

27 August 2003

The Honourable Mr Justice John E Sprizzo  
United States District Judge  
United States Court House  
500 Pearl Street  
New York, New York 10007  
UNITED STATES OF AMERICA

Dear Judge

I, the undersigned, Solomon Johannes (Sampie) Terreblanche (PhD) do hereby make an oath and state that:

1. I am an emeritus professor in Economics at the University of Stellenbosch in South Africa. I was professor in Economics at this University from 1968 - 1995. I was a member of several government commissions and committees. I was a member of a commission to investigate the socio-economic conditions of the Coloured Population Group (1973 - 1976), a member of the South Africa Broadcasting Corporation (SABC) (1972-1987) and a member of the Economic Advisory Board of the Primeminister/Statepresident (1979-1985). I published 8 books in Afrikaans. My newest publication - the only book in English - is on South Africa's economic and political history: "*The History of Inequality in South Africa: 1652-2002*". (It was published in 2003.
2. I submit this oath on behalf of the *South African Apartheid Litigation* (MDL No.1499) and specifically as a rebuttal of the letter send to your highness by Dr. P.M. Maduna, the South African Minister of Justice and Constitutional development.
3. I swear that the facts deposed to herein are, excerpt where the context otherwise indicates, within my personal knowledge and in my judgement in the long-term interests of all the people in South Africa.
4. **Matters concerning the sovereignty of the South Africa government**
  - 4.1 In paragraph 3.1 of his letter, Dr Maduna claims that the Republic of South Africa is a sovereign state with the implication that a foreign court cannot intervene in South African matters. Two qualifications to this argument are relevant.
  - 4.2 Firstly, it is not the sovereignty of the present government in South Africa that is in the first place at stake in this court case, but the sovereignty of the system of white political dominance that was in place in South Africa *before* 1994. The gross human rights violations allegedly committed by foreign firms and contested in this court case, were committed during the period of white political dominance. The policies of that political

system (or the so-called apartheid regime) was described by the South African *Truth and Reconciliation Commission* as a crime against humanity. The apartheid regime was an unjust regime that exerted its sovereignty not on behalf of the total population, but only on behalf of the white minority. Unfortunately, the ANC government has not used its sovereignty since 1994 to address the consequences of the gross human rights violations of a *systemic* nature - that were committed during the period before 1994 by both foreign and local corporations - in a proper and satisfactory manner. It is only in this sense that the sovereignty of the present South African government is relevant.

- 4.2 Secondly, since the rise of global capitalism over the past 30 years, the sovereignty of the government in the developing world (or the Poor South), have been constrained by global competition and by the manner in which multinational corporations conducted their business in the developing world. Countries in the developing world are highly *dependent* on the influx of foreign investment and foreign entrepreneurship from countries in the developed world. Consequently, the governments of developing countries are often pressurised by multinational corporations to agree to conditions that are often not in the socio-economic interest of their populations at large. The balance of power between the multi-national corporations and the governments of developing countries are often of such a nature that the sovereignty of this government is seriously constrained and even violated by the actions of the multi-national corporation. Against this background it is rather important that a legal opportunity should exist in which the often too powerful foreign firms - operating in relative "powerless" developing countries - can be taken to court. The litigation before your highness is, therefore, not a violation of the sovereignty of the South African government, but an opportunity for foreign firms to account themselves about the legality and the fairness of their operations in developing countries - in this case in South Africa during the apartheid period. Looking at the court case from this perspective, it furnished an opportunity in which the accountability and the transparency of foreign firms operating in a developing country can be scrutinized. It offers also an opportunity to improve accountability and transparency in the system of global capitalism - something that is regarded as highly necessary by students of global capitalism. It is, therefore, quite possible that the court case will not violate the sovereignty of South Africa (or any other developing country) but that it will *indirectly* enhanced the sovereignty of developing countries vis-à-vis the strong multi-national corporations operating in these countries.

## 5. Matters concerning the Truth and Reconciliation Commission (TRC) and the phenomenon of systemic exploitation

- 5.1 In paragraph 3.2.1 of his letter, Dr Maduna refers to the work done by the *Truth and Reconciliation Commission* (the "TRC"). His representation of the TRC is rather superficial and deceptive. The task of the TRC was not to concentrate exclusively on the violation of "gross violation of human rights" by *individual* perpetrators but also on "violations which were of a *systemic* pattern of abuse". (TRC 1998; Vol I, ch. 4, paragraph 31). Unfortunately, the TRC has to a large degree neglected violations of a "systemic pattern of abuse" in its first report that was published in 1998. (Please see the Appendix on "The inability or unwillingness of the Truth and Reconciliation Commission to uncover the truth about systemic exploitation").
- 5.2 Because the TRC neglected "violations which were part of a *systemic* pattern of abuse" in its First Report in 1998, it did not portray business - both local and foreign business - as having a moral and/or legal obligation for past practices. In its Final Report published in March 2003, the TRC includes the following paragraph on Anglo America Corporation:

"A reparation claim against corporations like Anglo American would be based on the extent to which decades of profits were based on systemic violations of human rights. In legal terms, this could be based on the principle of "unjust enrichment". "Unjust enrichment" is a source of legal obligation. Actions based on "unjust enrichment" are common to most modern legal systems. These kinds of claims give rise to an obligation in terms of which the enriched party incurs a duty to restore the extent of his/her enrichment to the impoverished party. Put differently, the impoverished party acquires a legal right to claim that the extent of the other's enrichment be restored to him/her if it was acquired at his/her expense. (Vol Six, section TWO, chapter Five, paragraph 60).

