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Edited by Robert I. Rotberg and Dennis Thompson: Truth v. Justice □ □

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I

Truth Commissions and the Provision of Truth, Justice, and Reconciliation

ROBERT I. ROTBERG

“NEVER AGAIN!” is a central rallying cry of truth commissions, and one about which perpetrators and victims can agree. The notion of “never again” captures the response of societies that are recovering their own equilibria, their own dignity, and their own sense of integrity. Truth commissions are intended to be both preventive and restorative.

But if societies are to prevent recurrences of past atrocities and to cleanse themselves of the corrosive enduring effects of massive injuries to individuals and whole groups, societies must understand—at the deepest possible levels—what occurred and why. In order to come fully to terms with their brutal pasts, they must uncover, in precise detail, who did what to whom, and why, and under whose orders. They must seek, at least, thus to uncover the truth—insofar as this aim is humanly and situationally possible after the fact.

Truth commissions generally are created after a totalitarian/authoritarian regime has been succeeded by a democratic one. Sometimes the transition is preceded by civil and economic war bolstered by world public opinion, sometimes by invasion, and sometimes when societal revulsion overwhelms a military junta, a minority dictatorship, or strong arm pseudodemocrats. Massive human rights violations usually accompany such arrogations of power. The mandate of the successor regime is to establish or revive democracy and to prevent any resumption of human rights abuses. It also seeks to reconcile the old and the new, and to move forward in effective harmony.

Truth commissions thus seek, whatever their mandate from a new government, to uncover the past in order to answer questions that remain unanswered: What happened to husbands, sons, wives, and lovers at the hands of the ousted regime? Who gave the orders? Who executed the orders? What was the grand design? Who benefited? Getting the facts provides closure, at least in theory. Making it possible for perpetrators to be confronted by victims and the heirs of victims (as in the South African and Guatemalan cases) can provide further closure. In societies as disparate as Argentina, Bosnia, Cambodia, Cyprus, El Salvador, Guatemala, Haiti, Nigeria, South Africa, and Sri Lanka, and now in Sierra Leone and Kosovo, there is a natural, consuming desire to elicit as complete an accounting as possible of how people disappeared, how

they were assassinated, how and why they were flung from airplanes above the Atlantic Ocean, and how and why they were slaughtered in groups and tossed into unmarked graves.

There are the clinical commissions that have tried to discover precisely what happened to persons who vanished during a “dirty war” organized by the defeated regime. They have largely taken testimony behind closed doors and published as accurate a recounting as possible given their constrained circumstances and resources. Sometimes, publication has been delayed or avoided, as in Sri Lanka for some months and in Haiti, for all practical purposes, indefinitely. In several of those cases, especially in the earliest truth commissions, there has been little attempt to go beyond the bare facts—to examine the moral and historical underpinnings of the crimes committed. It has been enough to answer specific questions rather than to affix societal blame. Some, however, have done neither; Haiti’s *Si M Pa Rele*, its National Commission for Truth and Justice, is the prime example.

Those more circumscribed and limited commission efforts reflect both the previous paucity of experience with the truth commission method, and also the bargains struck, as in Guatemala and El Salvador, and in adverse or better than adverse circumstances between an outgoing regime and its successor or between modern governments and human rights watchdogs. Most of the commissions that were formed later had broader mandates and extensive goals. They have sought more than an accounting, and something closer to an approximation of a full truth, about the chain of circumstances that resulted in massive human rights violations, and how each individual atrocity fitted into a carefully constructed mosaic of guilt. These more ambitious commissions have tried to apportion that guilt, both to those who attacked others individually and to those who authorized the dastardly acts by direction or indirection. Ultimately, these commissions wanted to understand the structure of previous abuse, and the extent to which it could be articulated.

The Guatemalan three-man Commission on Historical Clarification (1997–1999) was prohibited from naming names and from apportioning blame directly. Yet the nine-volume report of the United Nations-backed Guatemalan commission found the army responsible for more than 200,000 deaths and disappearances during thirty-six years of civil war. It documented 626 massacres perpetrated by the army and 32 by its opponents, and labeled the military actions genocide. By so doing, the commission nullified a 1996 blanket amnesty that banned prosecution for all other crimes.

South Africa’s Truth and Reconciliation Commission (TRC) is the prime example of a commission with a mandate much broader than that of Guatemala’s, extensive goals, and a comprehensive vision of how such an effort can prevent future conflict and ensure that “never again!” becomes a societal reality. A book examining the nature of truth commissions inevitably must focus largely (but not exclusively) on the new standard-setting model of the practice.

The TRC, though flawed in many ways, has set a high standard for future commissions.

The importance and rationale of the TRC must be understood in the context of apartheid. The rigid, legalized segregation of South African apartheid began in 1948 when the National Party (led and participated in largely by Afrikaners) won a narrow victory and proceeded to legislate against the vast African majority, against Communism, and against all forms of dissent and disagreement with the political aims of Afrikanerdom. Basic human rights were discarded. Terror gradually became perfected as an instrument of state control. For all Africans, coloureds, and Indians, and even for some white liberals, National Party rule was arbitrary and autocratic, obviously discriminatory, and mean. The police state that was created was supported by atrocities and brutalities equal to if not exceeding those on the other side of the Atlantic Ocean.

