

# **MEMORANDUM OF UNDERSTANDING BETWEEN THE NATIONAL PROSECUTING AUTHORITY OF SOUTH AFRICA AND THE INTERNATIONAL COMMISSION ON MISSING PERSONS**

## **A. THE PARTIES**

1. The International Commission on Missing Persons (hereinafter referred to as the "ICMP"), as represented by **KATHRYNE BOMBERGER**  

and
2. The National Prosecuting Authority of South Africa (hereinafter referred to as the "NPA"), as represented by **ANTON ROSSOUW ACKERMANN SC**
3. The Missing Persons Task Team (hereinafter referred to as the "MPTT"), represented by **ANTON ROSSOUW ACKERMANN SC**

## **B. PREAMBLE**

1. **WHEREAS** international humanitarian law obliges governments to determine the fate of persons who disappeared during a political conflict; and
2. **WHEREAS** the South African Truth and Reconciliation Commission (hereinafter referred to as the "TRC") investigated gross human rights violations during the Apartheid years in South Africa; and
3. **WHEREAS** the TRC recommended that the MPTT be established to locate and identify the remains of persons who had disappeared during the period of political conflict; and
4. **WHEREAS** the MPTT was established within the Office of the NPA and mandated to conduct investigations to locate the fate and whereabouts of persons who disappeared between 1980 and 1994 and where possible, to recover and identify their remains for return to the affected families;

## **C. PURPOSE OF MEMORANDUM**

The purpose of this Memorandum of Understanding is to record the terms and conditions required by the parties pertaining to:

1. The service to be rendered by the ICMP; and
2. The remuneration and payment of expenses by the NPA.

#### **D. TERMS AND CONDITIONS**

The parties agree as follows:

1. The NPA, at its expense, will submit to the ICMP the biological samples (hereinafter: "the samples") as have been collected from the remains of persons who went missing under the circumstances referred to above.
2. The NPA may also submit the biological reference samples (hereinafter referred to as "the reference samples") that the NPA may obtain from family members of the missing. To the extent feasible, the NPA will use the reference sample collection kits, provided by the ICMP.
3. The ICMP will seek to extract DNA profiles from the samples submitted by the NPA and, in the event the NPA submits the reference samples, the ICMP will compare both kinds of profiles for identification and re-association purposes.
4. The ICMP will report DNA profiles to an authorized recipient designated by the NPA, and will supply the raw data generated. The NPA herewith gives assurance to the ICMP that it will apply rules of strict confidentiality and data protection to the genetic data reported by the ICMP. The NPA herewith also gives assurance that processing of the samples and genetic data is permitted and that, if applicable, data subjects have expressed their free, express and informed consent to the processing of their genetic data in the manner agreed herein.
5. The ICMP agrees to apply strict rules of confidentiality and data protection to the genetic data it acquires from the abovementioned samples. The ICMP may publicise its assistance to the NPA, but specific cases analysed should remain confidential unless the NPA grants permission for any public disclosures to be made or publications generated regarding said cases.
6. The ICMP aims to complete the profiling of the samples within two months of their receipt by the ICMP. Samples received in excess of the total number indicated above may be accommodated subject to extended time lines to be determined jointly by the parties.

