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Socio-economic rights and the South African transition: The role of the Truth and Reconciliation Commission¹

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1 INTRODUCTION

It is still not so long ago that South Africa was universally condemned as a pariah nation on human rights grounds; yet with the passage of only a few short years, it is now a country to which the world looks with eager anticipation as a model of democratic and humane governance. This anticipation is based in part on its new Constitution, with its promise of protecting universally recognized human rights and promoting social development. In building institutions for a new non-racial democracy that not only protects but also ensures the fulfillment of the basic rights of its citizens, South Africa has embraced a holistic view of human rights. As eloquently stated in the interim Constitution's post-amble, the future of South Africa is "founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".² The Bill of Rights in the Constitution obligates the government to "respect, protect, promote, and fulfill" a wide range of civil, economic, social, and political rights.³ While these rights vary in how immediate government compliance is required⁴, they are all equally justiciable. South Africa has thus gone from a country

1 This article grew out of a submission made to the Truth and Reconciliation Commission on 18 March 1997 on behalf of a consortium of human rights non-governmental organizations. That submission, and thus this paper, benefited greatly from the assistance of many people, most particularly Sandra Liebenberg of the Community Law Centre, Steve Kahanovitz and Henk Smith of the Legal Resources Centre, and Jacqui Bouille of the South African National NGO Coalition. I am also indebted to Nico Steytler and the Community Law Centre for providing me with a warm institutional home during 1996-1997.

2 Constitution of the Republic of South Africa Act 200 of 1993.

3 Constitution of the Republic of South Africa Act 108 of 1996 (the "Constitution"). s 7(2).

4 See note 48 and accompanying text.

that protected very few rights of very few of its citizens, to a country that recognizes more rights for all of its citizens than almost any other constitutional democracy. South Africa has thus taken a quantum leap forward in the struggle for a more just world order. Just as the US Constitution was a product of its times incorporating some of the most progressive political thought on structures of government and the protection of individual rights and liberties, so too is the South African Constitution a product of its times incorporating some of the most progressive political thought on human rights and social development. Just as the US Constitution became a model for others fighting tyranny and oppression throughout the world (including in part South Africa), so the South African Constitution will surely provide a similar model to those people today fighting for social justice throughout the world.

It is not the purpose of this article to analyse all that is new and innovative in the South African Constitution. Rather, this article examines a part of a foundational principle of the South African Bill of Rights that individuals are entitled to a range of rights that ensure individual security, freedom, and well-being, and that these rights are interdependent and the crucial role of the Truth and Reconciliation Commission (the "TRC") in laying the groundwork for the fulfillment of those rights.

Unlike other constitutional democracies, South Africa recognizes the full range of civil, economic, political, and social rights. Rather than choose between the example of countries like the US, which emphasize civil and political rights at the expense of socio-economic rights, or the example of countries like China, which emphasize the fulfillment of social and economic needs at the expense of civil and political rights, South Africa has clearly adopted the approach taken by the modern international human rights movement. Embedded in the South African Constitution, and in the most recent international human rights conventions, is the principle that an artificial division between civil and political rights and economic and social rights results in a society that inadequately protects both. The proposition is a simple one: a society where many are hungry, homeless, or ill, requires increasingly authoritarian methods of social control that infringe on civil and political rights. Conversely, governments that deny civil and political rights are less likely to respond to the basic social and economic needs of the majority of its citizens.⁵

It is not surprising that post-apartheid South Africa has embraced a holistic view of human rights that emphasizes social development. Apartheid systematically violated internationally recognized civil, economic, political, and social rights, and deliberately followed a policy of social development that discriminated on the basis of race. Under apartheid, blacks,

5 One explanation for this latter phenomenon is that in a society that restricts civil and political rights, dissatisfied individuals neither have a mechanism by which their discontent can be made known, nor, in the absence of democratic accountability, is there much incentive for leaders to pay attention to the well-being of most of their fellow citizens.

coloureds, and Indians were subject to discriminatory laws and practices in every aspect of life, including employment, housing, speech, travel, and healthcare. These violations were intimately linked to violations of civil and political rights, and were part of a systematic pattern of persecution and discrimination. In fact, it is this aspect of apartheid – the mass and systematic violation of civil, economic, social, and political rights – that makes apartheid a crime against humanity. It is the singular job of the TRC to examine many of the violations and conflicts of the past in order to promote the development of a human rights culture.

This inclusive view of human rights and its applicability to the TRC is found at three distinct levels of social and legal authority in present-day South Africa. First, it is found at the level of parliamentary legislation in the statute creating the TRC. Second, it is found at the constitutional level in the provisions of both the interim and final Constitution. Third, it is found at an international moral, political, and legal level in the general imperative of post-apartheid South Africa to create a culture that respects human rights and the rule of law. While this article focuses on the importance of economic and social rights in the new South African legal order, a similar analysis can be applied to civil and political rights.

2 THE PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT

The legislation establishing the TRC contains four specific provisions that make it clear that it is to adopt an inclusive view of human rights. First, the definitions of “gross violations of human rights”⁶ which are the violations that are the primary, although not exclusive,⁷ focus of the TRC’s work and “victims”⁸ do not distinguish between types of rights.

Second, one of the categories of acts that triggers the TRC’s interest is “severe ill treatment”.⁹ While the exact definition of “severe ill treatment” is unclear, read within the context of the rest of the legislation the definition should be interpreted to include severe violations of civil, economic, political, and social rights.

Third, one of the major objectives of the TRC’s work is to establish “as complete a picture as possible of the causes, nature, and extent of the gross violations of human rights” that took place during the period under examination, including “the antecedents, circumstances, factors, and

6 Promotion of National Unity and Reconciliation Act 30 of 1995, as amended (the “TRC Act”), s 1(ix).

7 An individual may apply for amnesty for *any* act, not just for a gross violation of human rights. So long as the act might give rise to either criminal or civil liability, there is a direct benefit to the individual receiving amnesty. Whether an act for which an individual has applied for amnesty is a gross violation of human rights is only relevant in determining whether the committee is obligated to hold a public hearing on the application. s 19(4).

8 S 1(xix).

9 S 1(ix)(a).

context of such violations".¹⁰ There are no substantive limits on the types of factors it is to examine in relation to the causes, nature, and extent of gross violations of human rights. In other words, there is nothing to suggest that the TRC is to look at only violations of civil and political rights, or only violations of economic and social rights, in analysing the context of gross violations. The systematic violation of socio-economic rights under apartheid, as well as the systematic violation of civil and political rights, played an undeniable role in causing, and determining the nature and extent of, gross violations of human rights.