After the tyranny of apartheid was removed in 1994, and Nelson Mandela, a long-time prisoner, became the new South Africa's first president, Parliament was established, and he appointed (in 1995) the Truth and Reconciliation Commission to discover the dark facts of apartheid, to report them to South Africa and the world, and to trade amnesty, where necessary, for information. The TRC grew out of an elaborate political compromise that rejected the outgoing regime's demand for blanket amnesty and no retribution in exchange for a mechanism (the TRC) that could grant amnesty for political acts. The origins of the commission are discussed more fully below, in chapters in this volume by Alex Boraine and Dumisa Ntsebeza. They are two among the seventeen original members of the TRC, chaired by Anglican Archbishop Desmond Tutu. The TRC's report, published in 1998, is discussed by nearly all of the contributors, but especially by Wilhelm Verwoerd and Charles Villavicencio, two of its authors.

Whereas the first commissions (Uganda, Bolivia, Argentina, Zimbabwe, Uruguay, the Philippines, Chile, and ten or so more) dared not hear testimony in public for fear that it might be too inflammatory or arouse retaliation from the ousted military officers (who were still around) or their patrons, the South African commission not only insisted on public as well as private testimony, and the public interrogation of accused perpetrators by victims as well as prosecutorial figures from the commission's staff, and by the commissioners themselves, but it also went a step further and permitted press and television reports. Widely disseminated verbatim accounts became the content of an ongoing national drama. Rather than having a distilled version of what had occurred in past times summarized in a commission report, and then released, the South Africans were (with very few exceptions) totally transparent. Their activities educated the new society directly, well before its official findings could be presented to parliament and the president.

Truth could thus be affirmed by individuals across the land as well as by commissioners. The story of the past could not therefore be just one story, but a million perceptions of what had been revealed before the commission and argued back and forth between those charged with revealing what and why, and the victims, who wanted nothing but the full truth. The South African version of a commission empowered a popular understanding incrementally, rather than comprehensively by polished summary. Moreover, in this way, the new society was able to begin continuously to reconstruct itself—in terms of what it had gone through and how it was going to cope with its travails. As the South African TRC itself learned more and more, it could peel back layer after layer of apartheid atrocity. The report of the TRC, said a commissioner, could “not tell the story of apartheid as a whole, but only the story of its abuses of bodily integrity.”¹ The TRC’s hearings could slice closer and closer to the bone of terror and inhumanity in a way that the more limited commissions in El Salvador or Haiti never could.

The South African commission has become the model for all future commissions, which is why the chapters in this book examine the experience of the TRC much more fully than they do commissions elsewhere. But this book is about the theory of truth commissioning as well as its practice. It is about the tensions between truth and justice, about the prevention of future conflict through truth commissions, about reconciliation in postconflict situations, about knowledge as opposed to retribution, about victim’s as well as perpetrator’s rights, and about societal restoration.

There is a strong sense that a society can move forward only after it comes to terms with its collective angst. In the South African case, that meant dealing with outrages committed by whites against Africans, Africans against Africans, Africans against whites, and the African National Congress (ANC) against its own members, as well as with whites coming to terms with the evils of apartheid, perpetrated over more than forty years, with blacks primarily the victims. Tutu asked whites to apologize and take responsibility for their actions during apartheid. Is there no leader of “some stature and some integrity in the white community,” he asked in a statement released to the press, who will admit that the whites “had a bad policy that had evil consequences?”²

“Moving forward” and “coming to terms with” are figures of speech that provide the rationale for most truth commissions. There is an assumption that a society emerging from an intrastate cataclysm of violence will remain stable, and prosper, only if the facts of the past are made plain. Critics, including several contributors to this book, question that assumption, suggesting that the “truth” that a commission may uncover can only be tentative. Additional truths, they argue, will emerge by encouraging conflict and controversy, not by establishing one truth and declaring consensus. Continuing moral controversy is desirable in a democracy, and fact-finding in the service of reconciliation must take that goal into account.

The rationale for truth commissions, nevertheless, is that the inexplicable should be understood, that actual murders and murderers will be unmasked, that unmarked graves will be located, and, for example, that the bizarre attempt to poison apartheid's opponents will be revealed. As contributors to this book imply, proper remembrances fulfill the collective needs of badly damaged societies. There is too much injury to individuals and nations. Forgetting reinforces losses of self-esteem among victims and even among victims as a group.

Truth commissions exist because of political compromises, in South Africa's recent case as a substitute for the broad amnesty that the outgoing regime wanted, and could not get.³ But commissions also exist because society is unwilling to forgive and forget, refusing to move on without confronting the repression of its precursor generation. Those who advocate dispensing with truth commissions and simply moving on after a massive regime change argue that the kinds of confrontation engendered by the commission process only make societal tensions more palpable. Opening the old wounds, they argue, harms rather than helps beneficially to reconstruct a society in transition. By this logic, the truth commission process retards reconciliation. Indeed, a society cannot forgive what it cannot punish.⁴ Thus, the prevailing assumption that postconflict reconciliation is both desirable and possible, as well as necessary, may be incorrect. Similarly, some wonder wisely whether the approach to reconciliation that most of the contributors to this book support may be culturally specific; South Africa may have special qualities that differentiate its potential for reconciliation from a society like Sri Lanka, where a bitter seventeen-year civil war continues.

Most commissions have not tried to reconcile the old, which oppressed, with the new, which enshrines democracy. But the Chilean commission did, and the South African version had as its primary mission the seeking of reconciliation through acquiring and displaying the truth, and, in its chairman's religious design, requesting atonement. Thus, for him and for the other commissioners, uncovering the facts—the truth—of the past was a necessary if not sufficient stage that could prepare the new South Africa to be reconciled, and whites and blacks to be reconciled to one another.