7. The ICMP will communicate and report the statistical comparisons with relation to relevant published population databases of allele frequencies exclusively to the NPA, unless it is otherwise agreed by the parties. The ICMP will not perform duplicate testing. Re-testing with new extractions may be performed if it can reasonably be expected to produce satisfactory results. Following testing, the ICMP will retain any remains of samples for up to six months, and thereafter dispose of them in accordance with applicable the ICMP SOP.
8. The primary form of DNA testing and statistical analysis will involve nuclear STR typing following the ICMP ISO17025-accredited standard protocols. Y-chromosomal STR testing may be applicable to certain cases, and can be performed if agreed with the NPA. Likewise, it may be beneficial to test particular samples for additional STR loci to increase statistical strength, or to apply additional experimental procedures to improve the success of the testing. In such cases, agreement will be reached with the NPA prior to work.
9. The NPA agrees to award the ICMP in consideration of the ICMP's efforts and costs, regardless of DNA extraction success, as follows:
  - USD 45.00 per reference sample submitted;
  - USD 2.80 per reference sampling kit provided by the ICMP;
  - USD 295.00 per missing persons sample submitted;
  - USD 70.00 per Y-chromosomal test in the absence of new DNA extraction
  - USD 45.00 per additional STR multiplex applied, in absence of new DNA extraction.
10. Any duplicate or re-testing of a sample shall be counted towards the total consideration due to the ICMP as if the sample was a newly submitted sample. In the event an extraction fails the repeated best practice efforts, the ICMP may request a replacement sample to be submitted. Replacement samples shall be regarded as additional samples for purposes of calculating the consideration due to the ICMP.
10. From time to time or at the request of either party, the parties will jointly evaluate the rates specified in Article 7 above and if appropriate adjust them through an amendment to this Memorandum of Understanding.
11. All payments due to the ICMP shall be made within 30 days upon the receipt by the NPA of a request for payment.

12. Neither party shall be liable to indemnify the other in respect of any claim, debt, damage, or demand brought forth by a third party and arising out of the implementation of this Memorandum of Understanding. Nor shall either party be liable for compensation for the death, disability, or other hazards which may be suffered by the employees and/or volunteers of the other Party as a result of their activities during work on the subject matter of this Memorandum of Understanding. Neither party shall furthermore be liable for expenditures nor obligations incurred by the other in excess of the consideration as specified in this Memorandum of Understanding.
13. This Memorandum of Understanding may be terminated on written notice for cause if a party has failed to comply with its provisions. The Memorandum of Understanding may be terminated for convenience if the parties so agree. It may be terminated by either party if the parties fail to come to an agreement under Article 9 above.
14. Unless a party is notified otherwise in writing, any notice required or permitted under this Memorandum of Understanding shall be deemed sufficiently given if sent by certified mail, return receipt requested, addressed as follows:  
  
If to the ICMP to: Kathyne Bomberger, Director-General,  
Alipasina 45a, 71000 Sarajevo, Bosnia and Herzegovina  
  
If to the NPA: Anton Rossouw Ackermann SC, Special Director  
of Public Prosecutions, National Prosecuting Authority of South  
Africa, Private Bag X752, Pretoria, South Africa, 0001
15. The Memorandum of Understanding shall enter into effect upon the signature of the representative of the NPA and the representative of the ICMP. There shall be two signed copies in English language. All amendments to this Memorandum of Understanding shall be made in writing, duly signed by both parties.
16. The NPA will advise the Chief Directorate for Central and Eastern Europe of the Ministry of Foreign Affairs of South Africa of this Memorandum of Understanding.
17. The parties agree to settle any disputes amicably. Failing amicable resolution, any dispute between the ICMP and the NPA arising out of this Memorandum of Understanding which is not settled by negotiation shall be submitted to arbitration at the request of either party. Each party shall appoint one arbitrator who shall jointly appoint a third, who shall be the chairman. If

the arbitrators cannot agree on a chairman the President of the International Court of Justice shall appoint an arbitrator. The procedure and expenses of the arbitration shall be fixed by the arbitrators in line with internationally accepted standards.

18. Neither this Memorandum of Understanding nor any part thereof shall be construed to constitute any waiver, whether expressed or implied, of any privileges and immunities that apply to the parties, the parties' offices, accounts, assets, officials, officers, experts and staff.

**Signed for and on behalf of the International Commission on Missing**

**Persons at** \_\_\_\_\_ **on** 29/7/ **2009**

  
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**KATHRYNE BOMBERGER**

**Signed for and on behalf of the National Prosecuting Authority of**

**South Africa at** Split **on** 29/7/09 **2009**

  
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**AR ACKERMANN SC**

**Signed for and on behalf of the Missing Persons' Task Team at**

Split **on** 29/7/09 **2009**

  
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**AR ACKERMANN SC**