The Mandate

INTRODUCTION

> *I have the privilege and responsibility to introduce today a Bill which provides a pathway, a stepping stone, towards the historic bridge of which the Constitution speaks whereby our society can leave behind the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and commence the journey towards a future founded on the recognition of human rights, democracy and peaceful co-existence, and development opportunities for all South Africans irrespective of colour, race, class, belief or sex.*
>
> *Its substance is the very essence of the constitutional commitment to reconciliation and the reconstruction of society. Its purpose is to provide that secure foundation which the Constitution enjoins: `...for the people of South Africa to transcend the divisions and strife of the past, which generated gross human rights violations... and a legacy of hatred, fear, guilt and revenge'.*
>
> Dullah Omar, Minister of Justice introducing the Promotion of National Unity and Reconciliation Act in Parliament, 17 May 1995

1 The spirit and intention of the Postamble to the interim Constitution is captured in the Preamble of the Promotion of National Unity and Reconciliation Act No 34 of 1995 (the Act) and provides the framework within which the establishment and mandate of the Truth and Reconciliation Commission (the Commission) must be understood.

2 The Commission was conceived as part of the bridge-building process designed to help lead the nation away from a deeply divided past to a future founded on the recognition of human rights and democracy. Its purpose needs to be understood in the context of a number of other instruments aimed at the promotion of democracy, such as the Land Claims Court, the Constitutional Court and the Human Rights, Gender and Youth Commissions, all institutional `tools' in the transformation of South African society.

3 One of the main tasks of the Commission was to uncover as much as possible of the truth about past gross violations of human rights - a difficult and often very unpleasant task. The Commission was founded, however, in the belief that this task was necessary for the promotion of reconciliation and national unity. In other words, the telling of the truth about past gross human rights violations, as viewed from different perspectives, facilitates the process of understanding our divided pasts, whilst the public acknowledgement of untold suffering and injustice' (Preamble to the Act) helps to restore the dignity of victims and afford perpetrators the opportunity to come to terms with their own past.[1]

4 In the course of fulfilling its mandate, it became clear to the Commission that organs of civil society - such as faith communities, non-governmental organisations (NGOs), community-based organisations (CBOs) and ordinary citizens - all have a role to play in achieving the goal of national unity. South Africans will need to continue to work towards unity and reconciliation long after the closure of the Commission. In the words of a

participant at a public meeting of the Commission, we need to ensure that “reconciliation is a way of life”. Another acknowledged that the Commission could do no more than `kick start’ the process.

5 This chapter describes the specific contribution of the Commission to the bridge-building process in post-apartheid South Africa. It will provide a brief overview of the historical and legislative origins of the Commission and of the objectives and functions of the Commission as prescribed by the Act. It will also deal in some detail with the Commission’s interpretation and implementation of its mandate. The difficult and often contested decisions taken by the Commission in this regard will be highlighted.

HISTORICAL AND LEGISLATIVE ORIGINS

6 The first call for a South African truth commission came from the African National Congress (ANC) before the first democratic elections in 1994. Professor Kader Asmal mooted the idea on his installation as Professor of Human Rights Law at the University of the Western Cape on 25 May 1992, saying:

> *We must take the past seriously as it holds the key to the future. The issues of structural violence, of unjust and inequitable economic social arrangements, of balanced development in the future cannot be properly dealt with unless there is a conscious understanding of the past.*

7 Soon afterwards, Asmal’s call became a firm proposal of the National Executive Committee of the ANC, following an investigation of accusations that the ANC-in-exile had perpetrated human rights violations in some of its camps. In response to the allegations, the ANC set up its own internal commissions of enquiry, the Stuart, Skweyiya and Motsuenyane commissions. The reports of these commissions confirmed that gross human rights violations had taken place in the camps. The National Executive Committee accepted the criticisms levelled at the organisation. It expressed the view, however, that the violations committed by the ANC should be seen against the background of the human rights violations that had taken place in South Africa over a much longer period. It proposed the appointment of a truth commission as a way of achieving this. This was perhaps the first time in history that a liberation movement or government-in-waiting had called for an independent investigation of this kind, aimed at enquiring into allegations of violations of human rights not only by the previous regime, but also by its own members.

8 In the meantime, the negotiations that would bring apartheid and political conflict to an end and herald the introduction of democracy in South Africa had begun. They took place within an international framework, which increasingly emphasised the importance of human rights and the need to deal with past human rights violations.

9 The negotiations process began seriously with the Groote Schuur Minute in early May 1990. In terms of the Minute, a working group was established to make recommendations, amongst other things, on a definition of political offences in the

South African situation, and to advise on norms and mechanisms to deal with the release of political prisoners. On 21 May, the working group found that, while there was legislation allowing for the pardon or release of people who had already been sentenced or were awaiting appeals, new legislation would be required in respect of people who had not been charged. This resulted in the 1990 Indemnity Act.

10 The working group also produced findings concerning political offences. It recommended that, as there was no generally accepted definition of a political offence or political prisoners in international law, principles of extradition law should be used to develop guidelines. In terms of these principles, the working group concluded that cases should be dealt with on an individual basis; that certain offences (such as treason) were of a purely political nature, and that criminal acts of a serious nature (`even murder') might be regarded as political offences.

11 The working group also proposed that an adaptation of the Norgaard Principles[2] be used in making the relevant decisions. These took into account aspects such as motive, context, the nature of the political ojective, the legal and factual nature of the offence (for example, rape could never be considered a political offence), the object of the offence and whether the act was committed in the execution of an order and with the approval of the organisation concerned.

12 The recommendations were accepted with some amendments in terms of the Pretoria Minute on 6 August 1990. However, in the Government Gazette, recording acceptance of the Pretoria Minute, published on 7 November, the words `even murder' were inexplicably left out - an omission that caused significant problems subsequently.

13 It was agreed that the South African Constitution, the Prisons Act and the 1990 Indemnity Act would be used and that `a group of wise men' would be appointed to deal with releases and the granting of indemnity. Although the group was supposed to consist of three government and three ANC-appointed judges, the three ANC nominees refused to participate because of a ruling that deliberations had to be held in secret and they felt they could be compromised if the Indemnity Board rejected a recommendation.

14 In early 1992, negotiations collapsed completely for a number of reasons, including the fact that some fifteen to twenty key ANC members were still in prison. Negotiations were finally resumed after the signing of the Record of Understanding, which signalled a commitment to begin talks again and contained an agreement to review the whole question of political prisoners. Critical to this was a review of the contentious category of `murder', one of the causes of the dispute that brought negotiations to an end. The Record of Understanding contained the following sentence:

> *The two parties are agreed that all prisoners whose imprisonment is related to political conflict of the past and whose release could make a contribution to reconciliation should be released.*

15 One hundred and forty-nine prisoners were released with immediate effect and without any formal process at all. However, when the third Indemnity Act of 1992 was passed,

the category of``murder' was still not included, despite the undertaking in the Record of Understanding to review the contentious issue of political prisoners.

16 A day or so before the elections in 1994, President De Klerk, allegedly without consultation with the ANC and other political parties, authorised the release and indemnity of about eighty to one hundred people. However, by this stage, anyone who had committed a crime which, according to the terms of the Record of Understanding, involved some political motivation was up for possible release.

17 During the pre-election period, very few members of the security forces had applied for indemnity, possibly in the expectation of a general amnesty. However, only days before the election, when it became clear that there would be no general amnesty, a relatively large number of security force members applied for indemnity under the 1992 legislation. Their applications were unsuccessful because they failed to disclose details about acts for which they were seeking amnesty as required by the legislation.[3]

18 After the conclusion of the Record of Understanding, the focus shifted to the question of how a future democratic government would deal with amnesties for political offences and especially for the security forces. Two matters were settled relatively early. It was agreed, in the first place, that actions taken in terms of apartheid law would not merely for that reason be regarded as illegal and that there would be no Nuremberg-type trials for the many human rights violations legally committed in the course of implementing apartheid.

19 Furthermore, it was agreed that there would be some form of amnesty for politically-motivated offences committed in the past. The government insisted on a form of blanket amnesty, while most other parties demanded that amnesty should be linked to some form of truth commission process. A compromise was eventually reached only after the finalisation of the rest of the interim Constitution and was recorded in what became known as the `Postamble'. This provided that there would be amnesty for politically-motivated offences, and that future legislation would provide the criteria and procedures to regulate the process.

20 A number of NGOs and others played a role in preparing the ground for a truth commission. There were one or two major conferences, attended by leading scholars and human rights practitioners, that stimulated wide debate in civil society and in Parliament.

21 The new government introduced the Promotion of National Unity and Reconciliation Bill in Parliament in November 1994. The Bill provided for amnesty as required by the interim Constitution. It stressed, too, the importance of victims to the proposed process, emphasising their right to tell their stories of suffering and struggle. This became an essential focus of the envisaged commission - what has been described as a `victim-centred approach'. The legislation also required that, in order for amnesty to be granted, there should be full disclosure of the violations in respect of which it was sought. In this way, the `stick' of prosecutions and civil claims was combined with the `carrot' of amnesty to encourage perpetrators to testify about gross violations of human rights. This

was a unique feature of the South African commission. National unity and reconciliation could be achieved only, it was argued, if the truth about past violations became publicly known.

22 It is important to note the uniquely open and transparent nature of the process that preceded the adoption of the Bill. Civil society played an influential role in the months of debate and compromise leading to its adoption. The parliamentary Portfolio Committee on Justice conducted extensive public hearings. As a direct result of these public hearings and the pressure exerted by civil society, the parliamentary Portfolio Committee made a significant change to the Bill, as follows.