- 5.3 In the SIX and final volume of the TRC Report - published in March 2003 - the Commission recommends that financial reparations be paid to some 22 000 victims that testify before the TRC and claimed that they were *individual* victims of gross violations of human rights committed by individual perpetrators. The government accepted this recommendations and R30 000 would be paid to each of them. The government is, however, not prepared to install a wealth tax or any other form of taxation to create a Restitution Fund to compensate the million of blacks that were the victims of gross human rights violations which were part of a *systemic* pattern of abuse. It is rather puzzling that the victims of gross violation of human rights by individual perpetrators will be compensated but the victims of gross human rights of a systemic nature will not be compensated. During the debate in Parliament on 15 April 2003 - when the Report of the TRC was discussed, - Mr Kadar Asmal, the Minister of Education, said: (The first part of the first sentence is strictly not in accordance with the TRC act):

"The TRC was mandated to deal with individual reparation for victims of gross violations, but we must also remember that the real and offensive gross violations affected over 35 million people through the policy of apartheid. *Their suffering must also be addressed.* It would be extremely insensitive and absurd to suggest that the victims of apartheid can be limited to only 22 000 people". (My emphasis).

Unfortunately, the government has until now not announced any specific programmes to address the suffering of the over 35 million victims of apartheid.

- 5.4 An important reason for the TRC's original neglect of the violations of human rights which were part of a systemic pattern of abuse, was that it interpreted its mandate too narrowly. Another reason is that the TRC was instructed to investigate only the period from 1960 to 1994. By focusing on only 34 years of South Africa's modern history of 350 years, the TRC was not in a position to make a proper investigation of the *systemic exploitation* that took place for almost 350 years. It is important to realise that the exploitation of the black population in a systemic manner was not only intensified but also thoroughly institutionalised after the discovery of gold in 1886. During the period from 1886 until 1994 a very close symbiotic relationship was forged between the corporate sector (originally mainly the gold mining corporations) and the successive white-controlled governments in South Africa. White politicians and white (or Western-orientated) business people were for a period of a century in a very close partnership relation to protect their *mutual* interests in the maintenance of the *structures* of white *power, privileges* and *wealth* on the one hand and the structures of black *deprivation,*

*discrimination* and *exploitation* on the other hand. It is, however, important to make a clear distinction between *discriminatory* legislation and black labour *repressive* legislation. The first were enacted to protect whites against black competition in the labour market. The repressive measures were enacted to turn the black into an impoverished proletariat with no choice but to seek contract jobs at low wages in the white economy. While discriminatory measures were cost-increasing for white business, the labour repressive measures were cost decreasing. The cost-decreasing effect of the repressive measures was much greater than the cost-increasing effect of discriminatory measures. It was only more or less 10% of the labour force that was white and was protected by discriminatory legislation, while more or less 90% of the labour force was black and submitted into a cheap and docile labour force by repressive legislation. Almost all the repressive measures were enacted by the white-controlled parliament on request and on behalf of the white business community - both local and foreign. It is rather important that the *systemic exploitation* of blacks should be uncovered and put in its proper historic context.

5.5 If more information is required about the true nature of *systemic exploitation* during the periods of colonialism (1652 - 1910) segregation (1910 - 1948) and apartheid (1948 - 1994), I will gladly be prepared to supply your highness with such information. There can, however, not be any doubt that the power constellation and the legal systems in place (from 1652 until 1994) were of such a nature that the whites were *undeservedly* enriched, while the different black population groups were *undeservedly* impoverished. Both local and foreign corporations played a strategic role in the intensification of systemic exploitation during the 20th century, when the worst forms of systemic exploitation took place.

## 6. Matters concerning the socio-economic transformation and the distribution on income in South Africa

6.1 According to Dr. Maduna the ANC government's record - as far as "transformative and redistributive" policies are concerned "to enable *all* South Africans to overcome the legacy of apartheid, through the creation of a more just and equalitarian society,...is *impressive*". (See his letter, paragraph 5.1 my emphasis).