Reconciliation may or may not prove possible in the aftermath of an apartheid-riven society. But the TRC operated as if it were, and as if retailing the truth of the deepest machinations of apartheid—the culpability of its highest leaders and its mad-doctor schemes of biological and chemical warfare—would somehow set South Africa free to forge a successful multiracial society. To meet those goals—to encourage the kinds of testimony that would reveal apartheid at its moral worst—the TRC had to find a way to compel the real culprits to come forward and confess. Amnesty was the result, as the postamble to the interim constitution prefigured: perpetrators, black and white, would receive perpetual immunity from prosecution if they testified fully and candidly about their terrible deeds and if they could demonstrate (by the loose

standards that the TRC used pragmatically) that their crimes were political; that is, that they served political ends or were motivated by political beliefs.

Because the South African TRC is the latest and the grandest example of postconflict truth seeking, it is critical to inquire to what extent truth can be acquired by such means. Can justice in its several forms be served equally well? Would standard forms of prosecution be preferred? Does the amnesty process satisfy various criteria for justice? Does it distort the trial system that societies usually use to punish transgressors and prevent evildoing? Assuming that reconciliation is both desirable and possible, does the truth commission method, with its transparency and attendant publicity, retard or advance the process? How can commissions achieve these goals through the processes of their constituted endeavors and activities, and through the medium of a published report?

Such questions form the core of this book's combined philosophical and pragmatic inquiry. Gutmann and Thompson's chapter raises a central objection to the truth commission endeavor: truth commissions, they write, "sacrifice the pursuit of justice as usually understood for the sake of promoting some other social purpose such as reconciliation." But "trading criminal justice for a general social benefit . . . is, and should be, morally suspect." Indeed, if the moral case for truth commissions in a democratic society is to be made it must satisfy three critical criteria: It must (1) substitute rights and goods "that are moral" and equivalent (or "comparable") to the justice foregone; (2) be broadly inclusive so as to foster social cooperation among *all* citizens who have legitimate claims on the society being reconstructed; and (3) be "moral in practice," and intimately connected to the democratic ethos of the successor government so that the retribution being sacrificed can be appreciated in terms of the realization of specific, not general, forms of societal benefit.

Gutmann and Thompson assert that the mere stability of a successor government would not satisfy the first criterion, with its emphasis on moral goods. Such social stability only becomes morally relevant when it is part of a new, just dispensation or can be shown to promote justice in the future. Those who defend truth commissions therefore must distinguish moral justifications from the interests of individuals or groups.

The second criterion in their scheme does not mean putting such justifications to a referendum. Rather, there is the test of reason. Gutmann and Thompson want truth commissions to be accessible and inclusive, and they are prepared to take into account the previous history of the country and the conflict, with its critical legacy of injustice. Likewise, the third criterion cannot be satisfied by even a fully moral critique of contemporary violence and injustice for the sake of future peace. The commission is justified best that functions in the democratic spirit of the government which it serves.

Gutmann and Thompson, conscious as they are of the postamble that certified an important political compromise, insist that a political compromise is

not necessarily a moral compromise. Providing for amnesty satisfied political needs, not moral ones. What is needed to transform a purely opportunistic, pragmatic political decision into a morally defensible one is the approach that Tutu has articulated so consistently: that criminal justice may be sacrificed for the greater moral justice of enduring societal harmony. This is the restorative justice about which Elizabeth Kiss writes in another chapter of this book.

Tutu also wanted forgiveness and atonement. But those human accomplishments may not be sufficient, morally, to substitute for criminal justice. Forgiveness erases wrongdoing, which has the effect of submitting to evil. According to David Crocker, another chapter's author, "It is morally objectionable as well as impractical for a truth commission . . . to force people to agree about the past, forgive the sins committed against them, or love one another."

Rajeev Bhargava assesses these and other objections to forgiveness. He asks if forgiveness is morally appropriate, and suggests, in any event, that truth commissions cannot bear the burden of bringing about forgiveness by individuals. To forgive is not always appropriate or virtuous. It must, Bhargava concludes, be "consistent with the dignity and self-respect of the victim."

Societal reconciliation is of a different order. Indeed, Gutmann and Thompson claim, "reconciliation is an illiberal aim" if an entire society is expected to embrace one comprehensive moral approach. It is undemocratic, too, for disharmony is desirable and an attribute of a healthy democracy.

A further test of the truth commission method is the extent to which it serves the reciprocal requirements of deliberative democracy. To do so it must practice the democratic principles of the society that a commission is attempting to create. It must share its own views, which the TRC through Tutu has done, with citizens broadly and transparently. Providing a final report that spoke to the entire society also advanced this goal of reciprocity. Unlike a trial, or a series of trials, a truth commission report can express the range of behavior that society needs to judge and condemn, and to which it needs to be reconciled. If it does all that it can do to satisfy such moral criteria, then the goals of societal justice may be satisfied.

The TRC found that the state committed gross violations of human rights, including many of criminal nature. It condoned the extrajudicial killing of political opponents, and colluded with the Inkatha Freedom Party and others. The highest levels of the apartheid regime were responsible for these crimes. Although the "predominant portion" of the gross violations was perpetrated by the state and its agents, the African National Congress (ANC) also blurred the distinction between military and civilian targets. It tortured and killed alleged defectors and collaborators, and thus committed its own gross violations of civil rights. The TRC report named many names, and pulled few punches.⁵ It also uncovered evidence of secret biological,

chemical, and weapons experiments; the TRC exposed South Africa's Operation Coast, for instance, which tested biological and chemical weapons on troops from Mozambique and tried to invent infertility drugs to give to blacks only.