23 One of the compromises reached between the ANC and the National Party (NP) when the Bill was discussed in Cabinet had been that amnesty hearings should be held behind closed doors. Human rights organisations and other NGOs successfully contested this and the principle of open hearings, except where it defeated the ends of justice, was won. The Bill was signed into law by the President on 19 July 1995[4] and came into effect on 1 December 1995 after the Commissioners had been appointed. The appointment process was also open and transparent. Despite the fact that the legislation gave the President the authority to decide who would serve on the Commission, President Mandela decided to appoint a broadly representative committee to assist him in the process of identifying the commissioners. Organisations of civil society participated in the process by nominating prospective commissioners and monitoring the hearings which led to the appointments. The committee called for nominations and 299 names were received. After the public hearings, a list of twenty-five names was submitted to President Mandela. The President consulted with his Cabinet and with the heads of the political parties and appointed the required seventeen commissioners.

WHY THE SOUTH AFRICAN COMMISSION IS DIFFERENT FROM OTHER COMMISSIONS

24 In order to appreciate the difficulties the Commission faced in implementing its mandate, it is helpful briefly to consider some of the unique features of the South African Commission and how it compares with other similar commissions created in recent years.

25 The most important difference between the South African Commission and others was that it was the first to be given the power to grant amnesty to individual perpetrators. No other state had combined this quasi-judicial power with the investigative tasks of a truth-seeking body. More typically, where amnesty was introduced to protect perpetrators from being prosecuted for the crimes of the past, the provision was broad and unconditional, with no requirement for individual application or confession of particular crimes. The South African format had the advantage that it elicited detailed accounts from perpetrators and institutions, unlike commissions elsewhere which have received very little co-operation from those responsible for past abuses.

26 Another significant difference can be found in the Commission's powers of subpoena, search and seizure, which are much stronger than those of other truth commissions. This has led to more thorough internal investigation and direct questioning of witnesses, including those who were implicated in violations and did not apply for amnesty. None of the Latin American commissions, for example, was granted the power to compel witnesses or perpetrators to come forward with evidence, and these commissions have had great difficulty in obtaining official written records from the government and the armed forces.

27 The very public process of the South African Commission also distinguishes it from other commissions. While a few have held public victim hearings (such as Uganda in the late 1980s), such hearings have been far fewer in number than in South Africa. The Latin American truth commissions heard testimony only in private, and information only emerged with the release of the final reports.

28 The South African hearings also included aspects of enquiry not seen elsewhere: for example, the institutional and special hearings. These allowed for direct contributions by NGOs and those who were involved in specific areas of activism, policy proposals and monitoring in the past. Few other commissions have included such interaction with `non-victim' public actors.

29 The South African Commission was the first to create a witness protection programme. This strengthened its investigative powers and allowed witnesses to come forward with information they feared might put them at risk.

30 Finally, the South African Commission was several times larger in terms of staff and budget than any commission before it.[5]

OBJECTIVES AND FUNCTIONS AS PRESCRIBED IN THE ACT

31 The Act identified the following objectives and functions:

> 3. (1) The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by-
>
> a establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from I March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings;
>
> b facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act;

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

d compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights.

(2) The provisions of subsection (1) shall not be interpreted as limiting the power of the Commission to investigate or make recommendations concerning any matter with a view to promoting or achieving national unity and reconciliation within the context of this Act.

4. The functions of the Commission shall be to achieve its objectives, and to that end the Commission shall-

a facilitate, and where necessary initiate or co-ordinate, inquiries into- (i) gross violations of human rights, including violations which were part of a systematic pattern of abuse; (ii) the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations; (iii) the identity of all persons, authorities, institutions and organisations involved in such violations; (iv) the question whether such violations were the result of deliberate planning on the part of the State or a former state or any of their organs, or of any political organisation, liberation movement or other group or individual; and (v) accountability, political or otherwise, for any such violation;

b facilitate, and initiate or co-ordinate, the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or the representatives of such victims, which establish the identity of victims of such violations, their fate or present whereabouts and the nature and extent of the harm suffered by such victims;

c facilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts relating to such acts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty in the Gazette;

d determine what articles have been destroyed by any person in order to conceal violations of human rights or acts associated with a political objective;

e prepare a comprehensive report which sets out its activities and findings, based on factual and objective information and evidence collected or received by it or placed at its disposal;

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;

g make recommendations to the Minister with regard to the development of a limited witness protection programme for the purposes of this Act;

h make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society and the institutional, administrative and legislative measures which should be taken or introduced in order to prevent the commission of violations of human rights.

32 Briefly stated, the Commission was given four major tasks in order to achieve the overall objectives of promoting national unity and reconciliation. These were:

a analysing and describing the “causes, nature and extent” of gross violations of human rights that occurred between 1 March 1960 and 10 May 1994, including the identification of the individuals and organisations responsible for such violations;

b making recommendations to the President on measures to prevent future violations of human rights;

c the restoration of the human and civil dignity of victims of gross human rights violations through testimony and recommendations to the President concerning reparations for victims;

d granting amnesty to persons who made full disclosure of relevant facts relating to acts associated with a political objective.

INTERPRETING THE MANDATE

33 The interpretation of the mandate was the outcome of a long process of wrestling with how the Commission should deal with the above-mentioned objectives and functions.

34 It was recognised at the outset that the Commission could not carry out all the tasks required of it simultaneously. Thus, it first gave attention to the question of the restoration of the human and civil dignity of (individual) victims of past gross human rights violations. It did so by creating opportunities for victims “to relate their own accounts” of the violations they had suffered by giving testimony at public hearings across the length and breadth of South Africa between April 1996 and June 1997. These highly publicised hearings were coupled with an extensive statement-taking drive, investigations, research and so-called `section 29’ hearings (where witnesses and alleged perpetrators were subpoenaed) in order to “establish the fate or whereabouts of victims” and the identity of those responsible for human rights violations.

35 During the second half of the Commission's life (from approximately the middle of 1997), the Commission shifted its focus from the stories of individual victims to an attempt to understand the individual and institutional motives and perspectives which gave rise to the gross violations of human rights under examination. It enquired into the contexts and causes of these violations and attempted to establish the political and moral accountability of individuals, organisations and institutions. The goal was to provide the grounds for making recommendations to prevent future human rights violations. Features of this phase were public submissions by, and questioning of, political parties, and a range of institutional, sectoral and special hearings that focused on the health and business sectors, the legal system, the media and faith communities, prisons, women, children and youth, biological and chemical warfare and compulsory national service. It was also during this period that the majority of amnesty hearings took place.

36 In the process of interpreting the mandate, a number of difficult and often highly contested decisions had to be taken.

TERMINOLOGY

Victims or survivors

37 From the outset, the commissioners expressed some discomfort with the use of the word `victim'. Although the term is commonly enough used when talking about those who suffered under apartheid, it may also be seen to imply a negativity or passivity. Victims are acted upon rather than acting, suffering rather than surviving. The term might therefore be seen as insulting to those who consider that they have survived apartheid or emerged victorious. Unlike the word `victim', the word `survivor' has a positive connotation, implying an ability to overcome adversity and even to be strengthened by it. This does not, of course, mean that many (if not all) survivors were not still experiencing the effects of the trauma they had suffered. It also does not mean that all survived. There were, indeed, many who did not survive and on whose behalf others approached the Commission.

38 However, when dealing with gross human rights violations committed by perpetrators, the person against whom that violation is committed can only be described as a victim, regardless of whether he or she emerged a survivor. In this sense, the state of mind and survival of the person is irrelevant; it is the intention and action of the perpetrator that creates the condition of being a victim.

39 For the sake of consistency, the Commission ultimately decided, in keeping with the language of the Act, to use the word `victim'. In doing so, however, it acknowledged that many described as victims might be better described and, indeed, might prefer to be described as `survivors'. Many played so crucial a role in the struggle for democracy that even the term `survivor' might seem an inadequate description.

Perpetrators

40 The use of the word `perpetrator' to describe all persons found by the Commission to have committed gross violations of human rights was also the source of some discomfort as it made no distinction between the kinds of acts committed, the reasons why they were committed, their consequences or their context. It also does not distinguish between `perpetrators' who committed one act and those whose entire operation and purpose was the commission of such acts.

41 Again, however, the Commission chose to adhere to the terminology of the Act, while recognising sharp differences in the nature and degree of the acts committed.

WHO WERE VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS?

42 The Act states that:

> *… 'gross violation of human rights' means the violation of human rights through - (a) the killing, abduction, torture or severe ill treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to 10 May 1994 within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive (section 1(1)(ix).*

43 This definition is a reminder that the responsibility for building the bridge between a dehumanising past and a just and democratic future does not belong to the Commission alone. Furthermore, in making its own limited contribution, the Commission had to walk a tightrope between too wide and too narrow an interpretation of gross violations of human rights. The Commission would have neither the lifespan nor the resources to implement a broadly constituted interpretation. Too narrow an interpretation, on the other hand, might have added insult to the injuries and injustices experienced by the many victims who would have been excluded.

44 Segregation policies and practices have their roots far back in South Africa's colonial past. Building on an inherited social practice, apartheid imposed a legal form of oppression with devastating effects on the majority of South Africans. The NP government came to power in 1948 and, over almost half a century, apartheid became the warp and weft of the experience of all who lived in South Africa, defining their privilege and their disadvantage, their poverty and wealth, their public and private lives and their very identity.

45 Under apartheid, millions of people were deprived of the most basic rights. Through a huge body of laws, black people were shunted out of areas reserved for whites; evicted from their homes; forced out of the cities into shanties, homelands and what Father Cosmas Desmond has called, `dumping grounds', where there was neither water, nor shelter nor a living to be made.

> *I have seen the bewilderment of simple rural people when they are told they must leave their homes where they have lived for generations and go to a strange place. I have heard their cry of hopelessness and resignation and their pleas for help. I have*

seen the sufferings of whole families living in a tent or a tiny tin hut. Of children sick with typhoid, or their bodies emaciated with malnutrition and even dying of plain starvation.[6]

46 Apartheid redrew the map of South Africa. The wealth, the cities, the mines, parks and the best beaches became part of white South Africa. A meagre thirteen per cent of largely barren land was parcelled out in a series of homelands in which African people were forced to live, while the able-bodied were driven to seek a living as migrant labourers in the cities. And, as legislation formalised the divide between African, Indian, coloured and white, so the apartheid government sought, too, to divide African people on the basis of ethnicity.