6.2 This claim by Dr Maduna is simply not true. A remarkable *political* transformation took place in 1994, but a concurrent *socio-economic* transformation has not yet taken place. The black population group in South Africa is presently a highly stratified society. The top 25% of the black population of 40 million have become - over the past 30 years - a typical middle class society, while the poorest 50% (or 20 million people) is a typical lower class or lumpenproletariat. This group lives in abject poverty and destitution. The richest 25% has indeed experienced a socio-economic transformation. The further spectacular rise of a new black elite since 1994, is a distinctive characteristic of the new South Africa. The legislation measures to which Dr. Maduna refers in paragraph 5.5 of his letter were almost exclusively to the advantage of the richest 25%.

6.3 In paragraph 8.4 Dr Maduna claims that the real disposable income of households (at constant 1995 prices) rose from R8640 in 1994 to R9271 in 2002, reflecting an increase of 7.3% (i.e. 1,04% annually). Although this is correct, it is mainly the richest third of the population (5 million whites and 10 million blacks), that became richer. In a publication of Census South Africa - published in 2002 - it is stated categorically that the poorest 50% of the population were "even poorer in 2002 than in 1995".

- 6.4 Section 27 of the Constitution of the Republic of South Africa, Act, No. 108 of 1996 provides: "Everyone has the right to have access to:
- a) health care services, including reproductive health care;
  - b) sufficient food and water; and
  - c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

The State must take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of each of these right..."

- 6.5 *The South African Human Rights Commission* is pursuant to its mandate to monitor the progress made in supplying economic and social rights to all South Africans. Its 4th *Annual Economic and Social Rights Report : 2000 - 2002* was published in April 2003. In this Report the Commission passed a damning verdict on the slow progress made by the government in extending economic and social rights to the poorest and most vulnerable 15 to 20 million South Africans. According to the Report 23,8 million persons had no source of income, 3,7 million households (out of a total 9 million households) had an income below poverty line, 16,8 million persons has an income below poverty line, only 1,6 million children out of 3,3 million eligible children received the Child Support Grant. The Commission is especially critically about the progress made to extent the right to access to health care, the right to access to sufficient food, to social security and about the progress made in land reform. In 1994 the government promised that 30% of agricultural land will be distributed to blacks in 1999. Up till now less than 3% has been redistributed. The Commission blame the slow progress made in extending social and economic rights to those that needs it most, to mainly two factors. Firstly, to the inadequate budget allocations made to all the relevant state departments and, secondly, to the delivering problems experienced by all departments due to a lack of bureaucratic capacity in the public sector. The Report of the Human Rights Commission is a clear and undisputable indication of the extent to which the government is neglecting the poorest 50% of the population.

7. **Matters concerning the partnership between the government on the one hand and foreign and local corporation on the other hand**

- 7.1 In paragraph 8.1 of his letter Dr Maduna states that the "government's policies" is to promote reconciliation with and business investment by all firms, South Africa and foreign, and we regard these lawsuits as inconsistent with that goal. Government's policies of reconstruction and development have largely depended on forging constructive business partnership.....[the government regards its] market-friendly [growth] strategy as the engine to economic growth".
- 7.2 I acknowledge that a sound working relationship should exist in all countries between the government of the day and the business community - too close. Unfortunately, we have since 1994 a situation in South Africa in which a very close symbiotic relationship has been forged between the still white controlled business sector and the black-controlled government. In this symbiotic relationship the business sector is the senior partner that prescribed to its junior partner what the government's economic and social policies ought to be. This symbiotic relationship is reminiscent of the too close symbiotic relationship that existed before 1994 between the white business sector and the successive white governments. As was the case before 1994, the business sector again succeeds to

prescribe social and economic policies to the government that are very much in business's short term and sectional interest, but are not in the interest of the poorest half of the population.