Bhargava's essay focuses on restoring a society's norms of basic procedural justice. A truth commission does so by discovering grave past injustices and by encouraging perpetrators to confess to their responsibilities. Only through those means, Bhargava suggests, can a defeated barbaric social formation gradually be transformed into a minimally decent society. That is the overriding objective of a truth commission. Morality flows from the restoration of confidence in procedural justice.

Bhargava's essay distinguishes between barbaric social formations that are asymmetric, where a controlling political group generates evil, and symmetric ones, in which social and political evil is produced collectively by an entire society. The second kind of barbaric social formation is profoundly amoral. The first, where a dominant group violates norms and the rest of society seeks to enforce the rules of procedural justice, is much more promising. It is particularly promising when the dominant group, despite its massive system of evil, still honors the intent of procedural justice, if more in the breach than in practice. When the dominant group is ousted, procedural justice needs primarily to be restored, not introduced (as it would be after a period of societal collapse and amorality).

For Bhargava's analysis, it is essential that the distinction between perpetrators and victims is fully acknowledged by truth commissions. If not, truth commissions will find it almost impossible to help transform a traumatized, postconflict society into a minimally decent society. Nor would they be able to help societies stabilize a system of basic procedural justice, which must be a critical objective.

Kiss's chapter affirms truth commissions as a modern instrument capable of strengthening civil society and providing restorative justice. Because they are simultaneously investigative, judicial, political, educational, and therapeutic bodies, they can pursue morally ambitious ends of profound value to a transitional society. Indeed, their moral ambition makes truth commissions politically innovative. At the heart of this innovation is a concept of justice that is survivor or victim centered, not retributive. It has been praised for being "moral, cultural, psychological, and human rather than . . . solely legal or instrumental"; in short, "the creation of a nation."⁶

Restorative justice emerges from this desire to create a new nation—the desire to reconstruct a just society. Punishment alone for perpetrators, in accord with prosecutions and the requirements of an arms-length criminal system, hinders the achievement of restorative justice. The better path, the believers in restorative justice suggest, is forgiveness and reconciliation preceded by an accounting of violations, a confronting of perpetrators by victims, repa-

rations, and a continuing emphasis on personal motivations and transformations. It is the individual-centered approach of the best truth commissions that contributes meaningfully to restorative justice.

Truth commissions, Kiss asserts, provide a mechanism to do justice to and to acknowledge that there were victims and perpetrators on more than one side. Commissions can be used in promising ways to advance beneficent societal goals despite competing narratives of oppression, and bitter, if opposite, memories of evil. If the goal is to reorient a society that has lost its moral way, truth commissions are more supple and constructive than criminal trials or forms of lustration (the banning of perpetrators from public office). There is positive value in what truth commissions seek, especially those like the Argentinean, the Chilean, and the South African versions—where the explicit goal was to restore a just society.

Crocker's transitional justice, like Kiss's restorative justice, is general and expansive. Rather than confining transitional justice to penal or retributive justice, Crocker employs transitional justice to encompass compensatory and distributive justice. Wisely, he suggests that the challenge for a new democracy is to respond effectively to past evils without "undermining the new democracy or jeopardizing prospects for future development."

Crocker judges the extent to which truth commissions actually serve transitional justice by how well they ferret out the truth, provide salutary platforms for victims and their kin, sanction violators effectively (a weakness of Guatemala's Historical Clarification Commission), uphold and strengthen the rule of law (critical if the new society wants to distinguish itself from the authoritarianism and institutionalized bias of the outgoing regime), compensate victims through reparations collectively or individually, contribute to institutional reform and long-term national development, reconcile the defeated with the victorious, and foster public debate leading to publicly acceptable compromises.

André du Toit's concept of transitional justice includes truth as acknowledgment and justice as recognition, together providing a coherent alternative to retributive justice. With victims' hearing as a central focus, du Toit suggests that the TRC's form of transitional justice passed moral tests. Differing with Gutmann and Thompson, du Toit avers that moral determination should depend on context; the compromise that was represented by the TRC was justified by postapartheid needs and circumstances.

Chile's special commission compensated the survivors of human rights abuses and the families of victims. The South African TRC's Reparation and Rehabilitation Committee recommended to Parliament who should be compensated, and by how much. But President Thabo Mbeki said that funds were short, and the provision of financial recompense became unlikely. One of the three Sri Lankan commissions of inquiry devoted almost all of its efforts to deciding whom to compensate, and by how much. The principle, which

Crocker supports, is that the truth commission process is complete only when victims obtain financial redress as well as knowledge (“truth”), and a moral sense of completion. Reparations and compensation strengthen the rule of law, reconciliation, and the overall process of institutional reform. Martha Minow feels even more strongly: no long-term vision of social transformation is possible if the need for reparations (such as monuments, parks, and renamed buildings as well as cash) is ignored.

Crocker examines the contribution of national and international civil society (transnational nongovernmental organizations for the most part) to the effective accomplishment of transitional justice. The experiences of Honduras and Guatemala, where civic groups succeeded only partially in influencing their nations’ postconflict attempts to come to terms with human rights abuses, were very mixed, but Crocker argues that a well-informed international or globalized civil society (including agencies of the United Nations, which Crocker assesses) will increasingly reinforce the work of truth commissions in preventing future intrastate conflicts. Never again! will become a greater reality because of the attention of international civil society.