47 `Separate development' was the magic formula. All over South Africa, public buildings and amenities were divided and sometimes even duplicated according to race group, retaining the best for the white group. African, Indian and coloured children were thrown out of city parks. Beaches and benches, trains and buses, and other public facilities and spaces were allocated according to the racial divisions of apartheid. Separate meant far from equal and often resulted in no facilities at all for those who were not white. Private sector space was also subjected to rules: banks, restaurants, shops, places of worship, bottle stores, hotels and cinemas were all segregated, often by legislation and often by self-imposed segregation.

48 Private life too was dominated by apartheid. Who you knew, whom you consorted with, whom you worked with and how you conducted your relationships all depended on remaining within your group. Law prohibited marriages and sexual relationships across the colour line. Even entertainment between races was severely restricted by curfews and a prohibition on serving drink to African people.

49 One of the most iniquitous acts of apartheid was the separation of educational facilities and the creation of the infamous system of Bantu education. Mission schools which had provided some schooling to African people were closed down and generation after generation of African children were subjected to teaching that was deeply inferior in quality to that of their white counterparts. Prime Minister Hendrik Verwoerd, the `architect' of apartheid, said:

The school must equip the Bantu to meet the demands which the economic life will impose on him … What is the use of teaching a Bantu child mathematics when it cannot use it in practice? … Education must train and teach people in accordance with their opportunities in life …[7]

50 Indian and coloured people were subjected to similar restrictions. The notorious Group Areas legislation moved people out of their homes and trading areas and onto the fringes of the cities. Separate education, separate amenities and other restrictions bounded their lives.

51 It is this systemic and all-pervading character of apartheid that provides the background for the present investigation. During the apartheid years, people did many evil things. Some of these are the gross violations of human rights with which this Commission had to deal. But it can never be forgotten that the system itself was evil, inhumane and

degrading for the many millions who became its second and third class citizens. Amongst its many crimes, perhaps the greatest was its power to humiliate, to denigrate and to remove the self-confidence, self-esteem and dignity of its millions of victims. Mtutuzeli Matshoba expressed it thus:

> *For neither am I a man in the eyes of the law,*
> *Nor am I a man in the eyes of my fellow man.*[8]

52 In a submission to the Commission, Justice Pius Langa, currently the Deputy President of the Constitutional Court, wrote of his life under apartheid:

> *My first real encounter with the legal system was as a young workseeker in Durban … in 1956. It was during that period that I experienced the frustration, indignity and humiliation of being subject to certain of the provisions of the Population Registration Act, no. 30 of 1950, the Natives (Urban Areas) Consolidation Act, no. 25 of 1945 as well as other discriminatory legislation of that time… The immediate impact on me was severe disillusionment at the unfairness and injustice of it all. I could never understand why race should have been the determinant of where I should live and where I could work. I was never able to understand why, whilst still a teenager, I was expected to live at a men's hostel and needed a permit to stay with my parents in the township… In that first flush of youth, I had thought I could do anything, aspire to anything and that nothing could stop me. I was wrong. My dreams came up against the harsh apartheid realities. The insensitive, demeaning and often hostile environment it had created around me proved to have been crafted too well; it was designed to discourage those who, like me, sought to improve their circumstances and those of their communities…*
>
> *The pass laws and influx control regulations were, for me, the focal point of the comprehensive network of laws and regulations which dominated my early working life … I was merely one of tens of thousands who peopled those seemingly interminable queues at the end of which, in general, bad tempered clerks and officials might reward one with some endorsement or other in the `dompas'. The whole process of the influx control offices was painful and degrading and particular aspects of it inflicted deep humiliation on the tens of thousands who were on the receiving end of these regulations. As a 17 year-old, I remember having to avert my eyes from the nakedness of grown men in a futile attempt to salvage some dignity for them in those queues where we had to expose ourselves to facilitate the degrading examination. To anyone who failed to find work during the currency of their permits, loomed the very real threat of being declared "an idle and undesirable Bantu" by the Commissioner's court and being subject to be sent to a farm colony. Scores of people were processed through those courts and sentenced on charges such as failing to produce a reference book on demand. …*
>
> *It was one thing, however, having the overtly discriminatory and repressive laws on the statute book. Their ugliness was exacerbated to a large degree by the crude, cruel and unfeeling way in which many of the officials, black and white, put them into operation. There was a culture of hostility and intimidation against those who came to be processed or for assistance. The face presented by authority, in general, was of a war against people who were unenfranchised and human dignity was the main casualty.*

53 A deep awareness of this systematic discrimination and dehumanisation made it very difficult for the Commission to concentrate only on those whose rights had been violated through acts of killing, torture, abduction and severe ill treatment.

54 For example, during the earlier information-gathering phase of the Commission's work, the category that required most attention was that of `severe ill treatment'. The ordinary meaning of `severe ill treatment' suggests that all those whose rights had been violated during the conflicts of the past were covered by this definition and fell, therefore, within the mandate of the Commission. This view was expressed in the submissions of a number of organisations and groups representing, for example, victims of forced removals and Bantu education.

55 While taking these submissions very seriously, the Commission resolved that its mandate was to give attention to human rights violations committed as specific acts, resulting in severe physical and/or mental injury, in the course of past political conflict. As such, the focus of its work was not on the effects of laws passed by the apartheid government, nor on general policies of that government or of other organisations, however morally offensive these may have been. This underlines the importance of understanding the Commission as but one of several instruments responsible for transformation and bridge-building in post-apartheid South Africa.

56 The mandate of the Commission was to focus on what might be termed `bodily integrity rights', rights that are enshrined in the new South African Constitution and under international law. These include the right to life[9], the right to be free from torture[10], the right to be free from cruel, inhuman, or degrading treatment or punishment[11] and the right to freedom and security of the person, including freedom from abduction and arbitrary and prolonged detention[12].

57 But bodily integrity rights are not the only fundamental rights. When a person has no food to eat, or when someone is dying because of an illness that access to basic health care could have prevented - that is, when subsistence rights are violated - rights to political participation and freedom of speech become meaningless.

58 Thus, a strong argument can be made that the violations of human rights caused by `separate development' - for example, by migrant labour, forced removals, bantustans, Bantu education and so on - had, and continue to have, the most negative possible impact on the lives of the majority of South Africans. The consequences of these violations cannot be measured only in the human lives lost through deaths, detentions, dirty tricks and disappearances, but in the human lives withered away through enforced poverty and other kinds of deprivation.

59 Hence, the Commission fully recognised that large-scale human rights violations were committed through legislation designed to enforce apartheid, through security legislation designed to criminalise resistance to the state, and through similar legislation passed by governments in the homelands. Its task, however, was limited to examining those `gross violations of human rights' as defined in the Act. This should not be taken to mean, however, that those `gross violations of human rights' (killing, torture, abduction and severe ill treatment) were the only very serious human rights violations that occurred.

EVEN-HANDEDNESS

60 The Commission was obliged by statute to deal even-handedly with all victims. Its actions when dealing with individual victims were guided, amongst other things, by the principle that “victims shall be treated equally without discrimination of any kind”(section 11(b)). In so doing, it acknowledged the tragedy of human suffering wherever it occurred.

61 This does not mean, however, that moral judgement was suspended or that the Commission made no distinction between violations committed by those defending apartheid and those committed to its eradication.

62 In this regard, it is important to remember that other aspects of the Commission’s mandate required that it:

- a facilitate inquiries into the nature, causes and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives that led to such violations;
- b establish organisational involvement and responsibility and identify all persons, authorities, institutions and organisations involved in gross violations of human rights;
- c determine whether gross violations of human rights were part of deliberate planning on the part of the state or an organisation;
- d discuss whether gross violations of human rights were part of a systematic pattern of abuse;
- e make recommendations on the creation of institutions conducive to a stable and fair society and on institutional, administrative and legislative measures to prevent the perpetration of human rights violations.

63 This part of the mandate, together with the overall objective of promoting reconciliation, clearly required that the Commission be sensitive to a wide range of different perspectives and beliefs concerning past conflicts. In its attempt to reflect accurately and to understand these perspectives, the Commission endeavoured to include people representing different positions in its public hearings. It also made repeated attempts to include those political groupings, such as the Inkatha Freedom Party (IFP), that chose not to participate in the activities of the Commission.

JUST ENDS, JUST MEANS AND CRIMES AGAINST HUMANITY

64 In making judgements in respect of the above requirements, the Commission was guided by criteria derived from just war theory (which was referred to in several submissions made to the Commission by political parties), international human rights principles and the democratic values inherent in the South African Constitution. By using these criteria, the Commission was able to take clear positions on the evils of apartheid, while also evaluating the actions of those who opposed it.

65 The application of some of the principles and criteria of just war theory have proved difficult and controversial, especially when dealing with unconventional wars, that is, wars of national liberation, civil wars and guerrilla wars within states. The distinction between means and cause is a dimension of just war theory that cannot be ignored. Often this distinction is made in terms of justice in war (jus in bello) and justice of war (jus ad bellum).

66 Justice of war evaluates the justifiability of the decision to go to war. The two basic criteria guiding this evaluation are: first, the justness of the cause (the underlying principles for which a group is fighting), and second, whether the decision to take up arms was a matter of last resort.

67 The doctrine of justice in war states that there are limits to how much force may be used in a particular context and places restrictions on who or what may be targeted. Two principles dominate this body of law:

a the use of force must be reasonably tailored to a legitimate military end;

b certain individuals are entitled to specific protections, making a fundamental distinction between combatants and non-combatants. Thus an enemy soldier who is armed and ready for combat may be harmed and even killed, but a civilian or a sick, wounded or captured soldier may not be harmed.