Fourth, as its final act, the TRC is to submit a report of its activities and findings, including "recommendations of measures to prevent the future violations of human rights", to the President.¹¹ The recommendations are to focus on the prevention of violations of *human rights*, and not just gross violations of human rights. It is through these recommendations for the future that the TRC will contribute most directly to the ongoing task of translating the Constitution and its Bill of Rights into a living reality.

2.1 The substantive focus of the TRC: Gross violations of human rights and victims

It has become almost a cliché to say that the TRC is a "victim-oriented process." Certainly the early public image of its work is dominated by survivors testifying in harrowing detail about the atrocities that they and their families suffered. This focus of the work on victims was a deliberate political decision made by Parliament in reaction to the obligation to grant amnesty as part of the negotiated settlement ending minority rule. The concern was that a process restricted to the granting or denial of amnesty would provide little space for the voices of the vast majority of people whose lives had been shattered by the acts for which individuals would be receiving amnesty. Focussing solely on those applying for amnesty would yet again silence those who had suffered the most during the conflicts of the past. The TRC was thus created with three major functions: the granting to certain victims of an opportunity to tell their story in public hearings and through oral or written statements made to it; the formulating of recommendations on reparations that should be granted to victims; and the granting of amnesty to individuals for certain acts undertaken with a political objective. Each of these functions is performed by a separate committee. Two of the three committees of the TRC are thus driven in large part by the experience of those who suffered from the violations of the past.

What then are the violations that are the focus of the TRC's work? There are two concepts in its legislative mandate that provide guidance on the type of violations under investigation: "gross violations of human rights", and "victims".

¹⁰ S 3(1)(a).

¹¹ S 3(1)(d).

Gross violations of human rights are defined as "the violation of human rights *through* the killing, abduction, torture, or severe ill-treatment of any person", and "any attempt, conspiracy, incitement, instigation, command or procurement to commit" such an act.¹² There are two parts to the definition. First, there are the acts that trigger the interest of the TRC i.e. acts of killing, abduction, torture, and severe ill treatment, and attempts and related efforts to commit such acts. This is a limiting factor in the mandate of the TRC. It must be able to point to one of these acts in order to justify its interest in a particular violation.¹³ Second, once the interest of the TRC is triggered through one of the specified acts, the types of violations that are the subject of the Commission's investigation is limited only to violations of "human rights". In other words, the TRC is to look at the violations of an individual's "human rights" that are the result of, or are effected through, specific acts of killing, abduction, torture, and severe ill treatment.

This focus on the violation of an individual's "human rights" is also found in the Act's definition of "victim." Unlike the definition of gross violations of human rights, "victim" is not exclusively defined in other words, the definition does not claim to provide an exclusive list of who can be considered a victim by the TRC. It may, if it so chooses, define other categories of victims in addition to those explicitly mentioned in the Act. Thus "victim" is defined as *including* a person or group of persons who "suffered harm in the form of . . . a substantial impairment of human rights" as a result of one of three things: (i) an act that qualifies as a gross violation of human rights; (ii) an act for which an individual has received amnesty; or (iii) an act that resulted from the victim's intervention to assist other victims.¹⁴ Like the definition of gross violations of human rights, there is a distinction between what triggers the TRC's interest in a victim, and what sorts of harm are then taken into account with respect to each victim. In other words, in order to qualify as a victim as defined in the legislation, an individual must have been harmed by one of the three specific types of acts listed. That harm, however, must consist of a "substantial impairment" of that individual's "human rights". Not all individuals who have suffered a substantial impairment of their human rights are automatically considered victims under the Act. It is only those people who suffered such harm as a result of one of the specified acts. Thus an individual who suffered a substantial impairment of her human rights by an act for which someone has received amnesty, qualifies as a victim. Since an individual may receive amnesty for an act that does not qualify

¹² S 1(ix) (emphasis added).

¹³ While the definition of gross violations of human rights does have a number of limiting factors, the TRC is empowered by the Act with a large degree of discretion in determining the scope of its mandate. This discretion is tied to the goal of achieving national unity and reconciliation. In other words, the TRC is empowered to focus on anything that in its opinion will contribute to national unity and reconciliation (s 3(2)). See also s 3(m) (granting TRC authority to look into *any* matter at its own initiative or at the request of any interested person regardless of whether it contributes to national unity or reconciliation).

¹⁴ S 1(xix).

as a gross violation of human rights, the definition of a "victim" further expands the type of acts the TRC may examine. In other words, the scope of acts that trigger the TRC's interest in an individual as a victim are much broader than those included in the definition of gross violations of human rights. This is equally true for the last category of acts referred to above.

The concept of "human rights" is central to both the definition of gross violations of human rights and victim. What, then, is meant by "human rights"? What are the types of rights the violation of which are the proper subject of the TRC's inquiry? In other words, when the TRC says that an individual suffered a "substantial impairment" of her "human rights", what sorts of harm are being described?

"Human rights" is not defined in the Act, so we must look elsewhere for a definition. There are three obvious sources relevant to the TRC: 1) Chapter 2 of the Constitution; 2) the African Charter of Human and Peoples' Rights;¹⁵ and 3) the International Bill of Rights, consisting of the Universal Declaration of Human Rights,¹⁶ the International Covenant on Economic, Social, and Cultural Rights,¹⁷ and the International Covenant on Civil and Political Rights.¹⁸ The first is the authoritative statement of what constitutes human rights within the new South African constitutional system; the second is the authoritative statement of what constitutes human rights at the African regional level; and the third is the authoritative statement of such rights at the international level.

Numerous typologies have been developed to categorize and analyse the different types of rights protected under international law. The most pervasive, and the one that has been the subject of much debate, is an analysis that divides rights into two broad categories: civil and political rights, and economic and social rights. This division was institutionalized in the two international covenants drafted by the United Nations: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.¹⁹ It is beyond the

15 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3 Rev 5 (1981), 21 ILM 59, entered into force on 21 October 1986 (49 parties as of 1 September 1995).

16 Universal Declaration of Human Rights ("UDHR"), GA Res 217A (III), UN Doc A/810 71 (1948).

17 International Covenant on Economic, Social and Cultural Rights ("ICESCR"), GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3, 6 ILM 360, entered into force on 3 January 1976 (135 parties as of 1 September 1996).

18 International Covenant on Civil and Political Rights ("ICCPR"), GA Res 2200A (XXI) 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 717, entered into force on 23 March 1976 (136 parties as of 1 November 1996).

