

# IUS GENTIUM



## Truth Commissions

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## ARTICLE

# TRUTH, JUSTICE AND AMNESTY IN SOUTH AFRICA: SINS FROM THE PAST AND LESSONS FOR THE FUTURE

*The Honorable S. Sandile Ngcobo*

*(Affiliation)*

Recent years have seen the collapse of repressive regimes and the emergence of democracies in Southern Africa, Eastern Europe and South America. These new democracies and the international community immediately faced the question of how to deal with the human rights violations committed by their predecessor regimes. There are three possibilities: first, to ignore the violations, forget about the past and enter into a period of amnesia; second, to prosecute the perpetrators; and third, to establish a truth commission, which is really a compromise between prosecution and doing nothing at all.<sup>1</sup>

Prosecution is the most obvious solution, most recently implemented by the United Nations to address the horrors of Rwanda<sup>2</sup> and Bosnia<sup>3</sup>, following the examples of the Nuremberg and Tokyo trials. The Rome Statute now offers the prospect of a per-

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manent International Criminal Court of Justice to deal with these violations. However, other nations - including Argentina, Chile, Guatemala, Honduras, El Salvador, and South Africa - have demonstrated that prosecution is not the only way to confront human rights violations. These nations have created Truth Commissions that supplement (or supplant) ordinary criminal prosecution.

Truth Commissions do not prosecute but seek rather to compile a complete record of what happened in the past, who was responsible, and with what motivation. This record is intended to provide a guide for the government in developing measures to prevent the future violations of human rights. Some countries have made their Truth Commissions the exclusive forum for addressing past human right violations. In South Africa, the Truth Commission was given the power to grant amnesty to those who come forward to provide a full disclosure of their misdeeds.

International law scholars disagree about the propriety of Truth Commissions. Under international law, states have a duty not only to protect the human rights of all individuals within their jurisdiction, but also to investigate past violations and to prevent future abuses. All accept the necessity of investigating past human rights violations, but some would say that they must also be punished.<sup>4</sup> Truth Commissions sometimes act as a substitute for prosecution.<sup>5</sup> This raises the question of when (if ever) this substitution would be just.<sup>6</sup>

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The South African experience furnishes two answers: first, that proper solutions depend on the circumstances; and second, that the relevant circumstances include not only legal, but also practical and political considerations. While prosecution may seem obviously more just, sometimes political realities and other practical considerations make prosecution inappropriate. These realities may justify establishing a Truth Commission as the exclusive forum for addressing past human rights violations, or call for a combination of a Truth Commission, amnesty and prosecution,

depending on the circumstances. The best solution to previous human rights violations will be revealed by a case-by-case examination of the circumstances, including political realities and other practical considerations in the country concerned. South Africa provides a useful illustration of this approach.

The South African example leads to three con-

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clusions: first, that although the ultimate goal of preventing violations of human rights may require the prosecution of past violations, prosecutions have certain limitations; second, that Truth Commissions are particularly useful in the context of transition from a repressive regime to an emerging democracy; and third, that prosecutions, whether national or international, may be combined with truth commissions, when the situation warrants it. In South Africa the coexistence of prosecutions and amnesty through the Truth and Reconciliation Commission process was essential to the transition from the apartheid regime to democratic governance.<sup>7</sup>

PROSECUTION IS GENERALLY THE  
APPROPRIATE RESPONSE

It seems to be self-evident that perpetrators of gross human rights violations must be punished. Prosecution of human rights violations offers numerous significant benefits: first, in breaking down the differences between those who had control over other persons' lives and those who were once at their mercy; second, in bolstering the legitimacy of the new government by showing justice to be done for all, without exception; and third, in diminishing the perception that certain individuals are above the law. This transformation in perception is necessary to establish public support for democratic institutions.

The message that no one is above the law is crucial where violations were perpetrated under the

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color of law. It removes the perception that those individuals who are charged with the duty to uphold the law are themselves free to break the law. By holding violators accountable for their violations, the new government sends the signal that the authority of the law is superior to that of the individual. This is essential to the restoration of the rule of law. The prosecution of perpetrators distinguishes the emerging democratic government from its predecessor. This helps new governments to establish their commitment to the rule of law, and to restore the people's faith in law where its authority has been undermined by the abuse of human rights.<sup>8</sup>

Prosecutions have other benefits, if the perpetrators and their accomplices are prepared to talk. This educates the public about what happened in the past. The present trial of Dr. Basson, the apartheid head of the South African chemical and biological weapons programme, has revealed gruesome and sometimes bizarre details of the apartheid government's attempts to eliminate or to neutralize its op-

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ponents. These include testing poisoned beer on unsuspecting black taxi drivers, poisoning chocolate and clothes, and releasing cholera to the water supply at a refuge camp. A bacteriologist testified that he had freeze-dried HIV-infected blood for use against enemies of apartheid.<sup>9</sup>

Prosecutions can also serve as deterrents to future violations. The record of what happened may help the development of protective measures. Prosecutions provide retributive justice: the offender is sent to jail and the victim can receive compensation for the wrong that was done. This may satisfy the victim's desire for vengeance. However, critics of prosecutions remind us that new democracies are fragile and that they are vulnerable to social animosities created by legal action. For example, prosecutions that begin as well-intentioned efforts to bring the most flagrant violations of human rights to justice may deteriorate into witch-hunts and create a pervasive atmosphere of recrimination, destroying the developing social fabric.

In addition, there may simply be too many violations to prosecute. In, South Africa alone, 21,000 victims of serious crimes committed in the name of apartheid came forward to report what happened. In these situations, the emerging democracy may find it impossible to prosecute all the violations and may have to decide to prosecute only the most serious violations. This may lead to charges of selective prosecution and the appearance of "victors' justice",<sup>6</sup>

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which undermine the new democracy, particularly when it has not prosecuted those within its own ranks who may have committed violations.

But prosecutions have other limitations too. Most violations occur in secrecy, with only the victim and the perpetrator present. The victims are often killed, leaving the perpetrators as the only source of information. Unless the perpetrators are prepared to talk, the evidence necessary for a conviction may not be forthcoming. And unless they obtain the guarantee that they will not be prosecuted, the perpetrators may not be willing to talk. In these circumstances it may be difficult to obtain evidence that is sufficient for conviction.

Even more importantly, many transitional governments do not represent a complete break with the past. In some cases, members of the police force and the security forces that were responsible for heinous acts under the old regime remain in influential positions. Their numbers and their continued control of

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deadly weapons provide them with the capability to undermine the peaceful transition. Their continued influence, may threaten the new democratic order, making prosecutions both undesirable and impractical. Given these realities, the emerging democracy may be compelled to look for alternative approaches. At this point, a Truth Commission may become an attractive option.

### TRUTH COMMISSIONS

Truth commissions have emerged as an alternative to the prosecution of human rights violations. They are really a compromise between prosecution and doing nothing. If prosecution is impossible, truth commissions may be the best alternative.<sup>10</sup>

Truth commissions typically serve three functions that are vital to the successful transition from civil strife to sustainable democracy: first, they have a cathartic effect on a population that has suffered from human rights abuses; second, they demonstrate the new government's break with the past; third, they demonstrate the new government's commitment to human rights. The motive behind truth commissions is not revenge, but simply to uncover the truth. They bring perpetrators of war into the light of history and an outraged world, when ordinary courts cannot.

### WHY THE TRUTH COMMISSION IN SOUTH AFRICA?

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For decades South African history was dominated by a deep conflict between a minority that reserved for itself all control over political and economic power and a majority that sought to resist this domination. Fundamental human rights were suppressed to silence individuals who tried to protest this state of affairs. As the conflict deepened, the assault on human rights escalated. The legitimacy of the law was deeply wounded when it became the instrument of oppression.

Political intolerance grew, even among those who fought to resist white minority rule, and this resulted in further violations of human rights. As the liberation movements became increasingly infiltrated by outsiders who wanted to spy on their activities, those who were suspected of being spies were dealt with brutally. The ethos of the liberation movements themselves became severely compromised.

The period from 1960 through the 1980s was

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marked by civil unrest and political violence. An outraged international community made known its disapproval of apartheid with the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. As the internal and international pressure grew, apartheid became costly both economically and politically. Civil and political violence was no longer confined to black neighborhoods - it also spread to white neighborhoods and to the cities. White neighborhoods were no longer as safe as they had been, and South African whites began to feel the economic impact of apartheid.