Boraine, the deputy chairman of the TRC and one of those who originally advocated using an elaborated form of the Chilean commission model to deal with South Africa’s “unfinished business” in the aftermath of apartheid, argues for a wide-ranging, powerful, and public investigatory commission capable of extraordinary truth-telling and truth-finding. Creating such a body made it possible to contemplate restoring the nation’s moral order, profoundly jeopardized as that order had been by abuses of the rule of law and of fundamental human rights. An attempt by the incoming ANC-led government to hold Nuremberg-like trials would have antagonized any hope of a peaceful transition. (Ntsebeza, another member of the TRC and its chief investigator, also develops this argument in his chapter.) Granting the agents of apartheid a blanket amnesty would have infuriated the long-oppressed majority. Establishing a TRC was an available middle course, and one advocated by important sections of civil society; indeed, only such a forum could provide a collection of individual, but carefully investigated, amnesties. No other method could have legitimized the amnesty or forgiveness process that was essential, Boraine and others argue, if South Africa were to move peacefully from war to peace. Hence the postamble (recognizing the political compromise that overcame apartheid) and the adding of reconciliation to truth as the commission’s mandate.

Boraine argues that deeply divided societies cannot rely on punishment to heal and reconcile their several communities. He and Ntsebeza explain what the South African Parliament intended by reconciliation and the development of national unity: understanding not vengeance, reparation but not retaliation, and humanness not victimization. The nature of the TRC’s hearings were intended to achieve those goals; its final report (as Villa-Vicencio and Ver-

woerd make clear) was shaped with that same intent in mind. Boraine believes that acquiring a series of individual truths can contribute to the healing process, albeit partially.

In contrast to most other truth commissions, the manner in which the idea of a South African commission was advanced as an alternative to a potentially costly and inconclusive war crimes tribunal, the nature of its mandate and procedures, and the character and composition of its members were decided upon democratically. Other commissions were presidentially appointed and were composed (as in the Chilean case) by leading figures from the old regime as well as the new.

In South Africa, civil society played a large role in composing the commission and its mandate; Parliament, not a president or prime minister, authorized the TRC. Its striking structure and many goals were mandated by an act of Parliament. Its committees—Human Rights (the one that held hearings and made most of the headlines), Reparation and Rehabilitation, and Amnesty—and their functions were laid down in the act. So was its public nature, its powers of subpoena (which the TRC used sparingly), and the procedures by which amnesty could be granted by the committee that subsequently developed into a specialized commission of its own and was not expected to conclude its work until the end of 2000.

Amnesty was never intended to be easily accessible. It was available in South Africa for individuals only; applicants were required to make full disclosure during open hearings. A long list of qualifications limited the consideration of amnesty only to those whose motives and objects were political and subject to the approval of, or were committed at the behest of, a political body. Boraine and others argue that amnesty was the price South Africa had to pay to achieve a peaceful transition and to achieve a “limited” form of justice—to obtain a series of revelatory truths for victims and kin of victims. Ntsebeza says, indeed, that there was no other way. Likewise, in Brazil, Rwanda, and other countries that were at one time overwhelmed by atrocity, it may be impracticable on multiple grounds to prosecute. For retributive justice to have worked for victims, evidence would have been needed, and only through the amnesty procedures could that evidence have been developed.

“The really big maggots are beginning to come out from beneath the stones,” exclaimed the husband and father of two victims of apartheid letter bombs in Angola.⁷ Like so many relatives of victims, he preferred retribution, but he also appreciated that persons like himself would have been unlikely to have learned how and why their loved ones were killed by agents of the old South African state without the availability of amnesty. In these late 1998 and 1999 hearings before the Amnesty Committee of the TRC, several of the more mendacious South African operatives sought idemnity from prosecution in South Africa and, if they could achieve it, protection from extradition to Britain, Angola, and Mozambique.

Demanding truth for amnesty, as did the TRC, is suspect because the confessed guilty go unpunished, and in the case of the killers of Amy Biehl, an American Fulbright student, go free retrospectively.⁸ When the TRC's amnesty committee granted amnesty to four ANC activists who had killed a black Bophuthatswanan policeman in 1986, the committee said that the applicants had fulfilled the two main conditions for amnesty: "telling the truth and proving a political motive." But in the case of the two whites jailed for killing Chris Hani, an ANC leader, in 1993, the committee ruled that they had failed to tell the whole truth and had acted without the authority of their political party. They did not have the necessary "political mandate." Jeffrey Benzien, a confessed apartheid torturer who demonstrated his "wet bag" methods to the TRC, was pardoned for several murders. Eugene de Kock, involved in 107 cases of murder, torture, and fraud, and serving a 262-year sentence in a high-security prison, was among the last to plead for amnesty, and an escape from incarceration and future punishment. Even he was given an amnesty for some of his crimes, but remains imprisoned for many others.