19 These two Covenants grew out of the first major international statement of human rights: the Universal Declaration of Human Rights. Unlike the two Covenants, the UDHR adopts a holistic view of human rights, including civil, economic, political, and social rights. In the latter part of the twentieth century, international human rights legislation has returned to the holistic model of the UDHR. See, e.g. Convention on the Rights of the Child, GA Res 44/25, Annexure, 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), 28 ILM 1448, entered into force on 2 September 1990 (190 parties as of 1 March 1997); and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), GA Res 34/180, 34 UN GAOR, Supp (No 46), UN Doc A/34/46, 193 (1979), 1249 UNTS 13, 19 ILM 33, entered into force on 3 September 1981 (156 parties as of 1 March 1997).

scope of this essay to delve into the pros and cons of the various ways rights are categorized and analysed. For our purposes, the important point is that South Africa has embraced the trend at both the regional and international level to recognize the interdependence of all rights and to reject efforts to label one set of rights more important than another. Thus, as discussed briefly below, the Bill of Rights of both the interim and final Constitutions recognizes and protects a wide range of civil, economic, political, and social rights. The same is true of the African Charter on Human and People's Rights. Finally, the most widely ratified human rights treaty, the Convention on the Rights of the Child, follows the trend of other recent international human rights conventions in prohibiting in one instrument violations of all types of human rights.

It is clear from the text of the Constitution that the concept of human rights in South Africa is a holistic one, embracing universally recognized civil, economic, political, and social rights. It is this definition of human rights that informs the mandate of the TRC. Thus a gross violation of human rights is a violation of an individual's civil, economic, political, or social rights *through* an act of killing, abduction, torture, or severe ill treatment. A "victim" thus includes a person who suffered a "substantial impairment" of his civil, economic, political, or social rights as a result of a gross violation of human rights; an act for which someone has received amnesty; or an act resulting from his intervention to assist a victim.

What does this mean in practice? There are two related ways in which a holistic view of human rights informs the work of the TRC. First, any investigation and analysis of gross violations of human rights will quickly show that gross violations of human rights occur within the context of, and thus are partially caused by, a variety of human rights violations. This is an inquiry concerning the context of gross violations. A second and related point is that in assessing the damage that results from such a violation, one quickly realizes that gross violations of human rights do not discriminate in their consequences. In other words, the consequences of a gross violation of human rights are just as likely to affect universally recognized civil and political rights as economic and social rights. Let us take the example of a student leader in a community that has been denied basic educational resources such as teachers, schools, books and that has been the subject of deliberate discrimination in the allocation of such resources by the government. While leading a peaceful demonstration demanding more educational resources for his community, the student leader is killed by members of the security forces. The killing triggers the TRC's jurisdiction. The first inquiry concerning the context and causes of the gross violation of human rights involves the right to education. The second inquiry concerning the effects of the violation involves the rights to life and education, and the freedoms of expression, assembly, and demonstration. Except for the right to life, these are violations of the rights of both the student leader and other members of his community the other demonstrators, students, and the general community from which they come. All of these rights are violated *through* the killing of the student leader. This particular gross violation of human rights thus had an immediate impact on five different rights recognized in the Constitution: education, life, assembly, expression, and demonstration.

Who are the victims in this example? Victims are those who have suffered a "substantial impairment" of their human rights through, in this case, a gross violation of human rights. Clearly the killed leader himself is a victim, as are members of his family.²⁰ His fellow demonstrators might be victims, since their rights to assemble and freely express their views may have been violated. The question is whether the infringement on the right to assemble was substantially impaired by the killing. If the police continued to threaten individual demonstrators, thus effectively making it impossible to exercise these rights, then one might conclude that the killing of the leader did substantially impair their rights, and they would qualify as a victim. What about members of the community who did not participate in the demonstration but who, in one way or another, had an interest in the educational issues at stake? If it can be shown that the death of the leader directly contributed to the perpetuation of the denial of the right to education of members of that community, or that access to education in fact decreased as a result of his death, then one might conclude that members of the community qualify as victims under the TRC Act.²¹

A similar analysis can be applied with respect to many of the violations that the TRC is investigating. To cite only one example, the destruction of houses in the KTC camp outside of Cape Town involved killings and severe ill treatment, and resulted in the denial of the right to access to adequate housing entrenched in the Bill of Rights. Hundreds of individuals desperately fought to preserve their right to housing. In the end, over sixty people were killed and thousands of homes were destroyed. As the hearings before the TRC on this incident have shown, the government was intimately involved in the destruction of the camp in its efforts to enforce racially defined residential zoning. The destruction of the camp was thus part of the broader systematic persecution of black people, and part of the systematic violation of freedom of movement, access to adequate housing, and discrimination that was a fundamental part of government policy at the time.

The definition of gross violations of human rights does not include *all* violations of universally recognized civil and political rights, such as equality before the law,²² privacy,²³ freedom of expression,²⁴ and the opportunity to vote and otherwise participate in public life.²⁵ Nor does it include *all* violations of universally recognized economic, social, and cultural rights, such as formation of trade unions,²⁶ protection of the family,²⁷ and the

20 Victim is defined as including relatives and dependants of victims (TRC Act, s 1(xix)(c)).

21 Surely such a community and its members are victims in the broader sense of the word. They have lost not only a member of their community but also an effective advocate for social justice.

22 Art 14 ICCPR; s 9 Constitution.

23 Art 17 ICCPR; s 14 Constitution.

24 Art 9(2) ICCPR; s 16 Constitution.

25 Art 25 ICCPR; s 19 Constitution.

26 Art 8 ICESCR; s 23 Constitution.

27 Art 10 ICESCR.

enjoyment of a minimum standard of living.²⁸ Likewise, not all individuals who had many of these same rights violated automatically qualify as a victim under the Act. Some violations of these rights, however, are part of the TRC's work: those that are the result of, or associated with, acts of killing, abduction, torture, or severe ill treatment. Those individuals that can show a substantial impairment of their rights through any of these acts will thus qualify as a victim under the Act.

By incorporating socio-economic rights into its definition of gross violation of human rights, the TRC is hardly breaking new ground. At the dawn of the modern international human rights movement in 1946, the International Military Tribunal ("IMT") at Nuremberg prosecuted individuals for crimes against humanity that included violations of socio-economic rights. While in order to qualify as a gross violation of human rights under the Act, a violation of socio-economic rights must be shown to have been effected through an act of killing, abduction, torture, or severe ill treatment. At Nuremberg a violation of socio-economic rights had to be a part of a mass or systematic pattern of persecution. Persecution was defined at Nuremberg to include a wide variety of discriminatory acts. While the IMT concluded that discrimination against Jews in food rationing was not sufficiently severe in its consequences to constitute a crime against humanity, the Tribunal did indicate that offences against personal property such "as would amount to an assault upon the health and life of a human being (such as the burning of his house or depriving him of his food supply or his paid employment)" might constitute a crime against humanity.²⁹

2.2 Severe ill treatment

The second area where the TRC confronts violations of socio-economic rights is in its examination of cases of severe ill treatment. As argued above, the definition of gross violations of human rights encompasses all *types* of rights irrespective of what constitutes "severe ill treatment". There are many who argue, however, that "severe ill treatment" should be defined so as to encompass violations of a wide variety of civil, economic, political, and social rights. What then, is the definition of severe ill treatment? Does it include certain extreme violations of socio-economic rights, and certain extreme violations of civil and political rights?