A combination of all these factors led to the dramatic February 1990 announcement by former President de Klerk, the last South African leader to preside over the apartheid regime. Taking the world by surprise, De Klerk declared that he was embarking upon a program of political reform that would see the release of all political prisoners, the unbanning of all political parties, and the commencement of negotiations that would pave the way to majority rule. This led to a negotiated peace settlement and in effect to a negotiated "revolution". This peace settlement was embodied in an Interim Constitution, that provided the framework for a second ("final") revised constitution for South Africa.

President De Klerk could not make this commitment wholly on his own. Transferring power to the black majority required the support not only of the ruling elite but also of the police and army gen-

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erals. If he had told his cabinet and the generals that they must not only surrender political power to the black majority, but also be subjected to Nuremberg-style trials and that many would end up in prison, he would not have received their support. There would have been no negotiated settlement if the leaders of apartheid thought that they would be put on trial. It is very probable that de Klerk promised his colleagues that they would not be prosecuted.

#### THE BIRTH OF THE TRUTH COMMISSION

The origins of the truth commission in South Africa may probably be traced to the meeting of the National Executive Committee of the African National Congress that was held in August 1993." This meeting had been called to discuss the recommendations of the Motsunyane Commission's report. The Motsunyane Commission was set up by the ANC to investigate allegations that captives held by the ANC in its camps in Angola, Zambia, Uganda and Tanzania had been subjected to human right abuses and

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that some had been killed. The Commission found that human rights abuses had indeed occurred in these camps, particularly in the form of gross mistreatment of captives at the hands of the camp guards. The Commission recommended that the ANC take some appropriate action, including the setting up of an independent commission to explore the allegations of disappearance and murder, and to bring those responsible to justice.

After intense debate, the ANC accepted the proposal that a Truth Commission had to be established to address the issues raised by the Motsunyane Commission report. This Truth Commission was to investigate all human rights violations regardless of who had committed them. What is significant here is that the idea of the Truth Commission did not emerge because someone said: "Wouldn't it be wonderful to have a Truth Commission in South Africa to deal with the transition in a way that has been done in other countries?" Rather, as Albie Sachs observed: "It came out of a very specific debate and an intensely felt need. It was rooted in our experience. It helped to solve one of the great dilemmas that sometimes face liberation movements: How does a liberation movement deal with violations of its own ethos, values and principles by its own members? So this was the first pillar, the essential ingredient of our truth commission."<sup>12</sup>

THE CALL FOR AMNESTY

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The concept of the Truth Commission became linked with the idea of granting amnesty to those who confessed in response to concerns of the apartheid-era police and security forces. Many felt that they might be subject to prosecution for human rights violations committed under the old regime. Their concern arose primarily from three factors: first, on the eve of the new democratic government, President De Klerk's Further Indemnity Act - an amnesty statute he forced through Parliament on November 9, 1992<sup>13</sup> - had been met with opposition, not only within the segregated parliament but also from outside government, and the leaders of the liberation movement and other civic organization. The Indemnity Act gave the President the authority to grant amnesty to those who advised, directed, commissioned, ordered, or performed any act with a political objective. It proscribed both criminal and civil proceedings. The applications would be made to the National Council on Indemnity, whose deliberations were to take place in secret. Second, the Interim Constitution said nothing about amnesty; and third, as South Africa began to emerge

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from apartheid, the public became interested in how to respond to past human rights abuses. Two important conferences were held in Cape Town to discuss the issue. At these conferences, victims of human rights abuses related their stories<sup>14</sup> and while it was clear that while there was support for a truth commission, most opposed any blanket amnesty.

It was against this background that the generals raised their concerns about their future in the new South Africa. The security forces were claiming that they had loyally defended the negotiation process, that they would loyally protect the first democratic elections, that they knew of a right-wing bombing campaign that threatened the whole process, and that they would do everything in their power to stop that campaign. They pointed out that they were risking their lives to save the elections and had cooperated with the liberation movements in protecting the negotiations, but that to ask them to submit to prosecution and jail afterwards would be asking too much.

The ANC and the other liberation movements were not in a position to defend the elections. They did not have informers to infiltrate the extremist right-wing groups. Yet to grant a blanket amnesty without accountability seemed unjust, because it would suppress the truth. This presented a dilemma. The security forces were still in control of deadly weapons and fully capable of undermining the peace process. They were needed to protect the first elections and to help to pave the difficult road ahead.

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Their cooperation was therefore crucial to the transition to democracy, and yet many were guilty of terrible crimes.

The solution was to reconcile amnesty with accountability. There must be full disclosure of what happened in the past. To uncover the truth, those who knew the truth had to come forward. To get their cooperation, there would need to be some incentive. Amnesty became the incentive for cooperating with the Truth Commission. People would get amnesty only if they were willing to come forward and fully disclose their past misdeeds. As a consequence, the draft constitution was amended to reflect this understanding and an epilogue was added to the Interim Constitution to incorporate the provision for the establishment of the Truth Commission with the power to grant amnesty.<sup>15</sup>

The acceptance of this link between amnesty and the Truth Commission reflected a deep appreciation of the difficulty and complexity of the task of

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building the new democratic order. Most South Africans understood that the new order could not be achieved without a firm and general commitment to reconciliation and to national unity. Rebuilding the nation required the inclusion of all elements of society, including those who might otherwise have been a threat to democracy. The unjust consequences of the past could not every be fully reversed, but they could be recognized, to prevent their repetition.

This was the principle that informed the transition from South Africa's divided past to a promised united and democratic future. It is eloquently captured in the epilogue to the Interim Constitution, added after the acceptance of the idea that amnesty had to be linked to the Truth Commission. The epilogue declared that:

This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

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The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not for victimization.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objec-

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tives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.<sup>16</sup>

This epilogue created the constitutional foundation for the Truth Commission in South Africa.

THE TRUTH AND RECONCILIATION  
COMMISSION

In 1995, the new democratic parliament of South Africa implemented this epilogue by passing the Promotion of National United and Reconciliation Act. This statute established the Truth and Reconciliation Commission and defined its objectives. Its main goal was to promote national unity and reconciliation “in a spirit of understanding which transcends the conflicts and division of the past” by “establishing as complete a picture as possible of the causes, nature and extent

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of gross violations of human rights.” Three committees were established for the purposes of achieving the objectives of the Truth Commission.

A. The Committee On Human Rights Violations

The first committee was the Committee on Human Rights Violations, which conducted public hearings pertaining to gross human rights violations and gave the victims of human rights abuses the opportunity to tell their stories. Its mandate was to inquire into systematic patterns of abuse; to identify their motives; to find out whether violations were the result of deliberate planning on the part of the State or the liberation movements; and to designate accountability, political or otherwise, for gross human rights violations.<sup>17</sup>

B. The Committee On Reparations And Rehabilitation

The second committee was the Committee

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on Reparations and Rehabilitation, whose primary task was to identify the victims of human rights abuse and their relatives, and to recommend suitable reparation for them to the President.

The granting of reparation to the victims was a way of acknowledging the harm that they had suffered. There was recognition that the compensation they would receive would not be full compensation. It was intended to be no more than symbolic acknowledgment of their pain. What was contemplated by reparation was something more than monetary compensation, as the responsibilities of this committee indicate. It had the responsibility to develop measures for reparation and rehabilitation of victims and measures to be taken to restore the human and civil dignity of the victims. It also had to recommend to the government the essential services that were needed for the rehabilitation of the victims.

C. The Committee On Amnesty

The third committee was the committee on amnesty. This committee had the power to grant amnesty to persons who made a full disclosure of their misdeeds, but these misdeeds must have been committed with a political motive as opposed to personal gain. The Committee sat in panels of either three or five but always chaired by a judge.

THE POWERS OF THE TRUTH COMMISSION

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The committees of the Truth Commission were given extensive powers to gather evidence, including the power to subpoena individuals who were believed to possess information crucial to the investigation. Refusal to comply with the subpoena was a criminal offense as was evidenced by the case of former South African President P.W. Botha, the predecessor to President De Klerk. Botha was put on trial because he refused to answer the call of the Truth Commission's subpoena and testify before the Commission.

