educational institution, boarding home, party to be owed for the school uniform, and the party to be owed for the costs of transportation (bank name, account number, branch code) as well as a stamp from each bank confirming these details.

- For tuition, proof of the amount payable to the educational institution and proof of enrolment.
- For the boarding home, proof of the amount payable to the boarding home and that the applicant actually lives in this place.
- For the uniform, confirmation that a uniform is compulsory as indicated in the Institution's Code/Rules.
- For transportation, proof of the amount required for transportation and proof that the applicant makes use of this method of transportation.

The logistics of obtaining these documents may be very difficult for certain applicants, depending on the current geographical location and the availability of transportation, particularly with respect to travelling to potentially four different banking institutions at locations that may be far from home. Further, the BER (Regulation 10(6)(b)) and HER (Regulation 11(6)(b)) both include a provision stating that the “administrator may, if the documents required in the request form are not attached, refuse to consider the request.” While it is unclear to what extent the application can be wholly disregarded without any meaningful consideration, the language of these provisions is ambiguous and leaves room for an administrator to reject an application if any one of these numerous documents is not present.

iii) Amounts payable

There ought to be policy justifications for the determination of the amounts should be provided by the Department. A number of questions remain unanswered.

Why is the payment of an allowance for a school uniform only provided if the uniform is a requirement? What about circumstances where the provision of the school uniform is necessary to ensure the child has appropriate clothing to wear to school?

The payment of a transport allowance to a grade R child is not payable where the school is within 1.5km from their place of residence. This would not be an appropriate distance for a child of that age to walk alone and assumes that someone is available to walk the child, when work commitments may prevent this from being possible. This is then increased to 2km for other children, who may also not be of an age where it is appropriate to walk that distance.

The minimum distances which a person must live from the educational institution to qualify for a transport allowance do not apply where the person is handicapped. However, in some circumstances the legislation refers to physically or mentally handicapped and in others it is limited to physically handicapped. There is no basis for the distinction and a policy justification should be provided or the regulations amended so that all such provisions refer to physically and mentally handicapped.

Payment of boarding or travel allowance will depend on the school the child is attending and consideration will be given to the ‘special needs’ of the child. This term is not defined. Will this only include the needs of physically or mentally handicapped children (as referred to in respect of travel allowances) or will it also take into consideration the capacity of learning institutions to accommodate special learning needs (such as ADHD, etc). It is unclear why the accounting officer would need a month to publish the new maximum amounts each year when the increase is a fixed 5%.

It appears that any financial aid, assistance or concession received from the state is to be deducted from the amount for which the person would otherwise qualify under the

regulations. This is inappropriate and such financial aid should only be considered as part of the gross income of the applicant and treated in the same manner as other forms of income. Arguably the people who qualify for such aid are the most likely to need assistance under these regulations.

iv) Administrator discretion

If there are not sufficient funds available for a year then the administrator gets to determine which of the requests are the most deserving. There is no provision made for assessing whether the funds made available for that year (which is determined by the accounting officer) were appropriate (which is unlikely given they then prove to be insufficient). There should be opportunity to review the amount allocated where it proves insufficient.

The determination of ‘most deserving’ in respect of higher education or training refers to ‘the level of education of a victim or a relative of a victim’. It is unclear how these criteria will be applied.

The regulations allow the administrator to refuse to consider a request if the documents required by the form are not attached. This is inappropriate given the power imbalance between the requester and the state, the level of literacy in the country and particularly among the group who are the target of this legislation. The administrator should be obliged to assist the requester.

The administrator gets to elect the period that a requester has to respond to a notice informing them that the administrator intends to recommend the refusal of their request for assistance. This is inappropriate and a minimum time period must be inserted (suggest 30 days) to protect the interests of the requester.

The person that verifies the decision of the administrator only has the power to refer the recommendation back to the administrator for reconsideration if they do not consider that all the requirements of the regulations have been met. There is no capacity to do so on the basis that they do not agree with the amount recommended or that they do not agree with the assessment of who is the ‘most deserving’ (unless there is a flaw in the procedure itself). While the fund administrator then has discretion regarding payment of monies, there is no provision which gives an express right to that person to pay someone where a contrary recommendation has been made or to pay an amount other than that recommended. This, in effect, means that unless the requester applies for a review of a decision by the DG no review is done of the discretion applied by the administrator. A substantive review step should be included as a matter of ordinary procedure.