The Act does not define the term "severe ill treatment," nor is there any guidance to be found in the Act's legislative history. In addition, the term "severe ill treatment" is not a term of art found in international human rights law. The Constitution follows international human rights law in prohibiting "cruel, inhuman, or degrading treatment or punishment."³⁰

28 Art 11 ICESCR; s 27 Constitution.

29 *Prosecutor v Dusko Tadic*, Trial Chamber decision, Case No IT-94-I-T, par 707, 36 ILM 908,959 (1997) citing to *United States v Flick* (Case No 5), VI Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10 (1950).

30 S 11(2) Interim Constitution: Most international treaties prohibit "cruel, inhuman, or degrading treatment or punishment", see, e.g. art 7 ICCPR, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, 39

[continued on next page]

The interpretive doctrine of *eiusdem generis* suggests that we should look to the other identified acts in determining the contours of what constitutes severe ill treatment. Two of the other three acts killing and torture involve severe and intense physical pain and violence. The other, abduction, is sometimes accompanied by severe violence but can just as easily be committed without it. Abduction is a crime that is as much about terror as it is about physical harm. It traumatizes both the person abducted and the community from which that person comes. It violates the individual's right to personal security, liberty, and dignity. The three acts of killing, torture, and abduction are universally recognized as violations of fundamental human rights.³¹ Any definition of severe ill treatment should therefore incorporate acts that are universally or near universally recognized as violations of fundamental human rights, and that result in harms similar in their severity to that created by acts of killing, torture, and abduction. Thus acts that terrorize an individual or a community, or that result in severe harm to an individual's physical well-being, security, liberty, or dignity, would be likely candidates for severe ill treatment.

UN GAOR Supp (No 51) 197, UN Doc A/39/51 (1984), entered into force on 26 June 1987; art 5(2) American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123 entered into force July 18, 1978. The European Convention on Human Rights, however, prohibits "inhuman or degrading treatment" (art 3, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1950), entered into force on 3 September 1953).

One of the first decisions of the Constitutional Court found that juvenile whipping constitutes cruel, inhuman, or degrading punishment. *S v Williams*, 1995 5 BCLR 861 (CC). While this decision was based on the interim Constitution, the final Constitution has almost identical language. See s 12(1)(e) of the Constitution (prohibition against being "treated or punished in a cruel, inhuman, or degrading way").

- 31 Summary executions are universally recognized as a fundamental violation of human rights. Not all killings, however, are prohibited under international or national law. All legal systems acknowledge that an individual who kills in self-defence is not necessarily liable for that act. The definition of what is legitimate self-defence, however, and what must be shown in order to justify such a killing, does vary from state to state. Killings undertaken as part of an armed conflict when not in violation of the principles of international humanitarian law as set forth in the Geneva Conventions are not considered violations under international law. The international law of armed conflict also known as the laws of war or international humanitarian law is codified in six major international conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) ("First Geneva Convention"); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (1949) ("Second Geneva Convention"); Geneva Convention Relative to the Treatment of Prisoners of War (1949) ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) ("Fourth Geneva Convention"); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (1977) ("Protocol I"); and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (1977) ("Protocol II"). Finally, some states still utilize the death penalty. While capital punishment is discouraged under international law, it is not categorically prohibited. See, e.g. ICCPR art 6(2). States are, however, strongly encouraged to take steps to eliminate the use of capital punishment. See ICCPR art 6(6) ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.").

What about the prohibition against cruel, inhuman, or degrading treatment or punishment found in the Constitution and international human rights law? That prohibition has been interpreted by numerous international tribunals and jurists. While evaluations of degrees of violation and harm are always fraught with controversy and uncertainty, the general observation that the category of cruel, inhuman, or degrading treatment or punishment is more inclusive than the category of severe ill treatment would seem to be uncontroversial. Thus not all acts that are considered cruel, inhuman, or degrading would also qualify as severe ill treatment. International interpretations of the prohibition against cruel, inhuman, or degrading treatment or punishment are useful if only to suggest limits to any definition of severe ill treatment. A review of international decisions and the writings of international jurists reveals the following as constituting cruel, inhuman, or degrading treatment or punishment:

- (a) Forcing detainees to stand for long periods of time; subjecting detainees to sights and sounds that have the effect or intent of breaking down their resistance and will; or inflicting severe mental or physical stress on detainees in order to obtain information or confession.³²
- (b) Expulsion from, or refusal of admission to, one's own country according to a discriminatory application of law; or in order intentionally to inflict physical or mental suffering; or without the necessary due process.³³
- (c) Deprivation of certain basic needs of the person, such as the need for food, water, or sleep, if the pain or suffering inflicted is not severe enough to constitute torture.³⁴
- (d) Deliberate indifference to a detainee's medical needs and deprivation of the basic elements of an adequate medical treatment.³⁵
- (e) Sexual abuse³⁶ and other forms of gender-based violence.³⁷

32 See *Ireland v United Kingdom* 18 January 1978 Series A, No 25 paras 166-68 (1978); *Bouton v Uruguay* (37/1978). Report of the UN Human Rights Committee GAOR, 35th Sess, Supp No 40 (1980), Annex XIV.

33 See *East African Asians v United Kingdom*, (1977) 3 EHRR 76 paras 186-88 But see *Xuncax v Gramajo* 886 F.Supp. 162, 189 (D Mass 1995) (US court holding that "constructive expulsion" of a citizen does not constitute cruel, inhuman, or degrading treatment or punishment).

34 Burgers & Danelius 1988: 118.

35 With respect to detainees and prisoners, the Standard Minimum Rules for the Treatment of Prisoners, adopted 31 July 1957, ESC Res 663C, 24 UN ESCOR Supp (No 1) 11, UN Doc E/3048 (1957), amended ESC Res 2076, 62 UN ESCOR Supp (No 1) 35, UN Doc E/5988 (1977) (adding art 95), provide guidelines to determine what constitutes cruel, inhuman, or degrading treatment in a particular case.

36 Cable from Secretary of State to All Diplomatic and Consular Posts Re: Instructions for the 1991 Country Reports on Human Rights Practices, P 211857Z (August 1991) (rape and other sexual abuse during arrest and detention or as a result of operations by government or opposition forces in the field constitutes torture and other cruel, inhuman or degrading treatment or punishment).

37 UN Committee on the Elimination of Discrimination Against Women, Adoption of Report, 11th Sess, General Recommendation No 19, at 2, UN Doc CEDAW/C/1992/L1 Add.15 (1992) (gender-based violence violates the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment).