The sittings of the committees were widely publicized to ensure maximum attendance by the perpetrators and the victims. The victims or their relatives were given the opportunity not only to oppose amnesty but also to put questions to the perpetrators.<sup>18</sup> There were many cases in which the victims or their relatives opposed the granting of amnesty. Their rate of success varied widely. And there were cases where the victims did not oppose amnesty.<sup>19</sup>

THE CONSTITUTIONAL CHALLENGE TO

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AMNESTY

The legislative decision to grant amnesty to perpetrators was not without controversy. It came as no surprise when two families challenged the constitutional validity of the statutory provision for amnesty. The Constitutional Court however upheld the constitutionality of the amnesty provisions of the statute. It did so primarily because this had been provided for in the epilogue of the interim constitution.

The concerns of the victims who challenged the amnesty provisions were understandable. It is an affront to one's sense of justice to see perpetrators of heinous crimes walking the streets with impunity. There is an understandable discomfort that decent human beings feel when perpetrators are protected in their freedom by an amnesty immune from a constitutional attack. But the circumstances that lead to this course must be fully appreciated. As the Constitutional Court explained:

The Act seeks to address this massive problem by encouraging these survivors and the dependents of the tortured and the wounded, the maimed and the dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and, crucially, to help them to discover what did in truth happen to their

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loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentives that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatized become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain re-

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lief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the 'reconciliation and reconstruction' which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.<sup>20</sup>

Amnesty was not the only option available to South Africans, but in the circumstances, it was the best. Maintaining the right to prosecute while disregarding the difficulty of gathering the evidence needed to sustain a successful prosecution would have kept the victims and their dependents substantially ignorant about what precisely happened to their loved ones. This would have perpetuated their legitimate sense of resentment and grief without in fact punishing the perpetrators, because of lack of evidence. The peace process would not have been able to continue.

The Interim Constitution provided a historic bridge - both the victims and the perpetrators had to walk on this historic bridge to the new society promised at the end of the bridge - a society founded on the recognition of human rights, democracy and

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peaceful coexistence and development of opportunities for all South Africans without regard to race, colour, class, belief or sex. Without amnesty, the historic bridge itself might not have been erected. The concerns raised by the security forces bear testimony to this reality.

For a successful negotiated transition, the terms of the transition required not only the agreement of the victims but also the agreement of those who are threatened by the transition to a democratic society. If the threat of prosecution, retaliation and revenge had been kept alive, the agreement of those threatened by change might not have been forthcoming. And if it had, the bridge itself would have remained insecure, endangered by fear and anger. It was in these circumstances that those who negotiated the transition to democracy deliberately chose understanding over vengeance, reparation over retaliation, ubuntu (basic humanity) over victimization.

WHAT DID THE COMMISSION ACHIEVE?

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It will take years to fully assess the work and achievements of the Truth Commission in South Africa. After all, its success and failure can only be meaningfully judged in the context of long-term developments in that country. At this point therefore, it is not possible to do more than offer some very tentative observations concerning its contribution to the South African peace process, democracy, and the rule of law.

THE COMMISSION CONFIRMED THE  
VIOLATIONS AND REVEALED THE  
PERPETRATORS

The commission revealed many terrible truths: people who had been reported by the police as having escaped from police custody but suspected dead, turned out indeed to have died in custody. The case of Steve Bopape, a Pretoria activist who was arrested by the police in 1988 is a case in point. Subsequent to his arrest, he was reported by the police to have escaped from their custody during an investigation. Implicit in the police report was that he had escaped into exile. The former minister of police confirmed this version of events to the parliament.

But in an amnesty hearing, we were told by police officers that in fact, they had tortured Bopape to death using electric shocks. Thereafter, they had embarked upon an elaborate scheme to cover up his

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death. This scheme included faking evidence of an escape by getting one of the police officers to wear his sneakers and to run across the yard. In this manner they could point out the marks made by the sneakers on the yard as proof of the direction Bopape took when escaping. Afterwards, they drove for miles to dispose of Bopape's body in a crocodile-infested river. In case his relatives did not hear from him in exile, they would have to assume that he tried to cross the river but was attacked by crocodiles.

But the commission hearings revealed more. The apartheid government, unable to maintain control through the use of legal means, resorted to increasingly ruthless measures against its opponents. In the interest of its security, the government avoided the judicial process and instead turned to a pattern of kidnapping, torture, extra-judicial executions and disappearances to combat any perceived subversion. The enemy became anyone who was not on the list of its friends. The victims included union leaders, re-

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ligious leaders, people who assisted the poor and virtually anyone who threatened the status quo.

A regime of draconian laws was deployed to achieve the government's ends. Laws permitted detentions without trials. People could be held for lengthy periods in detention and in solitary confinement without access to lawyers or relatives. These conditions created an atmosphere where gross human rights violations could be perpetrated with immunity.

One commonly used method was disappearance. Victims were kidnapped or arrested, held incommunicado in clandestine prisons or farms used for this purpose, without access to lawyers or relatives, and subjected to torture to force them to incriminate themselves. If they were not prepared to confess or provide the information that the police wanted, they would be either tortured to death or secretly executed without trial. The bodies of the victims were either buried in unmarked graves or burnt to ashes or, as the Bopape story indicates, thrown into crocodile-infested rivers. The South African public was told how the security police would enjoy a barbecue while the body of the victim was burning nearby.

Some of these revelations led to the exhumation of the bodies of the victims, and this allowed the relatives to give their loved ones decent burials. The remains of the loved ones meant a lot to families of the victims as illustrated by a mother at one of the hearings who cried: "Please can't you bring back

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even just a bone of my child so that I can bury him”. But the remains of the victims told shocking stories of cruelty. A perpetrator pointed out the unmarked grave of a woman who had been unwilling to cooperate with her torturers and had paid the ultimate penalty. Her remains were found - but they told a story of what she had gone through. The skull had a bullet hole right on top, indicating that she had been shot while kneeling. A blue plastic bag around the pelvis told another story. She had been kept naked by her torturers for ten days and had made herself underwear from a plastic bag.

These revelations were painful. They required the victims and their relatives to re-live the trauma of the disappearance of their loved ones and face the reality of what they had hoped would not be confirmed - that their loved ones had been killed. However these revelations were significant: first, they put an end to the uncertainty of what had happened to the people who had disappeared; second, they refuted the apartheid government's as to what

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had happened to the victims - they did not disappear into exile as the apartheid government sought to suggest; and third, most importantly, the search for the truth and its public inscription served an important public interest. They refuted denial that would have distorted our history.

Without these revelations our country would have had at least two histories, one remembered by the victims of apartheid and another by their former oppressors. The denials issued by the apartheid government would have been believed by some, especially those who wanted to alleviate their guilt in respect of what they knew or did not know, what they could have done but did not do.<sup>21</sup>

These stories were told in public, and were broadcast live on national television and on national radio. In addition, the Truth Committee's proceedings were held either in the areas where the violations were committed or where the victims came from and the proceedings were translated into the primary local languages. This helped to carry the commission and its work into every corner of South Africa. The special radio broadcast in all official languages, to make sure that even the illiterate did not miss out.

### RECONCILIATION

These revelations did not necessarily produce immediate reconciliation. Reconciliation, like the healing of a wound, is a process. It is not a destina-

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tion. It cannot be achieved overnight. Apartheid left deep wounds in South Africa and these wounds will naturally take time to heal. If reconciliation is defined as forgiveness on a massive scale, that did not happen.

There were dramatic moments when perpetrators and victims came face to face, with the perpetrators asking for forgiveness and the victims expressing their willingness to forgive. On these occasions, and they were not many, the victims expressed an understanding of why the perpetrators committed the atrocities against them. Victims were being tested in their capacity to love and forgive their enemy. But for some, it was asking too much of human nature to forgive someone who maimed you or who executed your loved one.