68 What implications did this have for the Commission? Can the acts of political violence by those who struggled against apartheid, on the one hand, and by the agents and defenders of the apartheid state, on the other, be morally equated?

Justice of war

69 As far as the question of the justice of the South African conflicts was concerned, the Commission was faced with competing claims of just causes from various parties to the conflicts of the past. In seeking to address these, the Commission took into consideration factors such as the Cold War and the international and regional contexts. These were raised by the NP and the Freedom Front (FF) in many amnesty applications and in the submission by Mr Craig Williamson. The Commission accepted that many people had clearly believed that they were fighting against Communism and anarchy and not, in the first place, for apartheid.[13]

70 At the same time, these acts of war were also ultimately undertaken in defence of the ruling white minority and the apartheid state. In international law, this system of enforced racial separation and discrimination was itself found to be a crime against humanity (see the appendix to this chapter). Thus, those who fought against the system of apartheid were clearly fighting for a just cause, and those who sought to uphold and sustain apartheid cannot be morally equated with those who sought to remove and oppose it.

71 The application of `the last resort' criterion in just war theory obviously yields a less straightforward answer. Submissions to the Commission by the NP, FF and the IFP contested the necessity for the resort to armed resistance by the liberation movements.

This matter will always be the subject of debate. However, any analysis of human rights violations which occurred during the conflicts of the past, and any attempt to prevent a recurrence of such violations, must take cognisance of the fact that, at the heart of the conflict, stood an illegal, oppressive and inhuman system imposed on the majority of South Africans without their consent. There had, over many decades, been numerous attempts by those opposed to this system to bring about change by non-violent means, before resorting to armed resistance.

72 The immorality and illegality of apartheid was acknowledged by most of the political party submissions and thus does not reflect the bias of any one perspective. Indeed, in his appearance before the Commission in May 1997, former State President de Klerk himself described apartheid as a system that caused great suffering to millions of people. This recognition was reflected in numerous other important submissions to the Commission, including:

a five of the most senior judges, on behalf of the judiciary past and present, declared in a submission to the Commission that apartheid was, in itself, a gross violation of human rights;

b four former NP cabinet ministers, testifying in the Commission's hearing on the State Security Council, acknowledged that apartheid had no moral basis;

c the Western Cape regional synod of the Dutch Reformed Church, in conformity with the position adopted by most major religious institutions, declared that apartheid as a system of enforced racial discrimination was wrong and sinful, not only in its effects and operations, but also in its fundamental nature.

73 The recognition of apartheid as an oppressive and inhuman system of social engineering is a crucial point of departure for the promotion and protection of human rights and the advancement of reconciliation in South Africa. It is thus a great sign of hope to the Commission and to the future of the South African nation that, during the 1980s, the early 1990s and during the life of the Commission, increasing numbers of those who formulated and implemented apartheid have recognised not only the political unsustainability but also the immorality of this system.

Justice in war

74 The Commission's confirmation of the fact that the apartheid system was a crime against humanity does not mean that all acts carried out in order to destroy apartheid were necessarily legal, moral and acceptable. The Commission concurred with the international consensus that those who were fighting for a just cause were under an obligation to employ just means in the conduct of this fight.

75 As far as justice in war is concerned, the framework within which the Commission made its findings was in accordance with international law and the views and findings of international organisations and judicial bodies. The strict prohibitions against torture and abduction and the grave wrong of killing and injuring defenceless people, civilians and soldiers `out of combat' required the Commission to conclude that not all acts in war could be regarded as morally or legally legitimate, even where the cause was just.

76 It is for this reason that the Commission considered the concept of crimes against humanity at both a systemic level and at the level of specific acts. Apartheid as a system was a crime against humanity, but it was also possible for acts carried out by any of the parties to the conflicts of the past to be classified as human rights violations.

State and non-state actors

77 Thus, the Commission adopted the view that human rights violations could be committed by any group or person inside or outside the state: by persons within the Pan Africanist Congress (PAC), the IFP, the South African Police (SAP), the South African Defence Force (SADF), the ANC or any other organisation.

78 It is important to note, however, that this wider application of human rights principles to non-state entities is a relatively recent international development. Traditionally, human rights focused on relations between state and citizens and on protecting the individual from the power of the state. Private non-state entities were not subject to the same restrictions and scrutiny. The traditional exceptions to this have been found in the area of war crimes and crimes against humanity which, even under the traditional definition of human rights, can be committed by any individual or entity.

79 The Act establishing the Commission adopted this more modern position. In other words, it did not make a finding of a gross violation of human rights conditional on a finding of state action. This extended view of human rights prohibitions reflects modern developments in international human rights law. It also contributes to national unity and reconciliation by treating individual victims with equal respect, regardless of whether the harm was caused by an official of the state or of the liberation movements.

80 At the same time, it must be said that those with the most power to abuse must carry the heaviest responsibility. It is a matter of the gravest concern when the state, which holds the monopoly on public force and is charged with protecting the rights of citizens, uses that force to violate those rights. The state has a whole range of powerful institutions at its disposal - the police, the judicial system, the mass media, parliament - with which it may denounce, investigate and punish human rights violations by private citizens or non-governmental groups. When this power is used to violate the rights of its citizens, as described in the report of the Chilean commission, their normal vulnerability is transformed into utter defencelessness.

81 This sensitivity to the unequal power relationships between state and non-state agents should be seen as an attempt to help lay the foundation for the rehabilitation of state institutions in order to hold present and future governments accountable for their use and abuse of power. It is thus central to the effort to prevent future violations of human rights.

DEFINING GROSS VIOLATIONS OF HUMAN RIGHTS

82 The Act did not provide clear guidelines for the interpretation of the definition of “gross violations of human rights”. In order to determine which acts constituted gross violations

of human rights, it was important to interpret the definition and to consider whether there were any limitations excluding particular acts from this definition. The Act used neutral concepts or terms to describe the various acts that constituted a gross violation of human rights. For example, `killing' and 'abduction' were used rather than murder or kidnapping. Clearly, the intention was to try to avoid introducing concepts with a particular content in terms of the applicable domestic criminal law. This was to avoid equating what was essentially a commission of enquiry with a court of law. If the full array of legal technicalities and nuances had been introduced into the work and decision-making functions of the Commission, its task would have been rendered immensely complex and time-consuming. It would also have contradicted the clear intention that the Commission should fulfil its mandate as expeditiously as possible. It could also have opened the way for a repetition of past injustices, with victims of the political conflict being excluded by legal technicalities from claiming compensation for their losses. Thus, it was clear that the underlying objective of the legislators was to make it possible for the Commission to recognise and acknowledge as many people as possible as victims of the past political conflict. This objective, in its turn, was central to the Commission's overall task to promote national unity and reconciliation.

83 Two distinct enquiries were envisaged by the Act insofar as it concerned the question of gross violations of human rights:

a Was a gross violation of human rights committed and what was the identity of the victim? (section 4(b))

b What was the identity of those involved in such violations and what was their accountability for such violations? (section 4(a)(iii), (v))

84 The first is a factual question about the conduct involved: in other words, does the violation suffered by the victim amount to one of the acts enumerated in the definition? This enquiry does not involve the issue of accountability. The question of whether or not the conduct of the perpetrator is justified is irrelevant. This was in accordance with the intention to allow as many potential victims as possible to benefit from the Commission's process.

85 The second enquiry is stricter and more circumscribed, involving technical questions like accountability. Findings emerging at this level of enquiry may have grave implications and impinge upon the fundamental rights of alleged perpetrators. This enquiry involves, therefore, both factual and legal questions.

86 Hence, the Commission could find that a gross human rights violation had been committed because there was a victim of that violation. It had, however, to apply a more stringent test in order to hold a perpetrator accountable for that violation.

87 It was in relation to this more rigorous test that issues such as justification were taken into account. A perpetrator could not be held accountable if the conduct in question was legally justified. Thus, for example, a person who killed in self defence could not be held accountable as a perpetrator of a gross violation of human rights. This raised the question of whether the notion of unlawfulness was implicit in the definition of gross

violations of human rights in the Act. In other words, must a particular act be unlawful for it to amount to a violation of human rights in the sense of a crime or a delict? In order to answer this question, it is important to take into account the fact that the issue of justification (for example, self defence and necessity) does not affect the nature of conduct but excuses its consequences. A legitimate killing in self defence still amounts to the deprivation of life and a violation of the right to life, but the law does not hold the perpetrator liable for the consequence of this conduct. Thus, although justification does not affect the nature of the act, it does affect the issue of accountability.

88 As a consequence, the position adopted by the Commission was that any killing, abduction, torture or severe ill treatment which met the other requirements of the definition amounted to a gross violation of human rights, regardless of whether or not the perpetrator could be held accountable for the conduct.

89 It is important to note that the categories of victims and perpetrators are defined in terms of specific acts, such as killing. The categories are not, however, mutually exclusive. Thus, for example, a person who may, in one situation, be a victim of severe ill treatment by the police may, in another, become a perpetrator of a gross violation of human rights through his or her killing of a political opponent.

90 This position was applied to a large majority of violations which took place as a result of what might loosely be termed civilian conflict: for example, conflicts between IFP and ANC or United Democratic Front (UDF) supporters or between youth and the police in townships.

Armed conflict between combatants

91 The political conflicts of the past were not only of a `civilian' nature. Several of the political groupings had an armed wing. The state used its armed forces to put down resistance and to engage in military actions in the southern African region. The Commission had particular difficulty in attempting to define and reach consensus on its mandate in this respect. Some argued that all killed and injured combatants should be included as victims of gross human rights violations. Others wanted to maintain a distinction between those defending the apartheid state and those seeking to bring it down. It was noted that members of the armed forces involved in these combat situations did not expect to be treated as victims of gross violations of human rights. This was illustrated in the submissions of political parties such as the NP and the ANC, which did not identify their members killed in combat as victims. In the end, the Commission decided to follow the guidelines provided by the body of norms and rules contained in international humanitarian law.