- (f) Prolonged judicial proceedings and delay in capital cases.³⁸
- (g) Delay in removing a condemned prisoner from a "death cell" after a stay of execution has been granted.³⁹

While some of these may not qualify as severe ill treatment under any definition, certainly cases described in (a) – (e) above that result in severe physical or mental harm would be strong candidates for inclusion.

While acts that qualify as cruel, inhuman, or degrading treatment or punishment under international law occupy the outer limit of what constitutes severe ill treatment, acts of persecution that qualify as crimes against humanity certainly fall squarely within any definition of severe ill treatment. As noted earlier, the international military tribunal at Nuremberg found that numerous violations of socio-economic rights were part of broader crimes against humanity. In identifying those violations, the tribunal was careful to limit itself to the most severe and egregious examples of social and economic deprivation. The IMT's statement that offences against personal property such "as would amount to an assault upon the health and life of a human being (the burning of his house or depriving him of his food supply or his paid employment)", might constitute a crime against humanity suggests that such acts would also qualify as severe ill treatment.⁴⁰ The Nuremberg Tribunal did find that certain acts of economic discrimination constituted persecution, and thus qualified as a crime against humanity.⁴¹

Based on the other acts identified in the definition of gross violations of human rights, and on the above international interpretations of cruel, inhuman, or degrading treatment or punishment and crimes against humanity, I suggest that certain severe violations of socio-economic rights constitute severe ill treatment. Those violations of socio-economic rights that result in a severe and deliberate deprivation of minimal subsistence needs to an individual or community, and that are committed with wanton disregard for the well-being of that individual or community, would qualify as severe ill treatment; so also would the forceful taking from an individual or community of such basic needs as housing, food, and medical care in a manner that severely and directly lowers their living standards.⁴² Thus a family that was forcibly moved to an area where they

38 Human Rights Committee decision of *Pratt v Jamaica* cited in the Privy Council case of *Pratt v Jamaica*, 2 AC 1, 4 All ER 769, 3 WLR 995, 143 NLJ 1639 (1993).

39 *Ibid.*

40 *Supra* note 29.

41 *Ibid.* Nuremberg also found that speech could amount to persecution, in finding Streicher guilty of crimes against humanity for his vitriolic anti-Semitic speeches and publications that Telford Taylor, one of the American members of the prosecution team, later concluded was a mistake. See Taylor 1992.

42 It is of course true that millions of South Africans were discriminated against and persecuted under apartheid, and that many South African citizens are under-educated, malnourished, under-skilled, and suffer chronic health problems as a direct result of apartheid. They are all victims of apartheid. One indicator of the legacy of apartheid is reflected in the recently issued Report of the Lund Commission on Child and Family Support (August 1996), which notes that in 1995, 95% of the poor in South Africa were

[continued on next page]

enjoyed a lower quality of life consisting of no running water, inadequate or no latrines, minimal if any medical care, and substandard or no housing, would meet this definition of severe ill treatment.

The following statement of a woman who was forcibly moved from her home on a white farm to Sahlumbe by the apartheid government reflects more eloquently than the definitions and examples above the types of socio-economic violations that most of us would agree constitute severe ill treatment:⁴³

"A BAD [Bantu Education Department] man gave me a stand which had four poles at the corners and said that was where I could build my house. I was given a tent to erect on the stand. As soon as we had put a roof on the first hut, the tents were taken away for someone else.

A water tanker was parked nearby so that we could get water to make the mud walls of our house. The moment the tents were taken away, the tanker was also taken elsewhere. After the tanker went, we had to carry water in 5-gallon drums from the Tugela which was a mile downhill from our place. This we still do.

There were no latrines. It was horrible to have to squat in public. The stands were clear and there were many of them and everybody had to do that. There was nowhere else to go that was private. We came from homes where the nearest neighbour was half a mile away and there were thick bushes to give us privacy. Now we were all living right on top of each other."

2.3 Causes, nature, and extent of gross violations

The third area where the TRC confronts socio-economic rights is through its mandate to compile "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights," including "the antecedents, circumstances, factors, and context of such violations." An analysis of the causes of the violations of the past will provide important information to assist contemporary efforts to create institutions and policies that ensure that South Africa does not again become synonymous with a callous disregard for human rights. An analysis of the nature and extent of the violations will assist in efforts to design institutions and policies to repair the extensive damage of the past – damage that can only be measured in part in material terms, and in part in psychological, moral, and developmental terms.

The systematic violation of socio-economic rights was an important contributing *cause* of many acts that qualify as a gross violation of human rights. In addition, the *nature* and *extent* of the gross violations include the violation of a large number of socio-economic rights. Finally, violations of socio-economic rights were certainly an *antecedent* to, and constitute some of the *circumstances, factors, and context* of, such gross violations.

African, and that many of the very poorest households in that year were headed by women. Report at 1. The effects of over forty years of apartheid, and hundreds of years of racism and colonialism, are overwhelming. The TRC is only one of many institutions established to address the legacy of the past.

43 Quoted in Surplus People Project 1985.

The systematic violation of *all* human rights – political, civil, economic, social and cultural – in South Africa under apartheid created the context which resulted in gross violations of human rights. Through systematic policies and legislation the government deprived black people in this country of their right to vote, the right to freedom of speech and assembly, and basic labour rights, to name just three. It also deprived the majority of its citizens of their fundamental right to live where they please, work, and receive education and social security without discrimination on the grounds of race or gender. Large numbers of people were subjected to discriminatory and arbitrary forced evictions, demolitions and resettlements in accordance with the dictates of apartheid ideologues and planners.

To enforce such deliberately inhumane policies, the State resorted to killings, abductions, torture, and severe ill treatment. Thus the violation of these socio-economic rights was one of the causes that led to the more immediate violations that are the main focus of the TRC's work. Resistance to these oppressive laws and policies through demonstrations, political organizing, and other forms of protest provoked in turn further gross violations. In addition, the nature and extent of the violations of socio-economic rights sometimes amounted to gross violations of human rights. Thus, to use an earlier example, the killing of the student leader not only violated that individual's right to life, but also a range of other rights of that individual and the community from which he came.⁴⁴

2.4 Prevention of human rights violations

The final area where socio-economic rights enter the TRC's mandate is found in its obligation to make recommendations to the President concerning the prevention of violations of *all* human rights. Its recommendations are two-fold. First, based on its analysis of the causes, nature, and extent of gross violations of human rights, the TRC is to suggest ways to lessen the risk that gross violations of human rights occur in the future. To the extent that such gross violations were caused by socio-economic rights along the lines described above, the TRC will presumably include in its recommendations mechanisms for the prevention of these types of violations.⁴⁵ Second, based on its experience in addressing gross violations of the past, the TRC is also to make recommendations to prevent future violations that would not qualify as a gross violation under the Act. In practice, given the limited life of the TRC and the focus of its work, this

44 The submission to the TRC on gender prepared by Dr. Sheila Meintjes and Beth Goldblatt from the University of the Witwatersrand provides a number of examples of the range of human rights violations that resulted from an act of killing, abduction, torture, or severe ill treatment. See Gender Submission at 26-30 (discussing gross violations of human rights that resulted in economic, social, and cultural violations) (on file with author).