The importance of allowing the victims to tell their stories, of listening to them and giving them the opportunity to confront the perpetrators cannot be underestimated. It had a cathartic effect. Of the

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Truth Commission in Chile, Jose Zalaquett, one of the commissioners, remarked:

The contact with so many families of victims convinced me of the paramount importance and the cathartic power of seeking to establish the truth. The families had refused to allow the previous government authorities to see them cry as they searched for their loved ones. But now they were being received with respect and offered a seat and cup of coffee. At first, we did not realize that the very process of seeking the truth was thus also a patient process of cleansing wounds, one by one.<sup>22</sup>

These remarks echo the sentiment of a South African widow whose husband, a lawyer, had been killed by apartheid agents. Remarking on the impact of having told her story to a conference regarding the Truth Commission, she said, "You know last night is the first night that I've been able to sleep through since I heard about my husband's death". When asked how she accounted for this, she responded, "I don't know, but I can only put it down to the fact that so many important people from South Africa and from abroad were interested in hearing my story."<sup>23</sup> This illustrates the importance of acknowledgment to the victims.

In the short term, the success of the commission does not lie in its ability to bring about reconcilia-

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tion, but rests in its ability to pave the way for national reconciliation and nation building. Indeed, its success must be judged by its ability to put the nation on the road to the healing of the emotional wounds that had continued to divide our nation. The Truth Commission told the truth in a nation that was not accustomed to hearing the truth. The lies and deception were at the heart of apartheid - which were indeed its very essence - were frequently laid bare. We now know what happened to Steve Bopape.

The healing process begins with the knowledge of the truth and acknowledging it. This allows the nation to focus on the future rather than on the cruel and divisive past. It removes one of the biggest obstacles on the road to reconciliation - the denial of the truth that divided the nation and haunted its conscience. By uncovering the truth to the extent that it did, the Truth Commission turned the narrow road to reconciliation into a highway.

JUSTICE

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But what of justice? The problem of satisfying the demands of Justice in a nation that is going through a transition is a difficult task. A nation in transition, searching for justice in a society divided by its past, and seeking to move forward, is likely to perceive justice differently than a stable nation would. Incomplete justice may be enough. As one human rights lawyer in South Africa has put it, it may come down to a choice “between the silence of the perpetrators without justice being done and learning the truth without perfect justice having been done.”<sup>24</sup>

The perpetrators had to pay a price for their misdeeds. First, they had to admit full responsibility for the misdeeds for which they sought amnesty. Therefore, there was no question of immunity. Second, they had to confess their guilt in public in the full view of national television cameras, national radio and the public, including the victims and their relatives. People who had been considered decent human beings by their families and members of their community were revealed as callous torturers, ruthless murderers and members of death squads. Some were shown to be so callous that they could enjoy a barbecue while the body of a victim that they had just murdered was burning in the fire nearby. These public disclosures led to public shaming. Perpetrators of human rights violations were confronted by their lies in public.

Men who had considered themselves to be

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above the law were shown to be below the law. Abandoned by the people who had sent them to the trenches, they suddenly discovered that what they had been rewarded for, given medals for, and promoted for, were terrible and cruel actions. In one of the Truth Commission hearings, I asked a police sergeant who was seeking amnesty whether he had anything that he wanted to add to his testimony. He looked at me and said, "Judge I do not know why I am here." I replied: "But you are here to ask for amnesty". He said, "Yes I know. The people that I had committed these things in order to protect have now abandoned me. Yet everything I did was to protect them, now I stand alone. I look like a fool who just did these things for no reason." This captures the sense of alienation and abandonment that some perpetrators felt.

Of course the shame does not end with the public hearings. The perpetrators had to return to their families, wives, children, relatives and neighbors, who may not have previously known about the atrocities, and heard about them for the first time on

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public radio or television. How do the perpetrators begin to explain these atrocities to their wives, children, relatives and friends? How do they begin to explain the lies they may have told, how do they explain the fact that they are murderers, assassins, monsters who could enjoy a barbecue while the body of a person they had just murdered was burning? The public shame and the sense of abandonment which these killers feel may be a form of punishment that may satisfy the demands of justice in a country in transition, though it may not be perfect justice.

Of course the Truth Commission was concerned with another kind of justice - restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships - with healing, harmony and reconciliation. Such justice focuses on the experience of victims hence the importance of reparation. The victims of human rights abuses were entitled to reparation. Reparation in this context must be something more than monetary compensation - it must include measures to restore the human and civil dignity of the victims, by recognizing that they have been wronged.

The Truth Commission could also recognize those instances where victims of apartheid were convicted of criminal offenses on the basis of confessions obtained by torture, despite their innocence, or by other illegitimate means.

Three ANC members who were convicted and

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sentenced to death illustrate the problem. During the apartheid era, three members of the ANC were tried for a murder that the state alleged had been committed in the course of the ANC's armed struggle. Despite their protestations of innocence and allegations that the evidence against them had been obtained through torture, they were convicted and sentenced to death. Prior to their execution, the government imposed a moratorium on executions. After the new democratic government had come to power and the Truth and Reconciliation Commission had been established, members of the Pan African Congress came forward and admitted that they had carried out the attack for which the ANC members had been convicted and condemned to death.

Others who claimed that they had been wrongly convicted were not as lucky. They came to the Commission and declared their innocence. They claimed that their convictions were wrongful and sought to have their names cleansed. But the amnesty committee was only concerned with the guilty. The

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Committee could take no action, for example, when two men sought amnesty for their conviction and sentence in respect of the Boipatong massacre. In June 1992, at the Boipatong township, some 60 miles south of Johannesburg, approximately 45 people were killed, including women and children. Scores of others were injured and a number of homes were destroyed when supporters of the Inkatha Freedom Party attacked supporters of the ANC. The attack was carried out by some 300-500 armed men from the nearby men's hostel. Subsequently, approximately 80 men were charged with various counts of murder and other related offenses. About 18 were eventually convicted. They later appeared before the Amnesty Committee of the TRC to apply for amnesty.

Among the applicants were two men who claimed that they had not been present during the attack. Their evidence before the committee was corroborated by those who were present during the attack and who testified that the two men had indeed been nowhere near Boipatong the day of the attack.

Members of the Amnesty Committee had no reason to disbelieve them. In fact, it appeared to the committee highly improbable that these two men would come to the committee and lie about their innocence, since all they had to do to go free was to confess to being involved in the attack and be granted amnesty. But to them, the truth was that they had not taken part in the massacre and there was nothing to confess.

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Even though they had not motive to lie before the committee and members of the committee (including myself) had no reason to disbelieve them, and had on the contrary corroborating evidence of their innocence from men who admittedly took part in the attack, we had no authority to grant them amnesty. We could only grant amnesty to the guilty, not to the innocent. The truth in this case did not set them free but instead sent them back to prison.

#### THE RESTORATION OF THE RULE OF LAW

One of the consequences of the abuse of human rights carried out under the colour of the law was that the legitimacy of the law was deeply wounded. Certain individuals, in particular those who were entrusted with the duty to uphold the law, were perceived as being above the law. What is unique about the Truth Commission in South Africa is that prosecutions were not abandoned: they existed side by side with amnesty. There was amnesty for

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those who confessed fully. Those who did not come forward, like Dr. Basson, were indeed prosecuted. The prosecution of a high-ranking apartheid spy is in itself the vindication of the rule of law.

Perhaps the authority of the law in the new South Africa was demonstrated most vividly in the trial of former President P.W. Botha for failure to obey a commission subpoena. The Commission had broad powers to gather evidence and to receive information. They could subpoena anyone who was believed to have information in connection with the violation of human rights. When Botha refused to obey the Truth Commission's subpoena, he was prosecuted. What is more, he was tried by a black magistrate. This was a symbol of how things had changed. People who had thought of themselves as beyond the reach of law were shown to be fully subject to the legal process.

WHAT DO WE LEARN FROM THIS EXPERIENCE?

The manner in which political change comes about in emerging democracies determines how best to respond to human right abuses. In a majority of countries that have had to confront this problem, political change did not come about by overthrowing the old regime but emerged instead from a peaceful evolution. In almost all the countries where change came about through a negotiated peace settlement, Truth Commissions have been adopted as appropriate re-

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sponses to past violations. The Truth Commission emerged from political necessity, respecting existing political realities.

South Africa is no exception. In South Africa, political change came about as a result of a peace process - it was a negotiated political change. It occurred with the agreement of those who were implicated in the violation of human rights. Their support was crucial to the peace process. South Africans were confronted with the reality that the human rights criminals were fellow citizens, and were living among us.