"It stinks to high heaven," said a prominent black editor of the amnesty process. "To imagine that after confessing, these people who committed the more horrendous crimes will then be patted on the shoulder by the TRC," he complained. Indeed, the editor went on, "The TRC is a denial of justice. Without justice, how can the victims feel healed?" For Boraine, forgiveness was preferable to trials that would not only have been costly but could have caused further division in society. "There was no victor and vanquished," he reminded. "Is it not a better alternative," he asked, "to deal with the past through the means of a commission which has a limited life . . . and move forward into the future?"⁹ "We know the decisions are going to upset a lot of people," a spokesman for the amnesty committee said about rulings that indemnified torturers and killers of Africans, "but we really don't have a choice. It is part of the process of reconciliation."¹⁰

Truth for amnesty is said to achieve justice through reconciliation—an "enriched form of justice." But is this special pleading? According to Christian Tomuschat, coordinator of Guatemala's commission, "no one can today insure that [the] immense challenge of reconciliation through truth can be met with success. In order to do so, the historic facts must be recognized and assimilated into each individual consciousness and the collective consciousness."¹¹ If amnesty is allowed, the common conception of justice is subordinated to future-oriented societal moral considerations. Gutmann and Thompson remind us that whatever the claims for an enriched form of justice (e.g., strengthening democratic institutions), there is a moral cost that is significant. It is a cost that the families of Steve Biko and Griffiths Mxenge, murdered by the apartheid regime, have paid. The justice that comes with punishment of perpetrators has been denied them (despite their strenuous protests). Gutmann and Thompson also suggest that a genuinely moral com-

promise implies no blanket amnesties, a condition that the TRC's Amnesty Committee breached in one notorious decision that was subsequently overturned by South Africa's High Court.¹²

Ronald C. Slye supports amnesty as a tool for increasing both the quantity and the quality of information available about the past and its abuses. The South African example is unusually important, he says, because of the innovative nature of the amnesty procedure introduced by the TRC; Slye calls it the most sophisticated ever undertaken for violations of fundamental international human rights. Previously, most amnesties were granted to a cohort, and without demanding testimony. The TRC offered amnesty only in exchange for full individual revelations. (However, the TRC could not later revoke that amnesty if new information were discovered.)

In the search for truth and for individual rehabilitation, the TRC process, unlike that of earlier commissions, provided many of the advantages of a criminal trial. Indeed, Slye's examination of the TRC proceedings found more participation by the accused than in a typical trial. He also discovered that despite the absence of the highly developed rules of evidence, procedure, and proof that govern trials in a Western setting, the quality and quantity of information collected by the TRC was comparable or superior to that which might have been produced in a courtroom.

Another advantage of the process pioneered by the TRC, unlike earlier truth commissions, is that it provided accountability, and thus permitted the possibility of reconciliation. Applicants for amnesty (there were more than 7,000) had to describe their acts, and those seeking amnesty for the most heinous violations of human rights had to participate in public hearings and submit to questions from victims and victims' families. Amnesty applicants were compelled to accept responsibility for their actions. In Sri Lanka, families and parliament refused to accept the amnesty for truth trade-off, and hence received limited answers to questions about disappearances.

In his essay in this book, Kent Greenawalt also asks, "Is the granting of amnesty . . . an injustice?" If it is, can the truth commission process justify such an injustice? Or is it primarily that such an injustice prevents other and larger injustices? One answer is that there are gains in justice from identifying offenders, even if some go free. More will be learned that way. Like Slye, Greenawalt suggests that relying on a truth commission will deliver more justice than criminal prosecutions. But Greenawalt would not want readers to assume that every society would experience "more healing" by avoiding criminal prosecutions. Greenawalt concludes that murderers and torturers do not deserve amnesty; indeed, amnesty for them is not moral.

Greenawalt reviews the American history of granting amnesties and executive grants of immunity (mistakenly called pardons), and provides a detailed checklist of different bases for amnesties. Although political expedience is not justice, amnesties may be highly political and still serve the ultimate ends of

justice. Blanket amnesties are not, however, the best ways to proceed. Moreover, he says, amnesty is not a failure to convict. It is something more, with utilitarian results of importance.

Boraine, along the same line, concludes that the truth commission procedure in South Africa at least “broke” the deathly silence surrounding the grotesque consequences of the apartheid system. The new nation and thousands of individuals achieved an important catharsis. Bringing forth truth about what happened helped to create an open society. In addition to knowledge of specific acts, there was an acknowledgment of individual and group collusion with apartheid. Part of “never again!” is the impossibility, thanks to the TRC, of any South African easily ignoring or dismissing the consequences and atrocities of apartheid. Fortunately, too, the generous amnesty process limited renewed victimization and favored forgiveness, thus contributing to the peace of transitional society, or “stable democratization.” That is true restorative justice.

Ntsebeza, in his chapter in this book, also focuses on catharsis. The TRC, he says, restored to victims of gross human rights violations their civil and human dignity. The truth did set victims and kin of victims free. It also destroyed a culture of impunity on the part of perpetrators. The public shaming that came through the open nature of the TRC procedures substituted reasonably well for penal justice. Exposure is punishment. It is a powerful component of accountability.

If the goal of healing individuals and society in posttraumatic situations is elevated morally and practically, Minow suggests, the truth commission method might be better than the prosecutorial. Litigation “is not an ideal form of social action.” Trials have procedural pitfalls. If resisting the dehumanizing of victims is a societal objective, trials are inadequate. Hence, for public acknowledgement of what happened and who did what to whom, a truth commission provides a safe and effective setting for explicating the truth. In this context, the trade of amnesty for testimony (with amnesty’s ability to encourage the lower-ranking perpetrators to implicate higher-ups) is justifiable.