- 7.3 A good example of the wrong policy that was prescribed to government is the *Growth, Employment and Redistribution* ("GEAR") strategy that was announced in 1996. Dr Maduna states in paragraph 8.1 that this strategy "further acknowledged the importance of the private sector that faster economic growth offers the *only* way out of poverty, inequality, and unemployment, that such growth is driven by both foreign and local private sector investment." (My emphasis of the word *only*). But given the far too capital-intensive character of the South African economy, the economic growth experienced in South Africa since 1994 was "jobless growth". The average GDP growth rate was 2,7% annually over the last 9 years. At least 1 million of 8,6 million job opportunities that existed in the modern sector in 1994, were destroyed. More than a million young people that entered the labour market since 1994, could not attain permanent jobs. Consequently, unemployed increased from ±4,8 million in 1994 to ±6,8 million presently - or to more than 40% of the potential labour force. If it is really the governments conviction - as alleges by Dr Madunsa - that faster economic growth *in the private sector* offers the *only* way out of poverty, inequality, and unemployment, then the poor will have to wait another fifty - or a hundred years - before they will be relieved of their poverty. Presently no trickle-down effect to the poor is taking place from economic growth in the private sector.
- 7.4 In the early 1990s a debate took place in South Africa about whether preference should be given to a policy approach of "Growth through Redistribution" or to an approach of "Redistribution through Growth". The business sector was strongly in favour of the latter and convinced the ANC about its alleged merits. Since 1994 the government is concentrating - as Dr Maduna alleges - almost exclusively on an economic growth strategy as the panacea for the problems of inequality, poverty and unemployment. The downside of this "growthmanship" approach is that far too little is spent on redistribution programmes. The economic policy approach of the government - accepted on request of the business sector - is incongruent if the systemic exploitation during the apartheid period and the sharp inequalities in the distribution of income are taken into account. The richest 15 million South Africans (5 million white and 10 million black) receive almost 90% of total income, while the poorest 45% receive less than 4%. The only explanation that can be given for the government's incongruent approach is that the government maintains its "growthmanship" approach to please business - i.e. the senior partner in the new power constellation that was institutionalised in 1994.
- 7.5 An important reason for Dr. Maduna's and the government's strong opposition against the court case in New York is that the government acts as a protagonist for the corporate sector - for both the local and the foreign corporate sector. Dr. Maduna actually let out this secret by emphasising the closeness of the partnership between government and business.
8. **Matters concerning the Business Trust of R1 billion (approximately US \$133 million)**
- 8.1 Dr Maduna claims in paragraph 9 of his letter "that corporate South Africa is already making a meaningful contribution to the broad national goal of rehabilitating the lives of those affected by apartheid". This claim is simply not true. The poorest 50% is today considerably poorer than in 1994. This group is exposed to several poverty traps through

which its poverty is not only intensified but also perpetuated. Neither the government nor the corporate South Africa is doing enough to improve the living conditions of this group.

- 8.2 Dr Maduna also stated that “over and above its existing corporate social investment programmes, business has been in partnership with the government in the R1 billion (approximately US \$133 million) Business Trust”. I am not questioning the merit of the existing corporate social investment programmes. Unfortunately, these programmes are mainly restricted to the corporate sectors employees and their families and are not to the benefit of the poorest 20 million South Africans.
- 8.3 It is rather pettines on the side of of Dr Maduna to boast about the Business Trust of R1 billion. If it is distributed between the poorest 20 million everyone will get only R50! (or \$13,3)! By boasting about this fund, Dr Maduna demonstrates the disrespect the government and business are displaying towards the millions that live in poverty, destitution and squalor.
- 8.4 In contrast with other countries in Africa, South Africa is a relative rich country. The white and the black elite - approximately 3 to 4 million people - maintains California living standards. The tax capacity of the top 1/3 of the population is large enough to enable the government to spent considerable larger amounts on poverty alleviation programmes. To improve the living conditions of the poorest 20 million - to a level that can be described as humane in, say 5 years - the government will have to spent at least an extra R15 billion (or US \$2) *annually* on poverty programmes.

## APPENDIX A

An extract from my book, (Sampie Terreblanche, *A History of Inequality in South Africa, 1652 - 2002*", pp. 124-132), [All the references in this extract to the "final report" of the Truth and Reconciliation Commission must be read "the 1998 Report". When this part of my book was written I was unaware that a final Volume (Vol. SIX) was to be published in March 2003.

### **The inability or unwillingness of the Truth and Reconciliation Commission to uncover the truth about systemic exploitation**

The TRC has done an excellent job of discrediting the apartheid regime, and the atrocities committed under its aegis. In doing so it has identified many of the individual perpetrators of gross human rights violation, and also many of the individual victims of these violations. But, as Mahmood Mamdani points out, ‘In the South African context, perpetrators are a small group, as are those victimised by perpetrators. In contrast, beneficiaries [of the *system* of apartheid] are a large group, and victims defined in relation to beneficiaries are the vast majority in society’ (1996).

Unfortunately, the TRC ignored the gross human rights violations perpetrated collectively and systemically against millions of black people over many decades under white political domination and racial capitalism. Its inability and/or unwillingness to systemically analyse South Africa’s history of unequal power structures are puzzling. By only trying to uncover the ‘truth’ about one form of victimisation under apartheid and ignoring another (and perhaps even more

important) form of victimisation, the TRC has failed dismally in its quest for truth and reconciliation.<sup>1</sup>

In attempting to solve this puzzle, it is again necessary to distinguish between the formal negotiations on political issues and the informal negotiations on economic issues. As indicated in section 4.2, the ‘balance of forces’ in the formal negotiations favoured the democratic movement, while those in the informal negotiations favoured the corporate sector. The political establishment of the apartheid regime was spectacularly defeated at the formal negotiations, and that prepared the way for the election of 1994 and the political transition from apartheid to representative democracy. In sharp contrast, the white corporate sector – which formed an integral part of the system of racial capitalism for longer than a century – was not at all defeated in the informal negotiations. It succeeded – given its wealth, its enormous power, and its capacity for propaganda and myth-making – in convincing ANC leaders that it was innocent of apartheid misdeeds. Consequently, two parties agree – if not explicitly, then at least - tacitly that the benefits that had accumulated (mostly undeservedly) in the hands of the corporate sector and other whites through systemic exploitation would either be forgotten or condoned. The TRC ratified this agreement, although it was not in the interests of truth-seeking and reconciliation to do so.