The army and the police, some of whose members were implicated in human rights abuses, were powerful and remained a threat to peaceful transition to the promised democratic future. They had protected the peace negotiations, and they were willing to protect the first democratic elections. But if there was a continued threat of going to jail without an alternative to avoid prosecution in the new South

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Africa, their cooperation may not have been forthcoming. They had already voiced their concerns in this regard. Judge Marvin Frankel explained the dilemma well in his book, Out of the Shadows of the Night: The Struggle for International Human Rights, when he wrote that:

The call to punish human rights criminal can present complex and agonizing problems that have no single or simple solution....

A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been the agencies of terror, the soldiers and the cops aren't going to turn into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life... The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathizers in the population at large. If they are treated too harshly - or the net of punishment is cast too widely - there may be backlash that plays into their hands. But

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their victims cannot simply forgive and forget.

These problems are not abstract generalities. They describe tough realities in more than a dozen countries.

Yet, the past cannot be ignored. Unconfronted wrongs repeat themselves. Victims of human rights abuses were yearning for the truth. But that truth lay buried with the victims in unmarked graves or was hidden in the consciences of the perpetrators. Amnesty was a price worth paying, to learn the truth. The denials issued by the apartheid regime had to be refuted by truths outside the old judicial machinery, which was tainted by the apartheid regime.

The pursuit of national unity, the well being of all South Africans and everlasting peace required reconciliation between the people of South Africa and the reconstruction of society. The task of rebuilding the nation required the participation of all South

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Africans. Truth and amnesty helped to lay a secure foundation on which the people of South Africa could transcend the divisions of the past that generated so many gross violations of human rights.

South Africa had to begin the long and necessary process of healing the wounds of the past, transforming grief and anger into mature understanding and creating the emotional and structural climate essential for national unity and reconstruction of a divided nation.

These realities supported the decision to set up a Truth Commission with the authority to grant amnesty to those who would come forward to confess fully, while reserving the right to prosecute those who were not willing to come forward. This was a political compromise. The decision to link amnesty to the Truth Commission was informed by history, experience, and above all the prevailing political realities.

#### CONCLUSION

Three things stand out about the Truth and Reconciliation Commission in South Africa: first, the public nature of its hearings. This served to educate the public directly about what had happened in the past. They did not have to wait for a report that would not have conveyed the truth in the dramatic fashion that the public hearings did; second amnesty was granted to those who disclosed fully in public what they had done; and third, prosecutions were

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not completely abandoned. There was always a threat of prosecution for the perpetrators who did not come forward and confess in public. Without the threat of prosecution, few would have come forward. The public disclosure of misdeeds forced many perpetrators who would not have come forward to cooperate. Those who did not come forward were prosecuted. The South African experience demonstrates that prosecutions and amnesty through the Truth and Reconciliation Commission can coexist.

Our experience shows that neither prosecution nor amnesty through the Truth Commission is the only answer to the problem of dealing with past violations of human rights in a country in political transition. But they go well together. Each reinforces the other.

Professor Charles Villa Venceio, former Director of Research in the South African Truth and Reconciliation Commission has observed, that “the in-actitude of peaceful coexistence and national recon-

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ciliation are most likely to be born where legal, political and moral absolutes are decalcified under the spotlight of rigorous enquiry and a creative response to political realities. Principled compromise that ignores neither the realities of political context nor the wisdom of judicial insight captured in international human rights law can create a sustainable breakthrough toward achieving peace and reconciliation.”

The South African experiment in truth and reconciliation has bequeathed at least three lessons to the international community: first, that there is no single or simple solution to the complex and agonizing problem of how to deal with past human rights violations; second, while prosecution is usually most appropriate, the prevailing political realities and other practical considerations may militate against prosecution; and third, the coexistence of prosecution and the offer of amnesty through the Truth and Reconciliation Commission may become an essential ingredient to the process of transition.

The concept of the Truth Commission has many variables. South Africa's Truth Commission played a useful role in moving from a divided and violent past towards a more united and democratic future. The problem of how best to deal with past human rights violations can most effectively be determined by the nation itself. The choice must be informed by the history, culture and above all the prevailing political realities in the country concerned.

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ENDNOTES

<sup>1</sup> Richard Goldstone, "Past Human Right Violations: Truth Commissions and Amnesties or Prosecutions", 51 Northern Ireland Royal Quarterly, No. 1 p. 164-165.

<sup>2</sup> U.N. Doc. Security Council Resolution 995 (1994), which approved the Statute for Rwanda Tribunal.

<sup>3</sup> U.N. Doc. G Resolution 827 (1993), approving the Statute for Yugoslavia Tribunal.

<sup>4</sup> Diana F. Orentlicher, "Settling Accounts: the Duty to Prosecute Human Rights Violations of Prior Regime", 100 Yale Law Journal, 2537, 2541 (1991).

<sup>5</sup> Jo M. Pasqualucci, "The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System", 12 Boston University International Law Journal, 321, 323-4.

<sup>6</sup> S. Landsman, "Alternative Responses to Serious Hu-47

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man Rights Abuses: Prosecutions and Truth Commissions”, 59 AUT Law & Contemporary Problems, 81, 82 and 92; Martha Minow, “Between Vengeance and Forgiveness”, 71 (1992); Charles Villa-Vicencio, “Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commission Meet”, 49 Emory Law Journal 205. Supporters of Truth Commissions argue that although they are not directly sanctioned by international law, their existence is nevertheless consistent with international law because, through their investigation and dissemination of the truth about past human rights violations, they inform the government on how to implement deterrent measures that will prevent similar abuses from reoccurring. Indeed, part of the mandate of the Truth Commissions is to make recommendations to the government on what measures are necessary to prevent recurrence of human rights abuses.

<sup>7</sup> Villa, p. 209.

<sup>8</sup> Landsman, p. 83.

<sup>9</sup> BBC News - Africa, “S.A.’s ‘Dr. Death’ gives evidence”, 23 July 2001, <http://news6.thdo.bbc.co.uk/hi/eng...frica/newsid%5f1452000/14525>.

<sup>10</sup> Goldstone, p. 165.

<sup>11</sup> Albie Sachs, “Truth and Reconciliation” 52 SMU Law Review, 1563.

<sup>12</sup> Sachs, p. 3.

<sup>13</sup> This was at about the same time that the Goldstone Commission, which had been set up to investigate political violence, was hearing testimony that police were involved in

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the violence. Of course President De Klerk denied that the purpose of the bill providing for amnesty was intended to grant amnesty to government perpetrators. There was opposition to this bill inside and outside of the racially segregated parliament from which Africans were excluded and at first it failed to pass into law. Then De Klerk resorted to a parliamentary device for breaking a deadlock that had not been used for a long time. In terms of this device, the bill was referred to the President's Council where the Nationalist party enjoyed a majority.

<sup>14</sup> Goldstone, p. 167.

<sup>15</sup> Constitution of South Africa 1993.

<sup>16</sup> Azapo & Others v. President of the Republic of South Africa, 1996 (4) S.A. at 676-677.

<sup>17</sup> This committee gave the victims of human rights violations the opportunity to come forward and tell their stories -- stories of pain from physical harm, stories of emotional pain for the loss of loved ones, stories of the pain of living in the uncertainty of not knowing whether their loved ones were dead or still alive. Ordinary people who had never had the

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opportunity to speak, spoke for the first time in public. It was known that people had been killed while in detention, it was known that people had been tortured by the police, it was known that people had disappeared from the camps in exile and indeed it was known that many people had lost their lives in the political conflict that engulfed the country, that pitted friends against friends, father against son, where the enemy was defined in terms of where one lived. But what was not known was the pain of the individuals who had suffered as a result of these atrocities. Their pain had not been acknowledged. But now they were being listened to, they were believed, and their pain was being acknowledged in public.

<sup>18</sup> Such opposition was limited to showing either that the perpetrator had not disclosed all the material facts relating to what he did or that the misdeeds in respect of which amnesty was sought had not been politically motivated. This was not an easy burden to discharge.

<sup>19</sup> Opposition to amnesty turned amnesty hearings into full blown trials with all their adversarial features. The victim had the right to legal representation just as the perpetrators had. This led to the hearings taking much longer to finish. However, it was crucial to the process to afford the victims of the violations or their relatives the opportunity to oppose amnesty as the decision to grant amnesty had the effect not only of preventing a criminal prosecution but also preventing a claim for damages. In addition, persons who were to be implicated in the course of the hearings had to be given notice and be afforded the opportunity to challenge the evidence implicating them. This procedure was essential to allow the individuals

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who were implicated the opportunity to challenge the evidence associating them with the violation of human rights.