45 In many cases this will of course include recommendations that will involve other institutions created by the new Constitution, such as the Human Rights Commission, and policies of the current government, such as the Reconstruction and Development Programme.

second set of recommendations will greatly overlap with the first. While the TRC will generally only be looking at violations of socio-economic rights to the extent they were effected through gross violations of human rights, or to the extent that they were part of the cause of such violations, such analysis should provide enough information for the TRC to make at least preliminary recommendations on how to prevent violations of, and fulfill the promise of, the socio-economic rights embodied in the Constitution. In so doing, it will make an important contribution to government and non-governmental efforts to create a human rights culture that respects and fulfills *all* human rights.

3 INTERIM AND 1996 CONSTITUTIONS

Both the interim and final Constitutions emphasize a holistic view of human rights entrenching alike civil, economic, political, and social rights. This emphasis on the full range of human rights is found throughout the text of the Constitutions, including the Constitutional Principles that provided the framework for the drafting of the final Constitution; the pre- and post-ambles; the Bill of Rights; and the constitutionally-mandated human rights institutions.

The importance that the founders of the new constitutional order attached to a holistic view of human rights is reflected in the Principles that provided the framework for the drafting of the final Constitution.⁴⁶ The second Constitutional Principle directs that the drafters incorporate and entrench "all universally accepted fundamental rights, freedoms, and civil liberties." The final Constitution thus adopts the modern but well-settled position that treats civil, economic, political, and social rights equally.

The break with the past and the decision to embrace a new vision of human rights is eloquently articulated in the pre- and post-ambles. The preamble to the new Constitution thus states that its adoption is for the establishment of "a society based on democratic values, social justice and fundamental human rights", and to "[i]mprove the quality of life of all citizens and free the potential of each person". The interim Constitution's postamble speaks of a future South Africa founded on "the recognition of human rights . . . and development opportunities" for all. Both Constitutions thus operate within a general framework that emphasizes all rights,

46 As part of the negotiated transition, an interim Constitution was drafted to provide a framework for the transition from a system of parliamentary supremacy to one of constitutional supremacy. The interim Constitution was the product of negotiations among the national political parties, and was passed by a Parliament constituted under the old regime. The interim Constitution became effective on 27 April 1994 -- the day of the first non-racial democratic elections. The final Constitution was drafted and passed after these historic elections, and thus was approved by the most representative Parliament that South Africa has ever seen. It was the Constitutional Principles included in the interim Constitution that provided the basis for the certification of the final Constitution by the Constitutional Court. See *In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC); *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa* 1997 1 BCLR 1 (CC).

and in particular socio-economic rights as they are promoted through social development.

The Bill of Rights of both the interim and final Constitutions gives concrete meaning to the general commitment to all human rights. The Bill of Rights recognizes the following civil and political rights: equality (s 9); freedom of conscience, religion, belief, and opinion (s 15); freedom of expression (s 16); freedom of assembly, demonstration, picket, and petition (s 17); freedom of association (s 18); political participation (s 19); citizenship (s 20); freedom of movement and choice of residence (s 21); access to information (s 32); just administrative action (s 33); access to courts (s 34); and the traditional rights of criminal defendants (s 35). Alongside these rights are also found the following economic, social, and cultural rights: freedom of trade, occupation and profession (s 22); fair labour practices (s 23); healthy environment (s 24); property (s 25); access to adequate housing (s 26); access to health care, food, water, and social security (s 27); education (s 29); use of language and participation in cultural life (s 30); and the right to form cultural, religious, and linguistic communities (s 31).⁴⁷ Unlike many of the socio-economic rights in the International Covenant of Economic, Social and Cultural Rights, the final Constitution makes all rights equally justiciable and equally immediate in their application. The core right in some cases, however, is access and not immediate provision.⁴⁸

Finally, the mandates of the constitutionally created human rights bodies also illustrate the holistic view of human rights. Thus, the Human Rights Commission is specifically empowered to promote respect for and protection of all human rights.⁴⁹ The Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities is to promote the human rights of specific communities.⁵⁰ The Commission for Gender Equality is empowered to look at violations specifically affecting women.⁵¹ In addition to these constitutional institutions, statutory bodies have also been created to focus on specific areas of economic and social rights, such as the Land Claims Commission.

4 THE HUMAN RIGHTS IMPERATIVE

The above discussion is meant to show *how* one can conclude that the new South Africa has adopted a holistic view of human rights. It examines

47 In addition to the civil, economic, political and social rights listed above, the Bill of Rights also recognizes the following rights that protect the integrity of the person: dignity (s 10); life (s 11); freedom and security of the person (s 12); not to be subject to slavery, servitude, or forced labour (s 13); and the right to privacy (s 14).

48 This does not mean that provision is irrelevant. One could certainly envision a situation where the availability of a particular good such as housing or health care was so expensive or so rare, that the right to access could be interpreted to require some action to increase the supply of the good so as to increase its accessibility.

49 S 184 Constitution.

50 S 185 Constitution.

51 S 187 Constitution.

the results of political decisions made during the transition to a non-racial democratic government: the mandate of the Truth and Reconciliation Commission and the rights entrenched in the new Constitution. What I want to touch on here is why it is important that these political decisions were made the way they were, and even to argue that South Africa was under some form of an obligation to embrace the contemporary view of human rights. By obligation, however, I do not mean obligation in the strict legal sense although I join those who say that international human rights law now obligates all states to respect most of the rights found in South Africa's Bill of Rights. The obligation I speak of here is a political and moral one. It is an argument based on history.

South Africa perfected systematic racial persecution and discrimination, and thus committed one of the most sustained and far-reaching crimes against humanity in human history. This historical fact places a heavy burden on South Africa. It is a burden that rests heavily on the overwhelming majority of South African citizens, who have lived a life filled with denied opportunities who are constantly confronted with the world of "what if . . ." The effects of this crime can be seen throughout society – the crowded living conditions that prevail in the black townships; the crowded and unsanitary medical clinics; and the lack of primary and secondary schools. Such a crime cries out for its own justice. It demands that some redress be made. It is a demand that finds its authority less in positive law, and more in natural law and historical necessity; it is the demand of the human rights imperative. It requires a comprehensive and holistic rehabilitation of a severely damaged society. Such a rehabilitation must address not only the acts of physical violence, and not only the systematic violations of civil and political rights, but also the systematic violations of economic and social rights. It is in the violation of those socio-economic rights that the most lasting damage is found, and thus where the most sustained efforts of healing are required. It is thus an imperative that says as much about how to redress the damage caused through comprehensive and progressive social development policies as it does about how to prevent their recurrence.