It is necessary to take the differences in the power play during the two sets of negotiations a step further. After a political transition had been negotiated, the new government deemed it necessary to consolidate its precarious political power by using the TRC to delegitimise the apartheid regime and its security forces. This was done rather dramatically when the TRC identified the individual perpetrators of gross human rights violations, and the individual victims of such violations. But because of to the new symbiotic relationship between ANC leaders and the corporate sector, it was expedient for the new government not to pressurise the TRC into uncovering the truth about systemic exploitation, or to delegitimise the corporate sector for its part in the design and utilisation of repressive labour systems.<sup>2</sup>

The TRC’s approach should be judged against the background of the compromises reached at the formal and informal negotiations. Ebrahim Moosa has concluded that ‘the truth [of the TRC] was what the party (parties) said it was. The truth was not measured, but manufactured. To be charitable [to the TRC], we can say that truth was negotiated [in the informal negotiations]’ (Moosa, in Villa-Vicencio and Verwoerd 2000: 116). Franco Barchiesi observes that the TRC had to operate within certain imperatives for the new South African state: ‘[T]he TRC itself is constituted by the institutional, social-economic, political and ideological imperatives of the new South Africa state ... [These] imperatives have had a decisive influence in the TRC’s reconstruction of the past and the recommendations for a future with regard to social citizenship

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<sup>1</sup> According to Marais, the TRC process ‘did not penetrate the systemic nature of oppression and the corresponding benefits that the minority enjoyed ... The TRC function in a broader socio-economic – and ideological – context that demonstrably reinforce existing inequalities, cleavages and antagonisms .. Individual remembrance was demanded, while collective amnesia [of mainly the whites] was condoned in the name of reconciliation. The evasion of moral (and legal) culpability was sanctioned, most obviously in the case of corporate South Africa whose complicity in a devastating social landscape still is rarely, if ever, noted publicly. On the contrary, corporate interest stand conflated with the “common” and “national” interest’ (2001: 302).

<sup>2</sup> The skewed approach of the TRC, under which the NP was delegitimised for its apartheid policies but the corporate sector’s participation in creating and utilising repressive labour patterns was condoned, has had a strange – and perhaps unintended – effect on the NP and the DP. While the NP’s electoral support declined from 22 per cent in 1994 to only 7 per cent in 1999, the DP – as successor to the PFP, and closely associated with the business sector – increased its support from less than 2 per cent in 1994 to more than 10 per cent in 1999. The TRC’s double standards were a serious blow for the NP, and a bonanza for the DP. While the NP deserved its destiny, the DP and the corporate sector did not deserve to be exonerated.



as an unresolved issue for the present form of state' (Barchiesi 1996: 16). The idea that 'truth' is often 'manufactured' by the elite in power is also reflected in Fernando-Armesto's general statement about truth: 'We need a history of truth. We need it to test the claim that truth is just a name for opinions which suit the demands of society or the convenience of elites'.<sup>3</sup> Mahmood Mamdani says this about the kind of truth produced by the TRC:

The truth of the TRC makes most sense when understood as institutionally produced truth, as the outcome of a process of truth-seeking, one whose boundaries were so narrowly defined by power [and especially corporate power] and whose search was so committed to reinforce the new power [of the ANC government], that it turned the political boundaries of a compromise into analytical boundaries of truth-seeking. By compromising a political compromise with a compromised truth ... the TRC has turned a political [compromise] into a moral compromise, and obscured the larger truth. While the political compromise is justifiable, the moral and intellectual compromise is not (in Amadiume et al, 2000: 177--8)

Interestingly, in its final report the TRC itself asks a question about the kind of truth for which it was searching: 'But what about the truth - and whose truth?' In reply, it states that the commission 'was [*inter alia*] required to report on the broader patterns underlying gross violations of human rights and to explore the causes of such violations. To do this ... it became necessary for the Commission to adopt a social scientist's approach - making use of the information contained in its database and from a range of secondary sources.' It then quotes the words of Michael Ignatieff: 'All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse' (Ignatieff 1996, quoted in *TRC* 1998, vol 1 ch 5, paragraphs 29 and 33).

The TRC was established by the Promotion of National Unity and Reconciliation Act (no 34 of 1995). Its mandate was formulated as follows:

'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 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 1 March 1960 to 10 May 1994.'

The definition of 'gross violation of human rights' was left vague. It was, however, stated that

'the Commission shall facilitate ... *inquiries into (i) gross violations of human rights, including violations which were part of a systematic pattern of abuse ... (ii) [and shall also facilitate inquiries into] the identity of all persons, authorities, institutions and organisations involved in such violations [of human rights]* (TRC 1998, vol 1, ch 4, para 31).