<sup>20</sup> Azapo & Others v. President of the Republic of South Africa, 1996 (4) S.A. at 684.

<sup>21</sup> Goldstone, p. 168.

<sup>22</sup> Interviews with Bizos cited in Villa, p. 221.

<sup>23</sup> The very act of compelling perpetrators to come forward under the pain of prosecution is in itself a demonstration that no one is above the law in the new South Africa. Senior police officers of the apartheid government, who were once thought to be above the law, were being compelled by the law either to come forward or face prosecution. Once the foot soldiers came forward to tell of their role, the generals had to come forward too, otherwise they risked prosecution.

<sup>24</sup> Botha is the same official who in the late 1980s or early 1990s reprimanded his foreign minister for suggesting that there might be a black majority rule in South Africa. He was considered untouchable under the apartheid regime. In the course of its hearings, the committee on human right violations obtained documents from the apartheid state security

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commission, one of which bore his signature. He was subpoenaed to come and explain the meaning of certain documents by the State Security Council, a panel was prosecuted for contempt. What he never thought would happen in his lifetime was about to happen: an African magistrate tried him. He was duly convicted and he appealed.



# Commissioning the Truth

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The truth, so my basic encyclopedia<sup>1</sup> suggests, is a bit of a fickle thing. The encyclopedia lists there to be various approaches about possibly establishing the truth, which suggests that truth itself is dependent on the approach chosen. And if that is so, then we're only a short step away from conceding that there is no such thing as "the truth"; instead, there may be more truths than one, and we just may end up with the relative rather than the absolute truth, in MacCormick's memorable phrase.<sup>2</sup>

With this in mind, the establishment of truth commissions during or after a period of political transition comes across, at first sight, as a curious enterprise: if the absolute truth is out of reach, then what

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<sup>1</sup>*The New American Desk Encyclopedia* (New York: Signet, 1993), at 1231.

<sup>2</sup>See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, rev. edn, 1994), at 271.

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is the point of establishing a commission to find it? If truth is relative, then which truth, or whose truth, is being established by a truth commission? And if truth is unknowable, what interest is being served by the search for such an elusive thing?

One of the more curious aspects about Justice Ngcobo's contribution on South Africa's Truth and Reconciliation Commission elsewhere in this issue is its almost apologetic tone.<sup>3</sup> For Justice Ngcobo, the South African Truth and Reconciliation Commission seems to represent a second-best solution: "While prosecution may seem obviously more just, sometimes political realities and other practical considerations make prosecution

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<sup>3</sup>S. Sandille Ngcobo, "Truth, Justice and Amnesty in South Africa: Sins from the Past and Lessons for the Future", elsewhere in this issue.

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inappropriate."<sup>4</sup> And elsewhere: "If prosecution is impossible, truth commissions may be the best alternative."<sup>5</sup>

This apologetic tone seriously underestimates the value of truth commissions. While establishing the truth is most likely impossible for any commission (this owes something not just to the elusive nature of truth, but also to the impossibility of achieving much of substance by means of a commission), the value of truth commissions resides elsewhere. Truth commissions are at their most instrumental in prescribing which truth will prevail for the foreseeable future.

II

Prosecution of human rights violators during or after political transition, and the establishment of a truth commission to come to terms with human rights violations committed by a past regime, both presuppose that truth is something different from mere opinion, or idea, or belief. Truth, its relativity aside, is something that precludes debate. A truth claim is a claim that something either exists or it does not; that someone either committed

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<sup>4</sup>*Ibid.*, at 3.

<sup>5</sup>*Ibid.*, at 7.

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something or did not; that something is either true or not. Faced with a truth claim, debate is no longer possible, except on whether the claim itself is true or false. But that debate differs fundamentally from debates about beliefs, ideas or opinions.

In being so uncompromising, truth is highly ambivalent: as Hannah Arendt puts it, as a political matter truth has a despotic character, and is therefore hated by tyrants and dictators, as long at least as they have no monopoly on truth.<sup>6</sup> Indeed, much of the attraction of trying to find the truth after a nasty regime has come to an end is precisely to demonstrate the falsehood of the past. Yet, by being so categorical, truth itself precludes politics: "The trouble is that factual truth", Arendt wrote, "like all

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<sup>6</sup>See Hannah Arendt, "Truth and Politics", reproduced in her *Between Past and Future* (New York: Penguin, 1977), 227-264, at 241.

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other truth, peremptorily claims to be acknowledged and precludes public debate, and debate constitutes the very essence of politics."<sup>7</sup>

Both prosecution and truth commission hearings aim to establish the truth (or at least a version of the truth), but given the dual nature of truth in politics (hated by tyrants but itself having tyrannical potential), it could well be argued that truth commissions are superior to transitional trials, at least in the sense that the truth commission represents a more overt recognition of the political nature of truth.

Transitional trials, after a regime has been ousted and has been replaced by a new regime, work on the curiously ambivalent presumption that truth is non-political and highly political at the same time.<sup>8</sup> Truth is deemed to be non-political in that faith is placed in the rule of law; closing the book of the past is left to the arguments of lawyers, legal rhetorics, and the neutral wisdom of judges. This may or may not be very

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<sup>7</sup>*Ibid.*, at 241. Arendt distinguished between factual truth and philosophical truth.

<sup>8</sup>See generally also Ruti Teitel, "Transitional Jurisprudence: The Role of Law in Political Transformation", 106 *Yale Law Journal* (1997), 2009-2080.

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convincing, but at least it is worth pointing out that prosecution usually purports to effectuate the neutral rule of law by putting entire regimes on trial, as has often been noted.<sup>9</sup>

At the same time, prosecutions are intensely political, in the candid recognition that a new truth should replace the previous truth combined with the perhaps not so candid sentiment that this transition should be given the imprimatur of legitimacy by reference to the rule of law. Indeed, in its most cynical form, prosecution results in show trials, in which the rule of law is used as the thin

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<sup>9</sup>See, e.g., Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin 1977, first published 1963); see also Guyora Binder, "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie", 98 *Yale Law Journal* (1989), 1321-1383.

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vener over the exercise of raw power.<sup>10</sup>

Given this ambivalence of prosecution, the net result is that trials may not be the best possible way to establish the truth (any truth), except for signalling that a new regime is in power and that therewith the truth is no longer what is used to be. That is not to say that trials may not serve other purposes<sup>11</sup>, most predominant among them perhaps the public cleansing of the national soul, the purging of the past<sup>12</sup>; it is merely to say that the truth-

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<sup>10</sup>On the political nature of the rule of law, see Martin Loughlin, *Sword & Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart Publishing, 2000). See also Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge MA: Harvard University Press, 1986, 2d edn.).

<sup>11</sup>Elsewhere I argue that the argument of deterrence is not very plausible when political acts are involved. See Jan Klabbers, "Just Revenge? The Deterrence Argument in International Criminal Law", 12 *Finnish Yearbook of International Law* (2001, forthcoming).

<sup>12</sup>The ambivalence also finds its way into the vocabulary. Terms such as cleansing, purging, or purification are all very capable of transmitting highly negative connotations as well: cleansing of the soul may be close to ethnic cleansing.

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generating capacities of transitional trials need not be overestimated. By contrast, the truth commission may be far better suited for the purpose of coming to terms with the past. The phenomenon of the truth commission recognizes that truth and politics are intimately connected, and that there is no a-political realm where the law reigns supreme, free from all things political. Indeed, Justice Ngcobo highlights as much when hypothesizing that South Africa could have had at least two histories, one remembered by apartheid's victims, and one remembered by their former oppressors.<sup>13</sup> On the other hand, he also suggests that truth commissions may help restore the rule

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<sup>13</sup>See Justice Ngcobo, note 4 above, at 25. On South Africa's truth commission more generally, see Tapio Puurunen, *The Committee on Amnesty of the Truth and Reconciliation Commission of South Africa* (Helsinki: Erik Castrén Institute, 2000).