92 Armed conflicts between clearly identified combatants thus provided the only exception to the Commission's position that victims of gross violations of human rights should include all who were killed, tortured (and so on) through politically-motivated actions within the mandated period.

93 With regard to specific aspects of the armed conflicts referred to above, the Commission was guided by international humanitarian law, particularly as contained in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. Since the Commission was not a tribunal and therefore not required to pass legal judgements, only the basic concepts and principles underlying these laws were taken into consideration.

94 International humanitarian law attempts to provide as much protection as possible to those faced with the harsh realities of armed conflicts, irrespective of what caused them. It therefore places limits on the means and methods used in warfare, declaring certain acts impermissible, while other acts, even some of those involving killing, are not regarded as violations. To understand this distinction, the two essential concepts of 'combatant' and protected 'person' need to be clarified.

95 Article 43 (paragraphs 1 and 2) of Additional Protocol 1 of 1977 defines combatant as follows:

> The armed forces of a Party to the conflict consist of all organised armed forces, groups, and units that are under a command responsible to that Party for the conduct of its subordinates...
>
> Members of the armed forces of a Party to the conflict are combatants; that is to say, they have the right to participate directly in hostilities.

96 Protected persons include the following categories of persons:

> wounded, sick and shipwrecked members of the armed forces and civilians[14]; prisoners of war[15]; civilians, including those interned and those on the territory of the enemy or in occupied territories.[16]

97 The basic principle is that combatants have the right to participate directly in hostilities. This does not mean that combatants have an unlimited right to kill. What it does mean is that the combatant is allowed to use (lethal) force against enemy combatants in the process of trying to subdue the enemy as quickly as possible. It remains preferable that these enemy combatants should be captured or wounded and not physically destroyed. But deaths do occur in war; that is its inherent evil. While the laws of war may not prohibit such deaths, they are a source of profound moral regret. Combatants who comply with the restrictions imposed by the laws of war are not, therefore, personally liable for the consequences of their acts. Thus, the laws regulating justness in war provide no prohibition on certain acts of violence committed by any party to an armed conflict, regardless of the justness of that party's cause.

98 However, when a combatant uses force in an armed conflict against a protected person - that is someone who does not or who can no longer use force and thus cannot defend him or herself - such acts break international humanitarian law and those responsible must be held accountable. The laws of war provide minimum protections that apply in all armed conflicts. These protections are found in Common Article 3 of the four 1949 Geneva Conventions, which reads:

Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat [outside combat] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to the life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples. (See also Protocol I, art 75).

99 Historically, when such violations have occurred in an international, as opposed to internal, armed conflict they constitute 'grave breaches'[17] which may be prosecuted by any state. This distinction between international and internal armed conflicts is less relevant today, as the laws of war have evolved to regulate more closely the use of force in all situations of armed conflict.

100 It is, furthermore, very important to note that the Geneva Conventions, both in their terms and as they have been interpreted, are inclusive in the protections they offer. In other words, if there is doubt about whether a particular person is entitled to certain protections provided by the Conventions, then it is presumed that such an individual should be protected. (See Protocol I, art 45.1, 50.1).

101 It must also be emphasised that the concepts of combatant and protected person are not necessarily opposites. When a combatant is wounded or surrenders, he or she becomes a protected person without losing combatant status. In other words, in order to decide whether someone was killed or injured as a combatant, two questions must be asked: first, was the person a member of an organised or regular armed force, and second, was the person in or out of combat?

102 The practice followed by the Commission was in accordance with these two considerations. The Commission also adopted the principle of giving the benefit of the doubt to those whose status as combatants or protected persons was unclear. These norms were applied as follows to the acts of killing, attempted killing and severe ill treatment falling within the Commission's mandate:

a SADF soldiers or SAP members acting as soldiers (for example members of the Koevoet Unit) who were killed or seriously injured in combat (during, for example, the

Namibian and Angolan `border wars') and Umkhonto weSizwe (MK) or Azanian Peoples Liberation Army (APLA) soldiers killed or seriously injured in combat were not viewed as victims of gross violations of human rights as defined by the Act. This is consistent with the position taken in the submissions made to the Commission by the NP, FF, the South African National Defence Force (SANDF) and the ANC.

b Those combatants who were killed or seriously injured while they were unarmed or out of combat, executed after they had been captured, or wounded when they clearly could have been arrested were held to be victims of gross violations of human rights, and those responsible were held accountable.

c In cases where the Commission could not determine whether a combatant was out of combat, and therefore regarded as a protected person, it followed the precedent set by international humanitarian law. The Commission gave the benefit of the doubt to people killed or seriously injured in uncertain circumstances and found them to be victims of gross violations of human rights.

d Conscripted soldiers in the SADF were defined as combatants, even where the system of conscription obliged them to perform military service against their will, threatening heavy penalties if they did not do so. Like all combatants, they may have qualified as victims of a gross violation of human rights in certain circumstances, such as being subjected to torture or killed when injured.

Victims of the armed conflict

103 Soldiers on either side of the political divide, whether they were permanent force soldiers, conscripts or volunteers, as well as their families and loved ones, were, of course, victims in a more general sense. They were victims of the armed political conflict of the past and their deaths, injuries and losses should be remembered and mourned.

104 In a number of cases that came before the Commission, however, the decision was more complex.

105 In respect of the first consideration - namely, whether the person was a member of an "organised force ... under a command responsible to [a] Party to the conflict"[18] - the Commission was faced with the problem of how to categorise members of a variety of more or less organised armed groupings. These ranged from relatively well to poorly organised self-defence units (SDUs), self-protection units (SPUs) and vigilante groupings, under varying degrees of control by the ANC, the IFP, the state or other political formations. Some units were well trained and ostensibly under military control, although at times they operated on their own initiative. Others were little more than bands of politically motivated youth, acting on example and exhortation. Many SDUs, for example, were `acknowledged' by MK, and even given some weapons and training, but were far from its chain of command.

106 The Commission had great difficulty in dealing with these cases. In the end, given the lack of information on the degree of control and the nature of the combat situation, it decided to employ the narrow definition of combatants. This meant that, in general, cases involving members of the above organisations were treated in the same way as non-combatants (as described above). However, where clear evidence emerged, on a case-by-case basis, of direct military engagement by members of these groupings, they were regarded as combatants.

107 A second difficulty arose around the question of whether members of the SAP and of other armed forces (such as the SADF and homeland defence forces) were in or out of combat when called upon to perform policing duties in the townships (the word used to describe residential areas for people classified as black). Further, should those who killed or injured police in the townships be regarded as in or out of combat? In general, the Commission did not treat these as combat situations, although it remained open to treating specific cases as combat situations where there was sufficient evidence to do so.

108 Thus, the Commission made a conscious decision to err on the side of inclusivity - finding that most killings and serious injuries were gross violations of human rights rather than the result of the legitimate use of force. Where the evidence of a combat situation was clear, however, the traditional laws of war were applied.

MAKING FINDINGS OF GROSS VIOLATIONS OF HUMAN RIGHTS

109 As the Commission embarked on the road of seeking to restore the dignity of victims through extensive statement taking and public hearings, it was confronted with the sometimes difficult task of interpreting the categories of acts contained in the definition of gross violations of human rights, and of formulating criteria to determine the 'political' motivation of these acts of killing, torture, abduction and severe ill treatment.

Torture and abduction

110 `Torture' and `abduction' were relatively easy to define. The following internationally accepted definition of torture guided the Commission in its work:

> *The intentional infliction of severe pain and suffering, whether physical or mental, on a person for the purpose of (1) obtaining from that or another person information or a confession, or (2) punishing him for an act that he or a third person committed or is suspected of having committed, or (3) intimidating him or a third person, or (4) for any reason based on discrimination of any kind. Pain or suffering that arises only from, inherent in, or incidental to, a lawful sanction does not qualify as torture.*[19]

111 `Abduction' was defined as the forcible and illegal removal or capturing of a person. This definition did not include arrests and detentions that satisfied universally recognised international human rights standards, nor the capturing of an enemy soldier in a situation of armed conflict. It was a category applied in the majority of cases where people

`disappeared' after having last been seen in the custody of the police or of other persons who were using force.

Killing

112 In defining the category of `killing', some difficulties were presented by the killing of combatants. The Commission's position in this regard is discussed earlier in this chapter. Many killings reported to the Commission were of people described as innocent bystanders caught in the crossfire. These were found to be victims of gross violations of human rights if the other conditions were fulfilled.

113 The Commission considered the executions of activists or other persons for politically-motivated crimes both within the established legal system and in other settings (for example, in `peoples' courts', or in tribunals or summary hearings conducted by the liberation movements). After considerable debate, the Commission agreed to consider all such executions, whether carried out by the state or the liberation movements, as gross violations of human rights. This decision was taken in the light of the need to promote a national and international human rights culture. It also took into account the lack of legitimacy of the legal system and the laws of the time, as well as the absence of minimal due process protections and proper forums of adjudication.

Severe ill treatment

114 `Severe ill treatment' is not a term that is recognised either in South African or in international law, although South African law recognises concepts such as grievous bodily harm and ill treatment. Both South African constitutional law and international law do, however, recognise cruel, inhuman, or degrading treatment or punishment, which is sometimes colloquially referred to as ill treatment.