There is no time limit in which the DG must respond to an appeal other than ‘as soon as circumstances permit’. This is not appropriate and a maximum time period must be inserted (such as 30 or 60 days). The requester must have certainty regarding when a decision will be made, remembering that a child may not be able to attend school for the year if a decision is not made quickly. Furthermore, some certainty should be provided as to when an application for judicial review under PAJA can be instituted.

v) Other concerns

Education is a key component of a reparations program, as it has the potential to give meaning to the sacrifices and loss of many victims, providing them with the tools to build a better future for themselves and their children. The current regulations contain no provision for screening and evaluating educational programs that will ultimately benefit from the

President’s Fund through victims who enrol in them. Some institutions, attracted by the public payment, could be driven to create cheap and inadequate programs for victims, so quality standards should be established. Also missing, are provisions to cover other educational expenses such as school supplies and school breakfast/lunches. The DoJ should be mindful of schools in certain communities that may experience an influx of students, and the regulations should provide for additional resources to those schools or for building new schools if needed.

The Constitution states that “everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”⁸⁵ Arbitrarily denying education assistance to thousands of victims of gross human rights violations, even when such education assistance was intended by the TRC to be a part of community reparations, is not making education “progressively available and accessible.”

In addition, some of the figures specified in the regulations contribute to this inaccessibility. The Basic Education regulations stipulate that the net household monthly income cannot exceed R 8,000 after deducting mortgage/rent, transport expenses, taxes, pension and medical contributions, R 300 per family member for living expenses, and statutory contributions.⁸⁶ This seems problematic if a child is in grade 10 and a family’s net income is R 9,000—too high to qualify for assistance, but too low to even cover the school fee which will likely be higher than the entire net income. The same problem arises under the Higher Education and Training regulations for a young person who wants to go to college in a family with a net monthly income of R 12,000—too high to qualify for assistance, but too low to even cover the higher education fees which will likely be higher than the entire net income.⁸⁷

Lastly, it is worth noting that the closed victims’ list policy of the education regulations, which refer to the South African Schools Act, is also contrary to the spirit of this law, as expressed in its Preamble, which recognizes the need to “*redress past injustices* in educational provision, provide an education of progressively high quality for *all learners* and in so doing lay a strong foundation for the development of *all* our people’s talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, [and] *uphold the rights of all learners*”⁸⁸

V. RECOMMENDATIONS

The SACTJ makes the following recommendations:

1- Allow all those who are victims of gross human rights violations under the criteria specified in the Promotion of National Unity and Reconciliation Act to access these educational and medical benefits.

⁸⁵ S. AFR. CONST. 1996 ch. 2, § 29.

⁸⁶ Regulations Relating To Assistance To Victims in Respect of Basic Education § 9, Government Notice (GN) R282/2011 (S. Afr.).

⁸⁷ See Regulations Relating To Assistance To Victims In Respect Of Higher Education and Training § 10, Government Notice (GN) R282/2011 (S. Afr.).

⁸⁸ South African Schools Act 84 of 1996 (S. Afr.).

2- Establish ongoing victim registration procedures and take affirmative steps to register victims of gross human rights violations. Support and publicize such efforts through broad information campaigns. Special effort should be made to reach out to victims of sexual violence and other groups who were marginalized in the TRC process and may traditionally be excluded from the social, political and economic life of the country.

3- Undertake an open and transparent process of consultation and dialogue with civil society to revise the Notice 282 regulations so as to be more responsive to victims' needs and afford victims the right to public participation.

4- Implement the TRC's community rehabilitation reparation recommendations, including mental health services.

5- Provide assistance to victims in applying for benefits and eliminate excessively complicated administrative requirements.

6- Streamline victim information in secure and easily-accessible databases, so that victims do not have to continuously provide the same details.

7- Eliminate the 5-year limit on the education regulations and revise the net income requirements.

8- Secure equity in the provision of reparations through reserving funds exclusively for community rehabilitation and establish a body to administer these funds that includes not only members of the government, but also representatives from civil society and the business sector.