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of law, which would seem to represent a return to the a-political realm somewhere above and beyond politics.<sup>14</sup>

Again, then, ambivalence reigns: the pull of the desire to turn to normalcy and establish a society on the basis of the rule of law and democracy is met by the pull of the desire to somehow rewrite, or at least re-touch, history. The problem then is, of course, that the two seem to be incompatible: rewriting history is the very antithesis of the rule of law and democracy, however precisely defined. Or is it?

III

In western style democracies one would be hard put to find truth commissions of the sort that have dominated the political landscape in parts of Africa and Latin America during the last few decades. Yet, on a smaller scale western style democracies may possess similar institutions or possibilities in the form of parliamentary enquiry committees: truth commissions writ small. If anything, these suggest that the re-touching of history is not altogether unfamiliar to well-established democracies either.

In a country such as the Netherlands, parliament has the power to instigate a parliamentary enquiry whenever it is of the opinion that something not quite warranted has

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<sup>14</sup>Justice Ngcobo, note 4 above, at 4.

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occurred. While historically this power may have originated merely as a tool to aid in the provision of information for purposes of current or future decision-making, in practice it has turned into an instrument to come to terms with the past.

A good example of this use is that, at the time of writing, Dutch parliament is reported to be contemplating the establishment of an enquiry committee to investigate the Srebrenica disaster. As is well known, thousands of Bosnian muslims were slaughtered in 1995 in the village of Srebrenica while Dutch peace-keeping forces stood by idly, clinging to their instructions and taking the commandment of using force only in self-defence very seriously indeed. The incident took place in 1995, and while it led to some high-level political rumblings, no immediate political consequences followed: parliament did not, e.g., force any members of the government to abdicate. A Dutch research institute was subsequently charged with the task of analyzing what went wrong, and following publication of its report in the spring of

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2002<sup>15</sup>, the Dutch government collectively resigned and parliament was said to be discussing the possibilities of a formal enquiry.

The interesting thing is twofold. First, there is fairly little of immediate substance to gain for parliament: the government has already resigned and accepted all sorts of political responsibility. Second, and related, there is fairly little left to find out by an enquiry: there is a hefty report which took some seven years to prepare, the government has accepted responsibility, what more could possibly be established?

The one thing left perhaps is an enquiry into parliament's own role in the matter: why did it not take control in 1995 and sent the then-government home? Why did it not conduct serious debates inside and outside The Hague? Why did it not assume responsibility for its own failure to properly oversee the activities of the government and the military? Whereas in constitutional theory if not always in practice, parliament does have a important say in Dutch political life, it is more than likely that parliament's own role will not be highlighted by any parliamentary enquiry: instead, the parliamentary enquiry serves as the symbolic gesture reassurance to the Dutch

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<sup>15</sup>For further information concerning the report, see <http://www.srebrenica.nl/en/index.htm> (last visited 18 June 2002).

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populace that nothing slips by it unnoticed, if necessary many years after the fact.

While parliament may have been caught napping, or may have been too caught up in partisan considerations to take much action when Srebrenica actually took place, the very purpose of the parliamentary enquiry is to tell the world at large that Dutch parliament never sleeps and is vigorous when it comes to defending the values of democracy and the rule of law, if necessary by investigating the past.

#### IV

If this is plausible, then an uncomfortable analogy presents itself: if Dutch parliament uses the right to establish a parliamentary enquiry to wash its own hands in innocence, to what extent are truth commissions and post-transition prosecutions engaged in whitewashing, engaged in re-touching the past so as to minimize the possible contributions of the present regime to the misdeeds of

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the past? To ask the question presupposes, of course, an important given: it presupposes that there is indeed something to whitewash, that indeed it is not impossible for the new regime to have somehow, however inadvertently, contributed to the misdeeds of the previous regime. Perhaps the most pointed example (because intentionally hidden behind the public facade of a prosecution) was the role of the Vichy regime, and the general attitude amongst the French, during the Second World War. As Binder has observed, the trial of Klaus Barbie became in part a conscious attempt to rewrite some of the darker pages in French history.<sup>16</sup>

The more interesting example however is the one made famous by Hannah Arendt's report on the Eichmann trial: the role of the Jewish leadership in Nazi Germany.<sup>17</sup> The example is interesting because it highlights the complex nature of the relationship between truth and politics, more so than the Vichy example which can be seen, in part, as a relatively simple case of opportunistic collaboration in which the Vichy government joined the bad guys.

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<sup>16</sup>See Binder, note 10 above. Something similar has been noted from a less theoretical vantage point by a Dutch journalist covering the trial. See Max Nord, *Klaus Barbie: Een van ons* (Utrecht: Kwadraat, 1989).

<sup>17</sup>See generally Hannah Arendt, note 10 above.

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Clearly though, that does not apply to the Jewish Councils who, while opposing Nazism, did what they thought was best in the circumstances, with the purest of intentions. Their actions backfired, but is that as such reprehensible? In those circumstances, who is to argue that what they did was right or wrong? The very storm of emotions released by Arendt's depiction suggests a moral universe in which various shades of grey struggle for prominence, indicating that the truth is a complicated thing indeed, and that it is even more complicated to rashly attach any consequences to whatever truth happens to be found.<sup>18</sup> Perhaps for purposes of organizing the future, there may be advantages in having less shades of

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<sup>18</sup>For a brief discussion, see Richard I. Cohen, "A Generation's Response to Eichmann in Jerusalem", in Stephen E. Ascheim (ed.), *Hannah Arendt in Jerusalem* (Berkeley: University of California Press, 2001), 253-277.

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grey in our moral universe; this prevents all sorts of confused and possibly counterproductive debate. Perhaps, if the function is to pave the way for a new order, black and white are about the only workable alternatives.

V

In the American television show *Cheaters*, men or women who suspect their partners of cheating may call on the show to investigate. If cheating is established, the show will confront the cheater and will do so in absolute terms: the cheater is wrong and must be castigated, while the cheated one is someone to sympathize with. There is no room for doubt or for nuance: a fleeting suggestion in one episode that a woman first endured years of abuse before turning her back on her husband was simply ignored. The moral universe of *Cheaters* is flat, and the only shades it recognizes are evil black and saintlike white. That may be deplorable, but also makes sense from at least one perspective: the cheated one comes out on top, and may be far better capable of redirecting her or his life then without the televised confrontation.

To some extent, both transitional prosecution and truth commissions share some of the characteristics of *Cheaters*. Issues are typically analyzed without too much nuance; there are difficulties recognizing colours other than black or white, and the moral premises are again, flat: the chance that someone will found to have done something wrong but for all the right reasons seems minimal.

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And perhaps this is how it should be: if prosecution or truth commissions are supposed to assist in paving the way for the future, then nuance is perhaps a still unaffordable luxury. It may well be that their greatest instrumental value resides not so much in finding the truth, but in prescribing a new, uncompromising version of the truth, in much the same way as the cheated husband can simply proclaim, with the tape of the broadcast in his hand, that he was a victim entirely without blame, thus doing away with years of abuse in one fell swoop.

## COMMENTS

### National Norms Prevailing

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From one perspective the South African Truth and Reconciliation legislation reflects the impotence of international legal norms in a context in which national norms are manifestly in control. It may seem trite to observe that the Promotion of National Unity and Reconciliation Act 34 of 1995, which in section 2 created a juristic person to be known as the Truth and Reconciliation Commission (TRC), is a South African solution to a South African problem. However, at the same time, it is important to recognise the phenomenon of a domestic *grundnorm* firmly in control to the extent that the norms of international law have no more role and relevance than those of natural law. In terms of Kelsen's classic positivist model this is unexceptionable. Thinking in these terms, any notion that crimes against humanity should be prosecuted under international law simply does not enter the equation. Rather, indeed, international thinking marvels and applauds the wonder of

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what South Africa is seen to have achieved. As a reflection of this overriding perception - but arguably only to that extent - the following quotation from Hassen Ebrahim, a South African Department of Justice officer, rings true: 'South Africa's transformation captured the imagination of the world. It was a model of a peaceful alternative to a bloody revolution - a miracle of modern political history. At the heart of this transformation lies the South African Constitution.' ('The Making of the South African Constitution: Some Influences' in Penelope Andrews and Stephen Ellmann (eds) *The Post-Apartheid Constitutions*, 85, WUP/OUP (2001)).