115 Severe ill treatment can be broadly defined.[20] The legislators included this category to give the Commission some discretion or flexibility in determining the breadth of the mandate. In defining severe ill treatment, the Commission was mindful of the general principle of legal interpretation which holds that terms found in sequence are presumed to be similar in kind. In other words, the acts constituting `severe ill treatment' were intended to be interpreted as similar in degree to other acts described (that is, killing, torture, and abduction). The Commission also examined similar concepts in South African and international law to provide contextual support for a working definition. The international prohibition against cruel, inhuman, or degrading treatment or punishment, for example, clearly encompasses a broader category of violations than that intended by severe ill treatment.[21] The category of ill treatment found in South African law is also clearly broader in scope than severe ill treatment.[22] The Commission's definition of severe ill treatment was thus designed to include the extreme acts of "cruel, inhuman, or degrading treatment" under international law, and ill treatment under South African law.

116 In the light of these considerations, the following definition of severe ill treatment was adopted:

Acts or omissions that deliberately and directly inflict severe mental or physical suffering on a victim, taking into account the context and nature of the act or omission and the nature of the victim.

117 Whether an act or omission constituted severe ill treatment was thus determined on a case-by-case basis[23]. The Commission determined that, in order to qualify as severe ill treatment, an act should meet the general criteria that apply to all gross violations of human rights.[24]

118 In addition, the following factors were be taken into account in determining whether particular suffering or hardship was severe: first, duration (the longer the suffering or hardship lasted, the more easily it qualified as severe); second, physical or mental effects (the more serious and permanent the physical or mental effects, the more severe the treatment); third, the age, strength and state of health of the victim. The very young and the very old, the weak and the infirm required less suffering or hardship to meet the criteria of severe. These criteria were interdependent - the more one criterion was satisfied, the less relevant were the others. In other words, a severe beating of a sick, elderly person might have qualified as severe ill treatment even though the beating lasted less than a minute.

119 By applying the above criteria, the following acts were regarded as constituting severe ill treatment:

a rape and punitive solitary confinement;
b sexual assault, abuse or harassment;
c physical beating resulting in serious injuries;
d people shot and injured during demonstrations;
e burnings (including those caused by fire, petrol, chemicals, and hot liquid);
f injury by poison, drugs or other chemicals;
g mutilation (including amputation of body parts, breaking of bones, pulling out of nails, hair, or teeth or scalping);
h detention without charge or trial;
i
b banning or banishment (a punishment inflicted without due process, consisting (a) of the restriction of a person by house arrest, prohibition from being in a group, prohibition from speaking in public or being quoted, or (b) of the enforced transfer of a person from one area to another without the right to leave it);
j deliberate withholding of food and water to someone in custody with deliberate disregard to the victim’s health or well-being;
k deliberate failure to provide medical attention to ill or injured persons in custody;
l the destruction of a person’s house through arson or other attacks which made it impossible for the person to live there again.

120 This list is illustrative and not exhaustive. It consists primarily of acts that have been generally recognised as prohibited under international law. While the above acts and omissions would normally qualify as severe ill treatment, individual cases may not, in

fact, have met all the criteria of the definition above and thus may not have qualified as severe ill treatment.

POLITICAL CONTEXT AND MOTIVATION

121 To implement its mandate, the Commission had, furthermore, to determine the `political motive' of the acts of torture, abduction, killing and severe ill treatment which "emanated from the conflicts of the past" (section 1(1)(x), the Act). Given the complexity of the conflicts that occurred in the past and the fact that the enforcement of apartheid legislation affected every sphere of society, the political nature of specific acts was hard to define.

122 In interpreting this part of the definition of gross human rights violations, the Commission was guided by the definition of an "act associated with a political objective" (section 20(2) and (3)). However, it also went further and employed the less restrictive notion of 'political motive' (section 1(1)(x)).

123 The framework applied in implementing the political requirement was that a violation of human rights within the prescribed period was found to constitute a gross violation of human rights if it was advised, planned, directed, commanded, ordered or committed by:

a any member or supporter of a publicly known political organisation or liberation movement on behalf of or in support of that organisation or movement, in furtherance of a political struggle waged by that organisation or movement (section 20(2)(a)). This included not only membership of or support for political organisations like the PAC or the ANC, but also membership of youth and community-based organisations. Trade unions were also included in this description (given the suppression of purely political organisations and the resultant political role that unions played), as was general resistance to the previous state through, for example, rent boycotts.

b any employee of the state (or any former state) or any member of the security forces of the state (or any former state) in the course and scope of his or her duties and directed against a publicly known political organisation or liberation movement engaged in a political struggle against the state (or former state) or against any members or supporters of such organisation or movement or any person in furtherance of a political struggle. The act in question must have been committed with the objective of countering or otherwise resisting the said struggle (section 20(2)(b)).

124 Whether these violations "emanated from the conflicts of the past" was decided with reference to the following criteria:

a the context in which the violation took place, and in particular whether it occurred in the course of or as part of a political uprising, disturbance or event, or in reaction thereto (section 20(3)(b)), for example, protests, 'stay aways', strikes and demonstrations;

b the objective being pursued, and in particular whether the conduct was primarily directed at a political opponent or state property or personnel or against private property or individuals (section 20(3)(d));

c whether it was the result of deliberate planning on the part of the state (or former state) or any of its organs, or on the part of any political organisation, liberation movement or other group or individual (section 4(a)(iv)).

125 In a number of cases that came before the Commission, it was difficult to apply this framework. These included cases of the following types:

Labour conflicts

126 In the case of gross violations of human rights primarily related to labour conflicts (and not to the more narrowly defined political conflicts of the past), it was possible to differentiate further between:

a those which fell outside the Commission's mandate because, on closer examination, there was no clear political context. Typical of this type were cases relating to the abuse of farm workers;

b those that fell inside the mandate because a deeper probe revealed that the context was clearly political. For example, where a labour union linked to a specific political organisation was used to attack workers from a union linked to another political organisation (as in the Durnacol coal mine conflicts in Northern KwaZulu-Natal in 1990), or where a labour-related conflict became the basis for clear political protest (as in Saldanha in 1987), or many actions in the course of trade union activity. The banning of political organisations often made trade unions the vehicles through which political struggles were waged.

Racism

127 There were cases in which people were victims of racist attack by individuals who were not involved with a publicly known political organisation and where the incident did not form part of a specific political conflict. Although racism was at the heart of the South African political order, and although such cases were clearly a violation of the victim's rights, such violations did not fall within the Commission's mandate.

128 Cases which were interpreted as falling inside the Commission's mandate included instances where racism was used to mobilise people through a political organisation as part of their commitment to a political struggle, or where racism was used by a political organisation to incite others to violence. Examples of these were instances when 'white settlers' or farmers were killed by supporters of the PAC or the ANC, or where black people were killed by supporters of white right-wing organisations.

Criminality

129 These included cases that appeared to be criminal but which had a strong political overlay. Classic examples were many of the violations committed by special

constables`[25] while engaging in unlawful activities or off-duty harassment of local residents. It could be argued that these were criminal and not political acts and therefore fell outside the mandate. The Commission's response was to view these acts within their political context - the nature, purpose and function of this kind of police force had been to institute a permanent armed presence. Clearly, the violations and the patterns of violations that resulted from deploying these poorly trained, politicised and armed people in communities should have been foreseen by those who were behind this contra-mobilisation force. Unless acts committed were clearly aberrations - for example, shooting the owner of a shebeen, or raping someone in circumstances which indicated that it was a random crime - the Commission concluded that these acts were politically motivated.

130 These also included acts by so-called `bad apples' within the security forces; in other words, it was claimed that certain acts had fallen outside the duties and orders given to, for example, security police based at Vlakplaas. In some cases, there were disputes between former state agents and former politicians about whether these acts were reasonable interpretations of deliberately vague, unwritten orders to 'deal firmly with the unrest', to 'do what has to be done' and so on. In such cases, the Commission gave the benefit of the doubt to victims and included them in its mandate where an interpretation of such an order was reasonable, taking into account all the facts and circumstances. Many of these acts were clearly criminal. However, the fact that they took place over a long period and that little or no action was taken against these employees of the state, gave the Commission grounds to regard them as political. By failing to act, the state condoned these `private' acts, thus neglecting its duty to protect its citizens against crime.

131 These also included `third force' related actions, for example, drive-by shootings, train violence, and some manifestations of the taxi violence and similar events. Even where it was not possible clearly to identify the perpetrator as acting for a 'third force', victims of such incidents were found to have suffered gross human rights violations if the circumstances of the cases warranted it. All such matters were considered on a case-by-case basis.

Convictions for politically motivated acts

132 One of the most difficult decisions related to whether conviction and sentencing (often to unusually long periods of imprisonment) for `public violence', or for offences defined in terms of other legislation specific either to the apartheid period or state of emergency regulations, could be considered gross violations of human rights. Factors that had to be taken into consideration were whether such provisions would now be in contravention of the South African Constitution, whether the severity of the sentence was out of proportion to the offence and whether there had been abuses in relation to due process. It was clear that the Commission could not recreate a court situation and review a conviction. Nevertheless, the Commission decided that, in certain cases, people who had been convicted in such circumstances could be deemed to have suffered a gross violation of their human rights. Again, these were dealt with on a case-by-case basis. If

there was clear and compelling new evidence, the matter might be referred to the authorities for a possible re-opening of the trial. As with capital punishment, the Commission's task was not to make a perpetrator findings in relation to the court which had passed the sentence, but to decide whether or not there had been a gross violation of human rights.

CLOSED LIST OF VICTIMS

133 The decision to establish a finite list of victims was taken fairly late in the process of gathering information about violations. Initially, in keeping with the spirit of inclusivity that governed the work of the Commission, it was felt that all victims of gross violations of human rights that had been shown to have taken place should be considered.

134 As the work of taking statements and investigating allegations progressed, however, it became increasingly clear that there would be no value in simply handing the government a list which included a broad category of unidentified persons for consideration as victims deserving of reparations.