Despite its rather broad mandate, and its explicit intention to report on the 'broad patterns underlying gross violations of human rights', the TRC decided to interpret its mandate far more

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<sup>3</sup> He continues: 'We need to be able to tell whether truth is changeful or eternal, embedded in time or outside, universal or varying from place to place. We need to know how we have got to where we are in the history of truth - how our society has come to lose faith in the reality of it and lose interest in the search of it' (Fernandez-Armesto 1997: 2).

narrowly. It has stated quite categorically that its governing act limited its investigation to gross violations of human rights defined as the ‘killing, abduction, torture or severe ill-treatment’ and the ‘attempt, conspiracy, incitement, instigation, command or procurement to commit such acts’ (TRC 1998, vol 1, chapter 2, paragraph 19). Consequently, the commission concentrated almost exclusively on violations of the human rights of individual victims by individual perpetrators. By doing so, the TRC, for all practical purposes, chose to ignore violations of human rights ‘which were part of a systematic pattern of abuse’. By concentrating on individual perpetrators and victims, it also chose not to ‘identify all ... authorities, institutions, and organisations involved in violations [of human rights]’. In addition, the TRC also chose to interpret ‘human rights’ as mainly ‘first-generation’ or legal ‘human rights’, while the violation of ‘second-generation’ human rights or ‘social rights’ were practically ignored. Consequently, it concentrated on ‘perpetrators and victims’ while neglecting the causal relationship between the beneficiaries and victims of racial capitalism and white political domination. In doing so, the TRC – according to Mamdani – made ‘perhaps the greatest moral compromise ... [in embracing] the legal fetishism of apartheid ... [by making] little distinction between what is legal and what is legitimate [and] between law and right’ (Mamdani, in Amadiume and Abdullahi 2000: 181). The TRC understood ‘beneficiaries’ to mean those who had gained from *corrupting* the laws and from acting illegally, but not those who had designed and implemented the immoral, corrupt, and skewed system of apartheid.

The commission acknowledged that, ‘there had been an expectation that the Commission would investigate many of the human rights violations which had been caused by the denial of freedom of movement through the pass laws, by forced removals of people from their land, by the denial of the franchise to citizens, by the treatment of farm workers and other labour disputes, and by discrimination in such areas as education and work opportunities. Many organisations lobbied the Commission to insist that these issues should form part of its investigations. Commission members, too, felt that these were important areas that could not be ignored. *Nevertheless, they could not be interpreted as falling directly within the Commission’s mandate*’ (TRC 1998: vol 5, chapter 1, paragraph 48; author’s italics).

This decision was probably not in accordance with its mandate, and should be deplored. It could only have resulted from pressure exerted on it by the corporate sector (and perhaps also by the new government), which realised that a broader investigation would include a systemic analysis of racial capitalism. Such an investigation would have embarrassed – and even angered – the business sector. In the end, the TRC devoted only three days of its life span of two and a half years to public hearings on the role of business in the apartheid era. Not surprisingly, the hearings were conducted in a way that obscured the systemic character of apartheid, and offered business people an undeserved opportunity to clear themselves and their corporations of any guilt in respect of or responsibility for the legacy of apartheid.<sup>4</sup>

According to Mamdani, the TRC ‘enthusiastically embraced [the analogy] of dictatorships in Latin America’ when it decided to narrow its investigation to perpetrators and victims of (legally defined) gross human rights violation. In the process, the TRC agreed ‘that apartheid was no

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<sup>4</sup> In mitigation of the recalcitrant attitude displayed by business at the hearings, we should acknowledge that many members of today’s managerial elite were not in their present positions before 1970, when racial capitalism and apartheid were most exploitative. To expect today’s managerial elite to be aware of the actions of their parents and grandparents would require a historical perspective from them, which is perhaps too much to ask. Business people are inclined to look towards rather than backwards. But what is deplorable is the inability of the TRC to put the evidence of business into a proper historical context. Two of the most blatant examples of corporate myth-making were the submissions and testimonies of the Chamber of Mines and the AAC. We have already discussed their twisted version of the truth in section 3.2.

more than a harsh and cruel dictatorship, a gross denial of human rights'. But, in contrast to the Latin American situation, apartheid was also about racial capitalism and the systemic exploitation of blacks. Mamdani vividly identifies what was missing in Latin America and also in the TRC's approach as follows:

The Latin American analogy obscured what was distinctive about apartheid. For the violence of apartheid was aimed less at individuals than at entire communities and entire population groups. And this violence was not just political. It was not just about defending power by denying people rights. The point of torture, terror, death, was even more far-reaching: its aim was to dispossess people of means of livelihood. The point is that the Latin American analogy obscured the colonial nature of the South Africa context: the link between conquest and dispossession, between racialised power and racialised privileges (in Amadiume and Abdullahi 2000: 179).