While the holistic approach to human rights demanded by the human rights imperative focuses on the domestic health of South African society, South Africa's enthusiastic embrace of such a holistic view is equally important internationally. While apartheid destroyed lives in South Africa, internationally it threatened to destroy many ideals of the modern human rights movement. As the implementation of an ideology of deliberate racism, it gave support to others throughout the world who preached racial and ethnic hatred and separation. The end of apartheid marks a watershed in the international human rights movement. It signals the end of a system that deliberately and openly oppressed people solely because of their race. There is no longer a society in the world that someone can point to as a model for such deliberate persecution. The hope is that the elimination of the model will make any attempt to recreate such a system less likely in the future.

In addition to eliminating such a negative model of human relations, modern South Africa has provided the international community with a

positive model towards which all societies can strive. Contemporary South Africa provides a concrete model of a society that respects, protects, promotes, and fulfills *all* universally recognized human rights. While the ultimate value of the South African experiment will only be measured many years hence, it is hoped that the work of the TRC will provide valuable insights into the danger of ignoring some, and the value of respecting all, universally recognized rights.

5 ECONOMIC, SOCIAL, AND CULTURAL RIGHTS AND THE TRC'S WORK: SOME BRIEF EXAMPLES

The analysis of gross violations of human rights by the TRC, and the task of identifying the causes, nature, and extent of those violations, is a complex one. Below are examples of the type of analysis of gross violations of human rights that incorporates a holistic view of human rights. They are not meant to be comprehensive; in fact they are deliberately brief. They are included to give the reader a flavour of the holistic approach to human rights embraced by the new South Africa.

5.1 Education

The right to a minimum level of education and the obligation of the state to make further education progressively available and accessible is entrenched in the Constitution⁵² and is echoed in the African Charter on Human and People's Rights,⁵³ and the International Bill of Rights.⁵⁴ The violation of the right to education was a causal factor in some incidents of gross violations of human rights. Recall the earlier hypothetical of the student leader. Violations of the right to education also contributed to increased resistance to the state, resulting in additional incidents of gross violations. In its formal submission to the TRC, the National Literacy Cooperation recounts both the violations of the right to education perpetrated under apartheid (an important component of the context of gross violations of human rights), and also provides examples of violations of the right to education through killings, abduction, torture, and severe ill treatment.⁵⁵ That submission also provides information on how the denial of the right to education led to other human rights abuses, including gross violations of human rights.⁵⁶

The struggle of South Africans to attain minimal standards of education resulted in gross violations of human rights. The massacre of innocent

52 S 29 Constitution.

53 Art 17 African Charter on Human and Peoples' Rights.

54 Art 26 UDHR; art 13 ICESCR.

55 See, e.g., s 4 of the report 4 and 13-14 ("State Repression and Homelands"); and the attached letter and submission from the Director of the Kwa-Zulu Natal office of the National Literacy Cooperation, 3 ("Violence and Intolerance/State of Emergency and Politics").

56 See, e.g. National Literacy Cooperation s 5.4 18 ("Social Problems Engendered by Illiteracy and Poor Quality Education").

school children peaceably marching in Soweto in 1976 is a well-known example of a gross violation of human rights involving education rights. Certainly the killing, torture, abduction, or severe ill treatment of a child directly and severely impairs that child's access to education.

5.2 Housing, residence, and freedom of movement

The right to access to adequate housing, to reside anywhere in the country, and to freely move throughout the country, is explicitly protected in the Constitution,⁵⁷ and in the International Bill of Rights.⁵⁸

Violations of the right to access to housing, and freedom of movement and residence, included the policy of forced removals. It is estimated that from 1960 to 1983, 3.5 million people were forcibly relocated.⁵⁹ In implementing this policy, and in responding to resistance to it, numerous people were killed, tortured, abducted and severely ill treated.⁶⁰ In addition, the implementation of the policy itself, as argued above, in many cases constituted severe ill treatment. Forced removals also led to the destabilisation of numerous communities, creating individuals with little or no stake in their communities, and creating a greater willingness to resort to violence.

Forced removals, especially of the elderly, infirm, and disabled, may give rise to severe ill treatment. Documented cases of individuals who died immediately before or after a forced removal because of the government's wanton disregard of their health and well-being undoubtedly constitute severe ill treatment. The deliberate and forced removal to a place with no clean water, no sanitation, and inadequate or no housing constitutes severe ill treatment.

Examples of the violation of the right to access to housing and the right to freedom of movement and residence through forced removals that involved gross violations of human rights abound in South Africa's history. To name only a few, there is the repression of the Magopa community;⁶¹ the destruction of the Crossroads satellite camps and KTC, which resulted in over sixty deaths; the removal of people to Sahlumbe and Onverwacht; the forced removal of the Bakubung people, including the use of killing, abduction, and torture;⁶² the destruction of Langa, including the detention of community leaders as well as those who resisted removal; the killing of Saul Mkhize in Driefontein, as part of the resistance to forced removal of

57 S 26 (right to access to adequate housing); s 21(1) (right to freedom of movement); and s 21(3) (right to reside anywhere in the Republic).

58 Art 25 Universal Declaration of Human Rights (right to adequate housing); art 11 ICESCR (right to adequate housing); art 13(1) UDHR (right to freedom of movement and residence); art 12(1) ICCPR (right to freedom of movement and residence).

59 Wilson & Ramphela 1989: 216.

60 For examples of individuals who suffered immediately as a result of forced removals, see Wilson & Ramphela 1989: 217-225 (describing heart attacks, death, starvation, and other immediate effects of forced removals).

61 See the first submission of the African National Congress to the TRC, dated August 1996 para 4.5.

62 *Ibid.*

this "black spot"; and similar violations committed against the people of the following communities: Mfengu, Moutse, Braklaagte, Leeufontein, District Six, Pageview, and Fordsburg. As with many of the other examples, these illustrate not only gross violations themselves, but also crucial parts of the antecedents, causes and context of a wide range of gross violations that occurred during the relevant period.

5.3 Health care

The right to adequate health care is entrenched in the Constitution,⁶³ the African Charter,⁶⁴ and the International Bill of Rights.⁶⁵ The medical profession was the subject of two full days of hearings before the TRC on its involvement in human rights violations. The most obvious examples of health-care related violations concern the lack of medical attention provided to those in government custody. The deliberate failure to provide medical attention to those who had been tortured or severely ill-treated illustrates the intersection between the right to adequate health care and gross violations of human rights. The case of Steve Biko is only one prominent example of many such occurrences. The death of doctors, such as Neil Aggett and Fabian Ribeiro, raise issues regarding the right to health similar to those that the killing of the student leader raised for the right to education. The deliberate refusal of an ambulance legally reserved for white people to stop and provide medical attention to a black patient certainly must constitute severe ill-treatment.