135 After a great deal of discussion, it was acknowledged that the Commission had the capacity to corroborate only those statements that it had actually received. There was, moreover, an inherent justice in dealing with the statements of those who had taken the trouble to approach the Commission to make a statement. After all, the Commission had made considerable efforts to reach all parts of the country and to disseminate information on how to make a statement. Those who had chosen not to do so should not, therefore, be included. It was recognised, however, that some had elected not to make statements as a matter of political choice, a position that was respected.

136 Furthermore, it would have been unrealistic to give the government what would, in effect, have been an open-ended list and, on this basis, to expect the state to make a commitment to paying reparations. The Commission resolved, therefore, to confine the number of victims eligible for reparations to three areas:

a victims who personally made statements to the Commission;

b victims named in a statement made by a relative or other interested person (for example a colleague, friend or neighbour); in other words, statements made on behalf of and in the interests of specific persons.

c victims identified through the amnesty process.

WHO SHOULD BE HELD ACCOUNTABLE?

137 The Commission was obliged to identify all persons, authorities, institutions and organisations involved in gross violations of human rights. This meant that it had to go beyond the investigation of those that had actually committed gross violations of human

rights and include those who had aided and abetted such acts. This is consistent with the definition of gross violations of human rights, which includes attempts, conspiracy, incitement, instigation, command or procurement to commit such acts.

138 The Commission based its conclusions on the evidence brought before it, firstly by people who made statements concerning gross violations of human rights, and secondly, by those who applied for amnesty. It also drew on the Investigation Unit's inspections of inquest records, court records, prison and police registers and on corroborative evidence produced by witnesses. Research into historical documentation produced additional information, and submissions to the Commission, especially from political parties, shed further light. The effort to apportion responsibility for planning, commanding, inciting and so on is discussed in a later chapter.

139 Individual responsibility could be laid at the door of specific perpetrators of abuses only once several factors had been taken into account. These included the question of self defence, of proportionality and, in several well-known cases, the doctrine of common purpose.

Accountability: legitimate self defence

140 A recent Constitutional Court judgement states that:

Self-defence is recognised by all legal systems. Where a choice has to be made between the lives of two or more people, the life of the innocent is given preference over the life of the aggressor. To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life. [26]

141 The right to act in self-defence means essentially that, while the use of force against another person is normally unlawful, it is justified in defence of persons, property or other legal interest against an imminent, unlawful attack, provided that the defence is directed against the attacker and is not excessive. Defence against an anticipated future attack or a completed attack is not justified. Defence cannot be a form of punishment or revenge.[27] This means that, in cases of legitimate self defence, the person who had no alternative but to kill or seriously injure a person posing an imminent threat to his or her life should not be held criminally responsible for his/her actions.

142 The legitimacy of self-defence is often difficult to establish. The task was even more difficult for the Commission, which had to deal with large numbers of cases in a limited period and, therefore, had limited information at its disposal on many specific cases.

143 Amongst the most difficult issues the Commission faced in this regard were cases involving SDUs and SPUs and conflicts between ANC- and IFP-aligned people in KwaZulu-Natal, where it was usually not clear who was 'innocent' (defending) and who was 'guilty' (attacking).

Accountability and law enforcement: exercise of police powers

144 States normally enjoy a monopoly over the legitimate use of force. Certain bodies and officials, primarily the police services, are empowered to use force to uphold the rule of law and to maintain public order. As in the case of armed conflict, however, the authority to use force to uphold domestic order is not unlimited. Generally, members of the police services are authorised to use a reasonable amount of force in proportion to the threat being addressed or the legitimate ends being pursued. Lethal force should be used only when someone's life is in imminent danger and there is no other reasonable way to control the situation.

145 These norms are captured in the Code of Conduct for Law Enforcement Officials, adopted by the United Nations General Assembly on 17 December 1979 (Resolution 34/169). For the purposes of this part of the Commission's mandate, the most important articles are articles 1, 2, 3, 5 and 6 which state:

Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty. [28]

No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

146 These norms governing the use of legitimate state power are particularly difficult to apply to the period of South African history prescribed by the Commission's mandate. The large majority of people inside and outside the country increasingly rejected the legitimacy of the state, and activists fighting against apartheid were defined as criminals through the enforcement of harsh, unjust and discriminatory laws.

147 However, individual police officers saw it as their duty to enforce laws that many of them did not, at the time, believe to be unjust. Indeed, in the South African context, the police were given very wide powers to use lethal force through, for example, the Criminal Procedure Act. In the overwhelming majority of inquests involving allegations of excessive force, the police members involved were cleared of any misconduct. These included cases arising out of Sharpville, Soweto 1976 and the 'Trojan Horse' incidents in Athlone and Despatch, where local and international human rights organisations

condemned the laws which made these acquittals possible and their uncritical application by the judiciary (see submissions on the judicial system).

148 Since the Commission had to decide whether specific acts by the SAP or homeland police forces constituted human rights violations and not necessarily whether they were legal or illegal in terms of the relevant domestic laws, it employed the internationally accepted principle of unnecessary or excessive force (described above). In the light of these international norms, the Commission found that, although the applicable South African laws at that time might not have been broken, fundamental human rights were often clearly violated. In a number of cases, the Commission was also presented with new and compelling evidence (for example corroborated statements by victims or witnesses) which strengthened the basis upon which it reached conclusions that differed from those reached at most inquests and criminal proceedings regarding police misconduct.

149 In determining whether excessive force was used, the Commission determined that it should be guided by the following considerations. First, as a body working to assist in the establishment of a culture of human rights, the Commission followed the inclusive approach to protection found in international humanitarian law. It thus interpreted human rights protections broadly to ensure maximum protection against violations. Second, since the primary duty of the police is to uphold law and order through the apprehension and arrest of those who break the law, the use of lethal force is justified only in extreme situations.

Non-state perpetrators of gross human rights violations

150 There were many cases where the Commission found that the use of force by the police was excessive and thus constituted a gross violation of human rights. There were also cases where the Commission found that violence against the police constituted a gross violation of human rights: for example, attempted killings (arson attacks when police were inside their homes) and killings of off-duty police. The latter cases were, however, fewer in number than those involving the police as perpetrators - an unsurprising result given the near monopoly of force exercised by those acting on behalf of a militarily powerful state.

151 Killings and severe ill treatment of people seen as informers or collaborators, attacks on people and places seen as part of the oppressive government and conflict between different political groupings, all formed part of the picture of gross human rights violations committed with a political motive.

Naming

152 The Act required the publication of the names of those who received amnesty in the Government Gazette. These individuals had already identified themselves as perpetrators by applying for amnesty. The Commission had therefore, to resolve which of the other perpetrators identified in the course of its work should be named in accordance with its mandate - to enquire into “the identity of all persons, authorities, institutions and organisations” involved in gross human rights violations, as well as the

"accountability, political or otherwise, for any such violation" (section 4(a)(iii), (v), the Act).

153 In fulfilling this part of its mandate, the Commission was again required to walk a tightrope. This time, it was faced with the tension between the public interest in the exposure of wrongdoing and the need to ensure fair treatment of individuals in what was not a court of law; between the rights of victims of gross violations of human rights to know who was responsible and the fundamentally important question of fairness to those who are accused of crimes or serious wrongdoing.

154 The risk of personal injury and hurt to those who are identified as perpetrators is inherent in any attempt to seek the truth through a public enquiry. This can be justified to some extent by:

a acknowledging the public importance of the Commission's truth-seeking role;

b the limited outcome of these findings (the Commission is not a court with the power to punish those identified; legal rights and obligations are not finally determined by the process);

c the adoption of a procedure which is fair within the context of an investigative process. (See chapters, *Legal Challenges* and *Methodology and Process*).

155 Given the investigative nature of the Commission's process and the limited legal impact of naming, the Commission made findings on the identity of those involved in gross violations of human rights based on the balance of probability. This required a lower burden of proof than that required by the conventional criminal justice system. It meant that, when confronted with different versions of events, the Commission had to decide which version was the more probable, reasonable or likely, after taking all the available evidence into account.

156 The kinds of evidence which guided the Commission in identifying those responsible for gross violations of human rights on the basis of the balance of probability included:

a Identification through court records, confessions, statements implicating people in police dockets, police inquests, and/or previous applications for indemnity.

b Instances where the Commission's investigations (section 29 hearings or investigative and research work) produced a high degree of corroboration (for example, other witnesses present at the time who supported the victim's statement). An example of a 'high' level of corroboration would be a situation where a witness confirmed the identity of the actual person committing the gross violation of human rights; a 'low' level of corroboration would be where the witness confirmed the event but not the identity of the perpetrator.

c Instances where names consistently recurred in the statements of people making allegations concerning gross violations of human rights (for example, vigilante groups).

Even in such cases, perpetrators would not be named without first being sent a section 30 notice advising them that the Commission intended to name them and allowing them an opportunity to respond. This procedure applied to all instances where persons were at risk of being the subject of an adverse finding.

157 In view of the Commission's commitment to human rights, it approached the issue of naming perpetrators in a number of different ways:

a No naming occurred where the identities of individuals and institutions involved were unclear.

b In many cases, where the Commission had insufficient information to send out section 30 notices (see chapters on Legal Challenges and Methodology and Process) to persons allegedly implicated in gross violations of human rights, such alleged perpetrators were not named.

c Institutions but not individuals were named where only the institution could be identified. In addition, only the institution was named where the identities of both individuals and institutions were clear, but where it was not possible to verify or clearly determine excessive force or illegitimate claims of self defence. In these situations, it was important to protect the accused individual against potentially unfair accusations.

d Naming of both individual(s) and institution(s) occurred where sufficient evidence was available to make a finding on the balance of probability and after completion of the correct procedure. This was not a finding of (legal) guilt, but of responsibility for the commission of a gross violation of human rights.

CONCLUSION

158 This chapter has provided an overview of the historical and legislative origins, as well as the objectives and functions of the Commission. More importantly, it has outlined the Commission's interpretation of its mandate. This was, in many ways, a difficult and highly contested arena, and the resultant interpretation was the result of many hours of debate and careful consideration.