At the beginning of its chapter on the business hearings (vol 4 ch 2), the TRC noted that, from a range of perceptions of the relationship between business and apartheid, two dominant positions emerged: a 'pro-business' or 'business-as-victim' school, and a 'systemic exploitation' or 'business-as-beneficiaries-and-blacks-as-victims' school.<sup>5</sup> It conceded that the opposing arguments were relevant to the task facing it because they implied 'different notions of accountability' (paragraph 8).

The report provides a reasonably good summary of the arguments of the two schools; however, its findings arising from the hearings are highly ambiguous. In paragraphs 161 to 167 (vol 4 ch 2) it states that '(b)usiness was central to the economy that sustained the South African state during the apartheid years', thus creating the impression that business was neutral towards apartheid and sustained the (apartheid) government only indirectly through its 'normal' business activities. What the TRC did not appreciate is that the slogan applicable to sport during the apartheid years – 'There can be no normal sport in an abnormal society' -- also, and to a far greater extent, applied to business. Indeed, 'normal' business was not possible while apartheid (and racial capitalism) was in place. The simple fact that the political and economic freedom, bargaining power, property rights, and entrepreneurial opportunities of blacks were seriously restricted under segregation and apartheid, and that blacks were therefore reduced to exploitable units of labour, shows the veracity of this. The TRC thus ignored this obvious relationship between blacks and whites during apartheid in a manner unbecoming of an official commission.

There can be no doubt that the apartheid system (or, more correctly, the system of racial capitalism) was deliberately constructed and maintained on behalf of white business and through close and continuous collaboration between almost all white corporations and business

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<sup>5</sup> It then described the two dominant positions as follows: 'One view, which sees apartheid as part of a system of racial capitalism, held that apartheid was beneficial for (white) business because it was an integral part of a system premised on the exploitation of black workers and the destruction of black entrepreneurial activity. According to this argument, business as a whole benefited from the *system*, although some sections of the business community (most notably Afrikaner capital, the mining houses and the armaments industry) benefited more than others did' (para 6). 'The other position, argued mainly by business, claims that apartheid raised the costs of doing business, eroded South Africa's skills base and undermined long-term productivity and growth. In this view, the impact of apartheid was to harm the economy ... If apartheid placed obstacles in the path of profitability (as alleged by pro-business position), then business as a whole is cast more as a victim of the system than as a partner or collaborator' (paras 7 and 8). The first view was supported and articulated in the submissions of the ANC, SACP, COSATU, the Black Management Forum, and the author of this book. The second view was supported in the submissions of the different business organizations, large corporations, Mike Rosholt of Barlow Rand, and Anton and Johann Rupert of Rupert International.

organisations on the one hand and the white political and bureaucratic establishments on the other. Racial capitalism was built and maintained for 150 years on successive phases of black labour repression. Consequently, the main issue during continuing consultation between white politicians and white business (in all sectors of the economy) during this period was how to design and to redesign a multitude of repressive measures with the sole purpose of giving white business easy access to, and control over, cheap and docile black labour. The commission failed dismally to devote any attention to the long history and exploitative nature of the black labour system. What is astonishing about the TRC's superficial reconstruction of South Africa's economic and labour history is that it did not even distinguish between labour repressive measures (with cost-decreasing effects) and labour discrimination measures (with cash-increasing effects), and simply accepted the arguments of business that apartheid was a cost-increasing system.

The finding of the commission (in vol 4, ch 2, para 166) that 'business failed in the hearings to take responsibility for its involvement in state security initiatives specifically designed to sustain apartheid rule [or white supremacy]' touched on a very important issue. It is a great pity that the commission did not explore this far more thoroughly. Many of the most respected corporations – led by a highly esteemed managerial elite – worked hand in glove with ARMSCOR during the 1980s when it was one of few going parastatal concerns. These corporations were, directly and indirectly, involved in the darkest hour of apartheid, and in the atrocities committed to perpetuate the apartheid regime.

While the TRC did not explicitly reject the 'pro-business' position, it also did not accept the 'systemic exploitation' position. In fact, it was very careful not to use the rhetoric of the 'systemic exploitation' school. When the recommendations are closely read it becomes clear that TRC went out of its way to ensure that it did not present business (or whites) as *beneficiaries* of the economic system of apartheid and blacks as *victims* of the same system. Consequently, it also did not portray business (or whites) as having a moral obligation to atone for past practices.