5.4 Welfare and social security

Apartheid created massive inequalities between people based on race and gender. Patterns of violence under apartheid that constitute gross violations of human rights contributed to these inequalities, and these inequalities, in turn, comprise part of the causes of and antecedents to gross violations of human rights. While the complex relationship among poverty, discrimination, and violence is beyond the scope of this paper, recent statistics compiled by the government illustrate the impact of decades of social deprivation and discrimination. In August 1996, the Lund Committee on Child and Family Support noted that South Africa is characterized by extremes of wealth and of inequality, that 95 % of the poor in South Africa are African, and that many of the poorest households are those headed by women.⁶⁶ The report also noted that an estimated 2.3 million South Africans do not receive a basic level of nutrition, including 87 % of all African children under the age of 12.⁶⁷ While a thorough analysis

63 S 27 Constitution.

64 Art 16 African Charter on Human and Peoples' Rights.

65 Art 25 UDHR; Art 12 ICESCR.

66 Report of the Lund Committee on Child and Family Support (August 1996) 1. The Lund Committee report also includes a brief historical overview of the pre-apartheid and apartheid policies that resulted in the impoverishment of a vast majority of South African citizens.

67 Lund Committee 1996: 3.

of the causes and effects of such inequalities is obviously beyond the scope of the TRC's mandate, not to mention its resources, the causal effect of such inequalities on incidents of gross violations of human rights, and the perpetuation of such inequalities through killings, abductions, torture, and severe ill treatment, are clearly part of its work.

5.5 Allocation of services

The distribution of resources under apartheid deliberately denied basic services to individuals based on race and gender. The deliberate denial of basic services in some cases certainly constitutes severe ill treatment, especially where it is clear that the denial was not caused by limited resources or technology, but was based on a deliberate policy of discrimination. For example,

5.5.1 Water

The Minister of Water Affairs was specifically empowered to distribute water from a government waterworks to any person for any purpose approved by the Minister.⁶⁸ Notwithstanding this, water was distributed in such a manner that the vast majority of white group areas had houses serviced by running water while the majority in other areas often had no running water and had to walk miles for access to water.

5.5.2 Electricity

Legislation provided for the provision of electricity throughout the country.⁶⁹ Escom was empowered "to investigate new or additional facilities for the supply of electricity within any area . . . so as to stimulate the provision, wherever required, of a cheap and abundant supply of electricity."⁷⁰ Local authorities were licensed to provide electricity, and were obligated to "supply electricity within the area of supply mentioned in his license to *every applicant* who is in a position to make satisfactory arrangements for payment therefor."⁷¹ This mandate was carried out in a deliberate fashion so that powerlines ran over but not into many townships, while citizens in white areas enjoyed the benefits of those same powerlines.

5.5.3 Planning

Government policy and planning under apartheid was specifically designed to foster "separate development," which in effect meant the diversion of most of societies resources to the white population, and mostly to the white male population. Such planning included structural inequalities based on race and gender in access to and distribution of property; the brutal dislocation and forced removal of entire communities; grossly

68. Water Act 54 of 1956.

69. Electricity Act 41 of 1987 and its predecessors, and the Escom Act 40 of 1987.

70. S 4(1)(b) Electricity Act 40 of 1958

71. S 30(1) (emphasis added).

unequal access to economic opportunities and services based on race and gender; and gross disparities in access to residential, recreational, and community facilities.⁷² The deliberate allocation of burdens and benefits under apartheid – through, for example, taxation; access to land, property, and other economic resources; and provision of municipal services – were implemented through specific acts of gross violations of human rights, and are an important part of the cause of such violations.

In addition to being directly responsible for acts that constitute severe ill treatment, many of the parastatals responsible for the provision of these services also developed quasi-private security forces that were directly involved in acts of killing, abduction, torture, and severe ill treatment. Thus in many cases the basic rights to water, health care, and a minimal level of subsistence were violated *through* such acts.

6 CONCLUSION

The promise of modern South Africa is a society that respects, protects, promotes, and fulfills all the rights of all within its borders; a society that recognizes the importance of economic and social rights as well as civil and political rights; a society that recognizes that the protection of each right is dependent on the promotion of all rights; and a society that recognizes the dependence of efforts to create a human rights culture with the promotion of equitable social development. These premises of South African society grow directly out of an analysis and understanding of the country's past. Apartheid has taught us with brutal frankness the interdependence of human rights and social development. The vast majority of black people in South Africa still live under abject conditions that were deliberately created under apartheid. South Africa enjoys the unenviable distinction of having one of the worst disparities in the world in distribution of income, wealth, and resources based on race and gender.⁷³ The socio-economic legacy of apartheid is a daily reality for millions of people in South Africa struggling to obtain access to adequate housing, health care, education, food, water, and social security. Proper acknowledgment of the personal and social consequences of socio-economic discrimination and deprivation inflicted on black people in this country is an important pre-requisite for achieving the ultimate objectives of national unity and reconciliation. This is the task facing the Truth and Reconciliation Commission. But it is not a task that it undertakes alone. The TRC's mandate is

72 These disparities were brought about in part by the influx control laws and the Group Areas Act, which I do not discuss here. The effect of these laws on individuals and communities is discussed in great detail in the report of the Surplus People Project 1985: 33.

73 South Africa was ranked 95th among all countries according to the 1995 Human Development Index, which is used by the UN Development Programme to measure the well-being of a country's population. If the black and white populations of South Africa were divided into separate countries, the white country would rank 34th (comparable to Portugal), and the black would rank 128th (comparable to Ghana). (UNDP 1995). On the large disparity of well-being between men and women in South Africa, see generally Budlender 1996.

backward looking. It is to examine the past so that all – both within and without South Africa – may understand its causes so as to prevent the recurrence of its most awful chapters. But in preparing us for the future, the TRC is hardly alone. As noted earlier, there are a number of constitutional and statutory bodies, and a range of government polices, which have as their aim the protection, promotion, and fulfilment of basic human rights. Although many expect much from the work of the TRC, if as a result of its analysis of South Africa's past, humanity can no longer ignore the danger of keeping the vast majority of a society's population in such abject conditions, then its value will be felt well beyond the borders of South Africa. If a result of the findings of the TRC is a renewed commitment on the part of the South African government to respect, promote, protect, and fulfill *all* the rights of *all* its citizens, then South Africa will have taken another giant step ahead of the rest on the long road to social justice.

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