Trials are assumed to proceed by a strict observance of due process. A serious objection to the truth commission endeavor is its inability to operate according to the canons of that process. The chapter of this book that most fully addresses that issue is Sanford Levinson’s. He cites Chief Justice Earl Warren’s majority opinion in *Hannah v. Larche* (1957), which approved the less than full due process procedures of the U.S. Civil Rights Commission (despite the dissents of Justices William O. Douglas and Hugo Black, two fierce civil libertarians), and supported the flexible quality of due process. This resembles the position advanced by South African Constitutional Court Justices Richard Goldstone and Albie Sachs at a conference in 1998 in South Africa. They both agreed with Levinson that truth commissions need not operate like trial courts

since the objectives of the one differ from the other. Trials might deprive individuals of life, liberty, or property; truth commissions seek to piece together the fabric of the past, and thus can operate best—most effectively—with fairness but without the strict requirements of due process. Truth commissions could accept hearsay, even if they evaluated it critically. Courts could not accept it at all.

Levinson also suggests that the granting of amnesties by truth commissions may be considered a special kind of plea bargain. It absolves a perpetrator of legal liability for terrible acts if he or she spells out fully and accurately the extent of the abuse. By waiving their right to a trial, plea bargainers waive their protection against unfounded accusations, which is what the lack of due process does in a truth commission proceeding. They also forfeit their right to counsel, but in that instance as well as one regarding unfounded allegations, the commissioners themselves can attempt effectively to act to protect the accused as well as the victims. (The Chilean and Sri Lankan commissions refused to name names.)

The use of plea bargaining was extended in the twentieth century in part because of numerical burdens on the judicial process. Hence, if the number of persons potentially prosecutable is too high, a commission method of examination is wise. So is a method that gains the most information (the most truth) with the fewest impediments (but still has safeguards). That is the argument that Levinson presents; it was widely discussed by an array of lawyers and jurists at the 1998 meeting.

There is also the question of trauma as a consequence of a truth commission endeavor. After a detailed assessment of how deep and enduring trauma affects individuals in situations like apartheid, and how psychologists of such trauma believe that sufferers can best recover their lives and senses of self, Minow suggests, in chapter XII, that whereas courtrooms carry memories of repression, hearings before the Human Rights Committee of the TRC did not. They created an atmosphere of trust and safety. The absence of adversariality also assisted. So did the TRC's public ability to acknowledge a victim's pain. (Where the TRC failed, many agree, was in its inability to provide sufficient counseling; the need to help victims overwhelmed all the resources available to the TRC.) The TRC proceedings would have failed to provide restorative justice if they had not been seen to be fair, compassionate, and far-ranging.

Minow believes that truth contributes more to reconciliation than does justice. Similarly, she favors final reports that lay out detailed narratives based on the cumulative testimony of perpetrators and victims alike, not a verdict. Commissions can express the complexity of events; tribunals cannot. This process can restore justice through accountability and societal repair, not retribution.

Reports produced by truth commissions follow a process that is less like those of working historians than are criminal trials. Charles Maier, in his chapter, affirms historians' interest in affixing responsibility, which is also the aim of most trials. Truth commissions are less able than either historians or jurists to reach an aggregate judgment about the context of societal responsibility, concentrating as they do on disclosure and contrition. Historians give protagonists their due by exploring their possible choices. Doing justice and doing history, Maier says, are akin because they produce a narrative that is both synthetic and open to conflicting testimony. The narrative is also meant to be coherent, one that interprets, explains, and records. Trials and historians focus on causality, and build a case based on a chain of verifiable events. Judges and historians, at their best, display jurisprudential wisdom.

Truth commissions can also collect materials for a narrative. They may help render what Maier calls weak retributive justice. It may be emancipatory, but a truth commission inevitably produces less than history. Historians, he predicts, will use truth commission revelations of coercion and abuses of power, but will integrate such truth commission findings into a wholly different framework. Historians evaluate issues of complicity and a chain of events that extends both temporally and morally beyond that usually considered by truth commissions. History is rendering justice to the nuanced complexities of different assumptions and divergent views of a chain of events, and all within a single, unified narrative that is much more than a compromise. In that sense, historians have an obligation to render judgment, not to reintegrate a society or attempt to heal victims. It might be harder to satisfy historians than it is victims and kin who want to know what happened, or who did what to whom. Historians want much more.

The legislative act that created the TRC committed the commissioners, in their final report, to "establish as complete a picture as possible—including antecedents, circumstances, factors and context of such violations as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations."¹³ But Villa-Vicencio and Verwoerd, who helped to write the report, explain that the TRC could hardly provide a complete picture. A lack of resources limited the commission's staffs' ability fully to investigate a number of barbarities. The TRC was unable to do so in the time available (three years was long enough to open festering sores but too short to have enabled the TRC to follow up all of the potential leads its witnesses and its own investigations suggested). Its mandate also confined the commission to an investigation of a narrow range of violations that had occurred within thirty-four years (not the whole period of apartheid), and to limit it to those who had suffered gross, not everyday, abuses.

Villa-Vicencio and Verwoerd see the report as a road map rather than a comprehensive history. It is less an expansion of the truth than a reduction in

the number of lies about apartheid that can be circulated unchallenged.¹⁴ The final report presents decisions in individual cases based on a balance of probability (rather than beyond all reasonable doubt), given the evidence offered to the commission and an honest attempt on the part of the commissioners and their staff to examine that evidence and corroborating material in an unbiased manner. Ultimately, the report balances precariously but precisely between the TRC's responsibility to the public interest and to individuals who may be harmed.