In its recommendations, the TRC appeals to business to voluntarily compensate black people for being disadvantaged under apartheid, stating that 'business could and should play an enormously creative role in the development of new reconstruction and development programmes' (vol 4, ch 2, para 159). This request has a positive ring; it sounds as if the TRC is giving advice to a valued friend. However, the exploitation of blacks did not happen voluntarily; it was based on economic and political systems embedded in a network of compulsory legislation, and justified by racist ideologies propagated as self-evident truths. To expect business to compensate black people voluntarily – and adequately – for the systemic injustices committed over 150 years was naïve.<sup>6</sup>

Elsewhere, the commission affirmed the judgement of the international human rights community that 'apartheid was a crime against humanity' (vol 1, ch 4, para 1; see also see also vol 1, ch 1, para 62). However, it does not explain why it shares the 'international community's basic moral and legal position on apartheid' (para 2), and does not spell out what aspect of apartheid was a 'crime against humanity'. Was it that part (ie racial capitalism and white supremacy) that enriched whites and impoverished blacks during the three quarters of the 20<sup>th</sup> century, or was it the security system institutionalised and applied from the 1960s onwards to counteract black

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<sup>6</sup> The opportunity given to businesses to pay off their 'apartheid debt' through charity has already amounted to opportunities to let them off the hook rather cheaply. Building schools and hospitals is a government responsibility, and should be financed through the normal tax system and not by charity. When opportunities are given publicly to corporations for all kinds of charity (by Mandela, for example), they are often misused not only for myth-making and image-building, but also to claim all sorts of patronage from the government in return.

insurrection with deeds of atrocity? Or did the commission regard both parts of the apartheid system as a crime against humanity?

The international human rights community decided that apartheid was a crime against humanity before the notorious security system of the apartheid regime was institutionalised during the 1960s.<sup>7</sup> By concentrating on the ‘legalistic’ gross human rights violations by individual perpetrators, one gets the impression that the commission believed it was mainly (if not exclusively) the security system, and the atrocities committed by its agents, that was the really criminal part of apartheid.

During the business hearings most businesses representatives argued – in submissions and during evidence – that gross human rights violations would require active and deliberate participation by individual business persons, and illegal acts committed by them. Consequently, they claimed that they (and their corporations) could not be regarded as participants in gross human rights violations, despite the fact they (or their parents or grandparents) were involved in designing and utilising immoral and exploitative systems. Thus the commission’s individualistic and legalistic approach to human rights violations provided business people with a convenient means of distancing themselves from apartheid and from any individual or corporate responsibility towards its immoral and criminal nature, irrespective of the extent to which they had benefited from racial discrimination and separation, and irrespective of the extent to which apartheid had impoverished millions of blacks.

If the commission had explicitly applied the notion that apartheid was a crime against humanity to the business sector, business people could not have washed their hands in this manner. It would not have been possible to walk away from black poverty, or to embrace – as the commission did – the fallacious argument that what was legal could not have been immoral or criminal (see Mamdani, in Amadiume and Abdullahi 2000: 181). By not applying the notion of apartheid as a crime against humanity to racial capitalism, and business’s involvement in it, the TRC lost a golden opportunity to educate the individual and corporate beneficiaries of apartheid about their direct responsibilities for the disrupted social structures and abject poverty of the majority of blacks. If the beneficiaries had been educated about their participation in racial capitalism, they would certainly have been less arrogant and, possibly, been more compassionate and generous.

Another reason why the TRC failed to do justice to these issues may have been that the period of South African history that has to be investigated by it (according to its mandate) was too short to deal with South Africa’s history in a credible manner. By focusing on only 34 of South Africa’s modern history of 350 years, the commission not only interpreted it in a one-sided way, but also distorted and compromised the ‘truth’. By giving official status to its skewed interpretation, the commission not only detracted from the reconciliation process, but also placed obstacles in the way of restoring social justice, social citizenship, and social rights. In this way history-writing in South Africa was done a great disservice, and the commission also missed an opportunity to ‘re-educate’ South Africans – both white and black – about the true nature of the centuries-long relationship between the white master class and the unfree black working class.

Mamdani comes to the following illuminating conclusion on the TRC:

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<sup>7</sup> In 1955, some 29 African and Asian countries decided at the Bandoeng conference that ‘colonialism in all its manifestations [including apartheid] was an evil that should be brought to an end speedily’. In 1960 the United Nations general assembly unanimously accepted the Bandoeng declaration (with nine western countries abstaining). In 1965 the general assembly accepted a resolution that colonialism and apartheid not only threatened international peace and security, but were also crimes against humanity.

In its eagerness to reinforce the new order ... the TRC wrote the vast majority of apartheid's victims [i.e. the victims of systemic exploitation] out of its version of history. The unintended outcome has been to drive a wedge between the beneficiaries and the victims of apartheid. In doing so, the TRC has failed to open a social debate on possible futures in South Africa. To reflect on the experience of the TRC is to ponder a harsh truth, that it may be easier to live with yesterday's perpetrators who have lost power than to live with beneficiaries whose gains remain intact (in Amadiume and Abdullahi 2000: 183).

As noted earlier, Ignatieff contends that 'all that truth commissions can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse' (1996: 113). It will indeed be very sad if the TRC's unwillingness or inability to properly analyse South Africa's troubled economic history spreads the following lie in the public discourse: namely, that the systems of white political domination and racial capitalism did not undeservedly enrich whites and impoverish blacks, and that the rich are therefore released from any moral, political, and/or systemic obligation to restore social justice towards blacks.