9- In relation to the specifics of the proposed programmes, we recommend-

- Provide greater specificity about the process for identifying victims eligible for educational benefits;
- In determining the financial means of a household, the applicant's own monthly financial contributions should be excluded in the analysis of the household's net monthly income, given the household will need to survive without that support for the duration of the beneficiary's education;
- Dependency alone should not be determinative of eligibility;
- At a minimum, medical benefits for conditions related to the human rights abuses (e.g. trauma) should be made available to all victims, direct and indirect;
- The Regulations should require the administrator to take into account the total number of eligible applicants for education assistance in one household and on that basis, determine an appropriate maximum net income accordingly. For household's with several school age children for instance, the cut-off amount for net monthly income should be higher than household's with one child, given the family will need to pay the education costs for each of them;
- The Regulations should recognize the opportunity cost of going to school and allow families to apply for a household subsidy during the time an applicant is in his/her program (including children as well).
- Applicants should be prompted with open ended questions and given ample space to describe in-depth the individual and financial circumstances of the household. This may alleviate some of the difficulty of determining financial need based on collective household income looking only at prescribed and limited indicators for financial need. For instance:

- The form currently asks if the applicant has any disabilities, but not whether any other members of the household do also, which might have a significant impact on the financial circumstances of the household. The applicant should be prompted to provide information for any disabilities or ongoing medical issues among all members of the household and whether these persons require bedside care or full-time support.
- The applicant should be prompted to specify the number of household members who are children or elderly and thus unable to work.
- The applicant should be asked to describe the nature of work held by income-earning members of the household, such as whether it is full-time, seasonal, part-time, temporary/contractual, etc. This may allow the administrator to obtain some insight into the ongoing financial vulnerability of the family, month to month or in the longer term future.
- The purposes and scope of the medical benefit should be specified to give greater clarity to the regulation overall. The Government should clarify whether beneficiaries may receive coverage for all medical treatments or only for those harms caused by human rights abuses under the apartheid regime.
- The bases upon which an application may be rejected should be explicitly laid out.
- The regulations should allow an applicant to apply once and for all for the status of an approved beneficiary, to avoid waiting on approval for each particular application. This might allow for a quicker approval process, reducing the risk to applicants of being rejected after the treatment has already been rendered.
- Previous costs incurred for treatment for harm resulting from gross human rights violations under the apartheid regime should be considered for compensation, particularly given the amount of time that has occurred since these harms were suffered. This recommendation aims to reflect the goal set out in the preamble to South Africa's National Health Act, which recognizes "the socio-economic injustices, imbalances and inequities of health services of the past," and "the need to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights."
- Particularly with respect to banking details, wherever possible the provision of supporting documents should be required AFTER the request is approved as a condition for the receipt of assistance. By requiring documentation after approval has been given, it will help to ensure that the documentary burden is less prohibitive at the outset for potential applicants and will allow greater flexibility in the time limitation for the beneficiaries to provide documents, allowing families to make the necessary logistical arrangements without risking that they miss the application deadline.
- Remove BER Regulation 10(6)(b) and HER Regulation 11(6)(b) entirely. It should be mandatory that all applications are considered in full to ensure that legitimate requests are not rejected merely because the logistical obstacles faced by the applicant are too burdensome.

10- We propose the establishment of an independent reparations monitoring body to consist of 3 members: (a) a representative from Parliament (because of the budgetary and legislation considerations) (b) a representative from the SACTJ and (c) a representative from the SA Human Rights Commission. Such a monitoring body ought to ensure that consultations are conducted, a registration process is established and that regulations are revised when necessary to meet victims' rights to reparations. It could also mediate or review disputes arising from DoJ decisions in relation to reparations.

VI. CONCLUSION

The Notice 282 regulations fall considerably short of addressing the needs of victims. The current reparations program lacks the accountability, transparency and accessibility required to provide marginalized communities with a post-apartheid experience of social justice that honors their sacrifices made in the struggle to achieve a democratic society based on human dignity, equality and freedom.

The Government of South Africa should not let the financial, temporal, and practical compromises of the past dictate the future. To knowingly allow an incomplete process to become dispositive of future benefits is to render a grave and unnecessary injustice to South Africa's victims and to the international norms of State responsibility for reparations.

The SACTJ stands ready to work with the government to ensure that a viable reparations program that serve the needs of victims is generated through participation and consultation.