159 In subsequent volumes of this report, the mandate is applied to a range of individual cases of alleged gross violations of human rights.

APPENDIX: A CRIME AGAINST HUMANITY[29]

1 It has been stated that the Commission - as part of the international human rights community - affirms its judgement that apartheid, as a system of enforced racial discrimination and separation, was a crime against humanity. The recognition of apartheid as a crime against humanity remains a fundamental starting point for reconciliation in South Africa. At the same time, the Commission acknowledges that there are those who sincerely believed differently and those, too, who were blinded by their fear of a Communist 'total onslaught'.

2 This sharing of the international community's basic moral and legal position on apartheid should not be understood as a call for international criminal prosecution of those who formulated and implemented apartheid policies. Indeed, such a course would militate against the very principles on which this Commission was established.[30]

3 It is important to note that the definition of what constitutes a crime against humanity has evolved considerably since it was first applied after World War II during the Nuremberg trials. There is still some debate about certain technical aspects of this definition. However, there is almost total unanimity within the international community that apartheid as a form of systematic racial discrimination constituted a crime against humanity. Given the confusion in public debates in South Africa surrounding the definition of 'crimes against humanity', it is important to state that a finding of a crime against humanity does not necessarily or automatically involve a finding of genocide. The latter involves conduct "with intent to destroy, in whole or in part, an ethnic or racial group" as required by Article 1 of the Genocide Convention of 1948.[31]

4 As indicated earlier, the definition of crimes against humanity can be applied at two levels. The first level of application, namely to apartheid as a system, flows from the Commission's obligation to enquire into the causes, nature and extent of gross violations of human rights, including the antecedents and context of such violations (section 3(a)). The Commission has concluded that the nature of the conflicts in general and the causes of the violations which occurred in the course of these conflicts cannot be understood without examining the system of apartheid within which they took place.

5 The Commission was also required, at a second level of application, to enquire which of the specific acts constituting gross violations of human rights "were part of a systematic pattern of abuse" (section 4(a)).

Organisations, instruments and judicial decisions that declared apartheid a crime against humanity

The United Nations

6 The General Assembly on numerous occasions labelled apartheid a crime against humanity[32].

7 In 1976, the United Nations Security Council unanimously stated that "apartheid is a crime against the conscience and dignity of mankind."[33]

8 Subsequent Security Council resolutions expressed agreement with the 1976 resolution.[34]

9 On 13 December 1984, the Security Council passed Resolution 556, which, in Paragraph 1, declared that apartheid is a crime against humanity[35].

International conventions and other instruments

10 Article 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid adopted by the General Assembly in 1973 stated that apartheid was a crime against humanity.

11 The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[36] stipulated that "inhuman acts resulting from the policy of apartheid are condemned as crimes against humanity".

12 The 1991 Draft Code of Crimes against the Peace and Security of Mankind[37] specifically lists apartheid,[38] together with other crimes such as genocide[39] and exceptionally serious war crimes,[40] as crimes against the peace and security of mankind.

13 Although the 1996 Draft Code of Crimes against the Peace and Security of Mankind41 no longer makes specific reference to apartheid as a separate crime, it does list a set of acts that specifically constitute crimes against humanity. Article 18(f) states:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organisation or group: … (f) institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population.

14 The Preamble to the African Charter on Human and Peoples' Rights, to which South Africa became a party in 1996, affirms that African states have a duty to:

...achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertak[e] to eliminate colonialism, neo-colonialism, apartheid [and] Zionism...

15 The international community is presently engaged in the establishment of a permanent International Criminal Court which will be given competence to try persons responsible for crimes against humanity. The proposed definitions of crimes against humanity encompass acts of the kind included in the Draft Code of Crimes against the Peace and Security of Mankind (1991); that is the kind of acts committed in execution of the policy of apartheid. The proposed permanent international criminal court will not have retrospective jurisdiction, with the result that those who have committed crimes of apartheid will not fall within its jurisdiction.

The International Law Commission (ILC).

16 In its Draft Articles on state responsibility, the ILC defines an international crime as a breach of an international obligation so essential for the protection of the fundamental interests of the international community that it is recognised as a crime by that community as a whole. Among such crimes, the ILC lists slavery, genocide and apartheid[42].

International courts

The International Court of Justice (ICJ)

17 In 1971, the ICJ asserted that:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on the grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter. [43]

18 In the Barcelona Traction Judgement, the ICJ held that:

an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising vis-â-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character. [44]

19 The International Criminal Tribunal for the Former Yugoslavia has recently handed down its historic first judgement. The Tribunal found a Bosnian Serb guilty of, inter alia, 'crimes against humanity'. The significance of this judgement is evident from the first paragraph of the ruling:

It is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal, the International Tribunal being the first such tribunal to be established by the United Nations. The international military tribunals at Nürnberg and Tokyo, its predecessors, were multinational in nature, representing only part of the world community. The International Tribunal was established by the Security Council of the United Nations in 1993, pursuant to resolution 808 of 22 February 1993 and resolution 827 of 25 May 1993.[45]

20 The judgement confirms the view in international law that apartheid is a crime against humanity:

The customary status of the Nürnberg Charter, and thus the attribution of individual criminal responsibility for the commission of crimes against humanity, was expressly noted by the Secretary-General. Additional codifications of international law have also confirmed the customary law status of the prohibition of crimes against humanity, as well as two of its most egregious manifestations: genocide and apartheid.[46]

Specific acts classified as crimes against humanity

21 The Commission chose to employ for its purposes the most recent definition adopted by the International Law Commission in its 1996 Draft Code of Crimes against the Peace and Security of Mankind[47]. It was satisfied that this definition reflects and incorporates many of the legal developments that have occurred since Nuremberg. Article 18 of the 1996 Code defines crimes against humanity thus:

A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organisation or group: (a) murder; (b) extermination; (c) torture; (d) enslavement; (e) persecution on political, racial, religious or ethnic grounds; (f) institutionalised discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) arbitrary deportation or forcible transfer of population; (h) forced disappearance of persons; (i) rape, enforced prostitution and other forms of sexual abuse; (j) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

22 The following brief commentary on the meaning of certain aspects of the definition allows it to be applied with greater certainty.

Systematic violations or violations on a large scale

23 The requirement that crimes against humanity must be committed in a systematic manner or on a large scale excludes acts which, although they are serious violations of human rights, occur in an isolated or random manner. The requirement is framed disjunctively, clearly indicating that it is not necessary for both requirements to be simultaneously satisfied. Simply, acts which occur on a large scale must occur in large numbers, while acts which occur systematically must follow a similar pattern and occur at different times and different places.

24 A question recently raised before the International Criminal Tribunal for the Former Yugoslavia was whether it is possible for a single act to constitute a crime against humanity. In the Tadic judgement, the Tribunal quotes with approval an earlier decision which stated that:

Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such an individual committing a crime against a single victim or a limited number of victims, might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above. [48]

25 The Commission was in agreement with this ruling.

Crimes committed by a government or by any organisation or group

26 Earlier definitions of crimes against humanity presumed that such crimes could only be committed by a government or those acting on behalf of a government. Implicit in this approach was an assumption that only an institution with the power and resources of a government would have the capacity to commit crimes on the scale necessary to qualify as crimes against humanity. Over the past fifty years, it has become clear that certain organisations or groups outside government are capable of committing crimes on a large scale or in a systematic manner. The Commission therefore endorsed the definition of crimes against humanity contained in the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind which includes acts committed by non-state actors.

Persecution

27 Clause (e) of the definition of the International Law Commission adopted by the Commission reads as follows:

persecution on political, racial, religious or ethnic grounds;

28 In the application of this clause, the following definition of 'persecution' has been adopted:

Action or policy adopted by a government, organisation or group leading to the infliction upon an individual of harassment, torment, oppression, or discriminatory measures, designed to or likely to produce physical or mental suffering or economic harm, because of the victim's beliefs, views, or membership in a given identifiable group (religious, social, ethnic, linguistic, etc.) or simply because the perpetrator sought to single out a given category of victims for reasons peculiar to the perpetrator. [49]

Inhumane acts

29 Clause (j) of the proposed definition reads as follows:

other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.

30 The Commission has chosen to interpret this clause in the same way in which it interpreted the term 'severe ill treatment'.

Crimes against humanity: supplementary definitions from recent cases

Barbie (1988) 78 International Law Report 136 at 137 (France)

31 The definition of 'crime against humanity' closely follows Article 6c of the Nuremberg Charter:

persecutions on political, racial or religious grounds É performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.

Touvier (1992) 100 International Law Reports 337 at 351 - 352 (France)

32 The definition of 'crime against humanity' has two elements, one substantive, and one of specific intent. The substantive element is guided by Article 6 of the Nuremberg Charter. To satisfy the intent element, however, more than simple criminal intent or general illegality is required. One must have the actual:

intention to take part in the execution of a common plan by committing in a systematic manner, inhuman acts or persecutions in the name of a State practising a policy of ideological supremacy.

33 The Touvier case also supports the notion that crimes against humanity are not synonymous with war crimes.

the elements constituting crimes against humanity within the meaning of Article 6c of the Charter of the International Military Tribunal of 8 August 1945 … are not the same as the requisite elements for war crimes within the meaning of Article 80 of the Code of Military Justice and the crime of maintaining contact with the enemy laid down by Article 70 of the Criminal Code.[50]

Regina v Finta (1989) 82 International Law Reports 424 at 431 (Canada)

34 The definition of crimes against humanity, as contained in section 6(1.96) of Canada's criminal code, means:

murder, extermination, enslavement, deportation, persecution, or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognised by the community of nations.

35 This supports the notion that the apartheid system in South Africa was a crime against humanity, in spite of the fact that it was perfectly legal within that country, because it contravened international law.