Villa-Vicencio and Verwoerd treat as sacrosanct a commission's obligation to accept what went wrong in the past, without rationalizations, and why. Equally sacrosanct is an obligation to promote national unity on the basis of the full acknowledgment of evil. To fail effectively to acknowledge the extent to which an individual, a state, or a liberation movement violated the rights of others "is to fail to give a full account of the past." It would be immoral and irresponsible to sidestep that challenge.

This book seeks to confront that and many other formidable questions. It does so in multiple iterations, for the contributors accept some but not all of the premises of their colleagues. Where they agree with others' premises, they sometimes argue differently. Since they bring the perspectives and training of political philosophers, political scientists, historians, lawyers, theologians, psychologists, and physicians to bear on the myriad issues that affect conclusions about the truth commission process, it is hardly surprising that they speak with more than one voice. Yet, in composite form, that voice is remarkably supportive of the value of truth commissions for developing truth in postconflict societies. There is less agreement, however, about the possibility of achieving societal reconciliation as a result of truth commission activities. In that regard, several of the authors of this book would not be surprised by the results of public opinion polls: an A. C. Nielsen–Market Research Africa survey reported that two-thirds of the South Africans asked believed that the TRC's investigations had led to a deterioration of race relations. An earlier survey by MarkData found that a majority of whites, coloureds, and Indians, and a third of Africans, believed the TRC to be biased and unfair. The leader of the National Party suggested that the people of South Africa were "further apart than when the Truth Commission started."¹⁵ But the contributors to this book, like their South African colleagues in the meeting at Somerset West, feel that such judgments are premature and situational.

The contributors to this book believe the South African TRC remains the most far-reaching, and the most effective of its genre. Indeed, it is obvious that truth commissions as a whole would have been judged more harshly by this volume's authors if the extraordinary work of the TRC had not been before them. Thus, this volume is about both truth commissions as a genre and the practice of truth commissioning as performed specifically in South

Africa. Its conclusions apply to both the general and the specific, particularly since the South African commission's mandate and procedures will become the starting point for all future truth commissions. It is the prescription for the next commissions, whether in the Balkans, in Cyprus, or elsewhere in Africa.

Notes

1. Mary Burton, in summary (16) of Somerset West meeting between the authors of this book, the TRC, and invited South African jurists and academics, May 1998.

A much more pointed critique of the TRC appeared in mid-1999. Anthea Jeffery, in an analysis of the *Final Report* of the commission, called the work of the TRC fatally flawed. It distorted rather than produced "truth." Her *Truth about the Truth Commission* (Johannesburg, 1999) argues that the TRC relied too heavily on testimony not given under oath and not subject to rigorous cross-examination. Of the more than 22,000 statements by victims, more than 17,000 were based on hearsay. Moreover, when the report was published, only 102 of the 7,000-plus amnesty applications had proceeded through public hearings and thus been subject to cross-examination. In reviewing several instances of massacres and other atrocities, Jeffery also bases her criticisms on the TRC's rejection of official inquest findings, but without convincing explanation.

2. Archbishop Tutu, statement on Truth and Reconciliation, quoted in the *Boston Globe*, 7 August 1998.

3. Albie Sachs and Leon Wessels, speaking at the Truth v. Justice conference in Somerset West, referred specifically to the postamble to the interim South African constitution. It laid out the compromise that resulted in the TRC. See also the chapters in this book by Ntsebeza and Minow.

4. See Martha Minow's chapter in this book for the argument and the context.

5. Excerpts from the *Final Report* of the TRC, *New York Times*, 29 October 1998.

6. Albie Sachs, quoted in Alex Boraine and Janet Levy (eds.), *The Healing of a Nation?* (Cape Town, 1995), 103; Sachs, quoted in Alex Boraine, Janet Levy, and Ronel Scheffer (eds.), *Dealing with the Past: Truth and Reconciliation in South Africa* (Cape Town, 1994), 146.

7. Marius Schoon, quoted in the *New York Times*, 9 September 1998.

8. On July 28, 1999, the TRC freed the four African killers of Amy Biehl. They had served three years of their eighteen-years sentence for murder. But the TRC decided that they deserved amnesty since their crime was politically motivated. *Boston Globe*, 29 July 1998.

9. *Boston Globe*, 9 September 1998; *New York Times*, 8 April 1999; *Christian Science Monitor*, 9 July 1999.

10. Mdu Lembede, quoted in "S. African Amnesties Reopen Old Wounds," *Boston Globe*, 20 February 1999.

11. Quoted in "The Atrocity Findings: The Historic Facts Must Be Recognized," *New York Times*, 26 February 1999. One critic of the TRC saw its effects as an attempt to execute, shape, and correct memory as needed "to serve as backbone to the new

history of the new nation.” Breyten Breytenbach, *Dog Heart: A Memoir* (New York, 1999), 21.

12. In late 1997, the Amnesty Committee of the TRC gave blanket immunity to thirty-seven key officials of the ANC. None had appeared before the committee or explained themselves in public. The court overturned the amnesties in May 1998.

13. Promotion of National Unity and Reconciliation Act, no. 34 (1995), Section 3(1)(A). Technically, the *Final Report* is an interim report, with a final *Final Report* meant to be produced in 2000 or 2001, when Amnesty processes conclude.

14. See Michael Ignatieff, “Articles of Faith,” *Index on Censorship* V (1996): 113. See also Jeffery’s critique, in note 1.

15. The Nielsen–Market Research sample was 2,500 persons. The results were reported and summarized in *Southern African Report*, 31 July 1998, 4.