The TRC process described and justified in Constitutional Court Judge Sandile Ngcobo's thought provoking article is, of course, part of the major

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process of constitutional transformation, its particular role simply being the need to deal with the past in a manner unprejudicial to the future. Seeing it as part of a much bigger picture, one may observe, perhaps tritely, that domestic solutions, primarily concerned with the future rather than the past, feature in South Africa's long and troubled colonial and post-colonial history which, of course, endured up to the 1990s reform era. The eventual solution to the late nineteenth century conflict which led to the Anglo-Boer War was the 1910 Union of South Africa. One perspective on the 1910 Constitution was that it sought to provide a new starting point freed from and absolved of the burden of culpability for the past. To this extent the National Convention of 1908 and the Convention for a Democratic South Africa of 1991/2 may be seen to have something in common. Of course, the essential substance of what South Africa's early and late twentieth century constitutional conventions were concerned with is entirely different. In the former the primary concern was the co-existence and mutual interest of the minority Afrikaans and English speaking groups; J C Smuts, principal architect of the 1910 constitution, speaks to this: 'The political status of the natives is no doubt a very important matter, but vastly more important to me is the Union of South Africa...' (quoted in W K Hancock, *Smuts*, Vol I, 256, CUP (1962)). In 1991/2 the focus was on saving South Africa by a root-and-branch shift to democ-

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racy.

From a lawyer's point of view the difficulty with the TRC process is that it involves a suspension of the principle that serious criminal conduct should be prosecuted. The article deals with this dilemma under the heading of 'justice'. In this regard the truth seems to be that the process forsakes justice in seeking closure in the interests of reconciliation. This is a likely if not inevitable position in circumstances in which agreement is reached between the leaders of an outgoing regime, retaining residual power but bereft of authority, and the legitimate government in waiting - wanting to build a new democratic and inclusive nation. It is unfortunate that there is not more general open acknowledgement of this underlying truth as the driving force behind the TRC process; rather, the focus tends to be upon perceived moral justification. That said, it should be noted that the article does acknowledge the fundamental motivating basis of po-

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litical reality in its concluding paragraph.

While Judge Ngcobo's article is a model of clear and honest thinking - as it were from the bench - unfortunately, certain other writings obfuscate. A chapter by South African Human Rights Commission member Leon Wessels (Deputy Minister for Law and Order in the old regime) in Andrews and Ellmann (above, 22) illustrates this problem. Explaining his position in the pre-reform government, Wessels (above, 44) - under the heading of 'Amnesty and the Rule of Law' - comments: 'In the inner circles of the government I cautioned urgently, but diplomatically, that violations had not been committed only by the opposition, but that I also had strong suspicions about institutionalised violence. Reaction to such rumours was very hostile, to say the least. It appeared that some in the establishment simply turned a deaf ear. They heard the protestations out politely, but they would not listen.' The writer goes on to note that 'many of us gave a sigh of relief' when the amnesty principle was adopted, observing that '[t]he relief we felt was for the fact that we could have the full truth out in the open without vengeance.'

But, vengeance? While one would not question the honesty of these comments the stated basis for relief is simply untenable. The relief was surely to do with the concession - made before the new gov-

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ernment assumed power - that there would be a general amnesty from prosecution. To ascribe as the actual basis for relief the perception of the whole truth emerging in an atmosphere unsullied by motives of revenge is simply disingenuous. In a compelling recent study of 'states of denial' (subtitled 'knowing about atrocities and suffering') Wessels's explanation of his position is considered and classified as the 'not having an inquiring mind' form of denial, preferable to the more prevalent denial of responsibility or denial of knowledge forms: '[his] admission of bad faith - whether this came from remorse or further posturing - makes all the difference. His muted understatement - even irony, if this is possible - conveys the essence of not-knowing: "the Nationalist Party did not have an enquiring mind about these matters".' (Stanley Cohen, *States of Denial*, 129, Polity (2001)).

The characterisation of the TRC process as a moral solution - on the basis of restorative justice -

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has been effectively demolished in a *South African Journal of Human Rights* article which is recommended reading as a matter of contrasting perspective to Judge Ngcobo's piece. Quoting a single sentence shows this but also indicates common ground in the recognition of a political compromise basis: 'The idea that provision for a conditional amnesty was made because of a desire to promote a set of moral values which were incompatible with retribution is wildly unconvincing.' (Stuart Wilson, 'The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty' 17 *SAJHR* 531 (2001).) A more positive assessment - arguably more of an endorsement of the Ngcobo position - is made in a comprehensive article which commences with an evaluation of Nuremberg and proceeds to consider forms applied in Latin America and Central and Eastern Europe before proceeding to a detailed critique of the TRC model (see Winston P Nagan and Lucie Atkins 'Conflict Resolution and Democratic Transformation: Confronting the Shameful Past - Prescribing a Humane Future' 119 *SALJ* 174 (2002)).

How does the TRC process fit from a 'rule of law' perspective? Judge Ngcobo cites the prosecution of former President P W Botha for failure to obey a subpoena to present himself at a hearing as a demonstration of the authority of the law. A different view of this episode is that it shows the futility of a notion

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of the rule of law with its primary focus on procedural rather than substantive justice. A distinguished South African judge, noted for his liberal views in the worst days of apartheid, presented the concept in this positivist way in the 1967 Hamlyn Lectures. (O D Schreiner, *The Contribution of English Law to South African Law; and the Rule of Law in South Africa*, Stevens/Juta (1967)). A leading South African liberal legal scholar of the apartheid era showed the danger of this approach which allowed infringements of the rule of law to be characterised as political rather than legal (Anthony S Mathews, *Freedom State Security and the Rule of Law*, xxviii-xxix, Juta (1986)). Arguably, however, the TRC process is consistent with a notion of the rule of law as procedural justice rather than as a concept concerned with justice in the substantive sense, this latter interpretation having come to be associated with an emphasis on human rights (see Mathews, 11). The general high prominence of human right's norms as controlling law in the new

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South Africa underlines the TRC's orientation as the product of political reality and compromise rather than as a manifestation of alignment with the country's new legal ethos.

In the last decade of the twentieth century South Africa addressed her complex national life in a dramatic and comprehensive process of reform. The radical changes have swept away discrimination and introduced a rights' culture founded on a far-reaching Bill of Rights (the volume of case law is such that a bill of rights textbook is already in its fourth edition: see Johan de Waal, Iain Currie and Gerhard Erasmus, *The Bill of Rights Handbook* (2001)). Few areas of South African law are unaffected and in some extensive change has occurred. Land reform has changed the land law scene (see D L Carey Miller and Anne Pope, *Land Title in South Africa*, Juta (2000)). But the reform development has occurred on the basis of selective continuity with the past; in private law the Roman-Dutch based 'mixed system' remains prominent (see my chapter 'South Africa: a World in one Country on the Long Road to Reality' in Andrew Harding and Esin Örüçü (eds) *Comparative Law in the 21st Century*, Kluwer (2002)). This continuity aspect is the key to understanding and evaluating the TRC process. Justice, in a pure sense, may seem to have been forsaken in the generous provision of amnesty; on the other hand the process was probably a

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necessary one in achieving a transition in which the past has a role in securing the interests of the future.

*David L. Carey Miller*

# Insights in the Working

*Eduard Somers*  
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This article is a commendable attempt to give some insights in the working of the Truth and Reconciliation Commission in South Africa, established after the collapse of the Apartheid regime. The ultimate objective of this Commission was to provide a way out in dealing with crimes and violations of human rights in South Africa during that period and to facilitate the change to a more democratic society.

Although the article remains rather general in its approach it provides nevertheless a solid contribution to the theme involved. However, some of the aspects dealt with do not necessarily add very much to the already well known situation of apartheid or the pre-democratic conditions before 1990. On the other hand the position taken by several of the victims and their family pro or contra amnesty could have been elaborated more in detail particularly in the light of the question of constitutionality of amnesty. This might have added some more profound contribution to the doctrine on truth commissions in general. Moreover, I think that it is of course important and interesting to deal with the results of the Truth and Reconciliation Commission but what could have been much more interesting for an international audience, i.e. the ac-

*Eduard Somers*

tual work of the commission, remains too much in the dark. The article seems to rely heavily on the experience of the authr whilst it could gain substantially by relying more on international doctrine in the field. Finally the article could have gained an added value if some more specified conclusions would be included which might be valuable also for dealing with similar situations in Latin America or in Central Europe.

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