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Amnesty in exchange for truth: Evaluating the South African model

MANY PEOPLE from around the world have asked me to what I attribute the achievement of the South African Truth and Reconciliation Commission. In my response I have referred to a number of favourable conditions which helped the Commission to achieve a degree of success in relation to its stated objectives.

Firstly, as has already been mentioned, the ANC was the first body to call for a truth commission. In other words, from the very outset the largest political party favoured such a commission and took this commitment with them when they became the new government in South Africa. Without this it would have been impossible for the Commission to come into being and to emerge as the important contributor that it became to truth, knowledge, acknowledgement, and accountability.

In an unpublished paper entitled 'Fourth D.T. Lakdawala Memorial Lecture', Judge Albie Sachs refers to the seminal meeting of the ANC National Executive Committee in August 1993 at which the recommendation was made for a truth commission to be appointed in South Africa. He describes it vividly: 'It was a passionate meeting, sharp, uncomfortable. The issue was how to respond to a report of a commission of inquiry set up by the ANC to investigate violations of human rights committed by ANC cadres in Angolan camps during the liberation struggle.'[1] The report of the Motsuenyane Commission had left no doubt that members of the ANC security forces had

committed gross human rights violations in dealing with those who for one reason or another had been placed in captivity in the ANC camps.

This was clearly a very sensitive issue and one which caused a great sense of embarrassment and shame to many, but also anger that they, as a liberation movement, should be criticised in this way in the face of the overarching violations that had taken place at the instigation of the state. It was critical for the future development of a human rights culture that the ANC did not sweep these serious allegations under the carpet. To their credit, they decided that it was impossible to ignore the findings of the commission and that there had to be a serious response to serious charges. Again, in the words of Albie Sachs,

> Some people said forcefully: we set up the Motsuenyane Commission, it has reported, we have to follow through. And others responded with equal vehemence: how can we do that, we were fighting a freedom struggle in terribly difficult conditions in the bush in Angola, the enemy was ruthless and they stopped at nothing, we had young people quite untrained in interrogation techniques, they did their best, they protected the leadership, how can we punish them now?[2]

Clearly, it was a moment of crisis. Against those who argued that the ANC should do nothing, Pallo Jordan, who later became Minister of Environmental Affairs and Tourism, stood up and 'with his well elocuted, high pitched voice said, "Comrades, I've learnt something very interesting today. There is such a thing as regime torture, and there is ANC torture, and regime torture is bad and ANC torture is good; thank you for enlightening me!" And he sat down.'[3]

In light of the ANC's subsequent displeasure with the TRC, followed by Deputy President Thabo Mbeki's criticism of it during the discussion in Parliament on the TRC report,[4] it is important to bear in mind Jordan's ironic comment, and we will need to return to it.

After a long discussion, according to Albie Sachs, someone stood up in the meeting and asked, 'What would

my mother say?' Albie Sachs explains that the figure of 'my mother' 'represented an ordinary, decent, working-class woman, not sophisticated in politics but with a good heart and an honest understanding of people in the world, a person whose hard life experiences had promoted a natural sense of honour and integrity'. The person who raised this question went on to say that the 'mother' would consider the ANC to be completely mad. Here they were, examining with deep agony their own weaknesses and faults, but in the meantime those responsible for state violence, those accused of a crime against humanity, were apparently getting away scot free.[5]

It was at that moment that Kader Asmal stood up and said, 'The only answer is a truth commission which can look at the violations of human rights on all sides from whatever party.' It is not clear whether Albie Sachs is quoting Kader Asmal directly, but he continues, 'human rights are human rights, they belong to human beings, whoever they might be. Any torture or other violation has to be investigated on an even-handed basis across the board, not just by one political movement looking at itself, but at a national level with national resources and a national perspective.'[6]

But the major point that concerns us here is that the ANC decided not only to face up to the charges against them in terms of gross human rights violations, but also to enlarge the terrain so that all human rights violations committed in the past would come under the spotlight. It was this commitment by the leadership of the ANC which of course made it so much easier for the Truth and Reconciliation Commission to come about.

The fact that the ANC won the election by an overwhelming majority enabled them to push swiftly for the appointment of a truth commission. It also meant that they were willing and ready to commit financial resources so that the Commission could be conducted efficiently and effectively. There are many countries that have considered the same approach, but simply lacked the backing of the government and/or the financial resources which are

necessary for such an undertaking. Such support enabled the Commission to hire premises, to have a very large travel budget enabling commissioners and staff to travel throughout South Africa, and of course to hire an adequate, professional staff which, at the height of the Commission's life, numbered more than 300 people.

The second favourable feature which gave both prominence and stature to the Commission was the person of Nelson Mandela. He is the embodiment of truth and reconciliation in his own life and person. I am still amazed at the remarkable lack of bitterness that he has consistently displayed. From the day of his release to the present time, he has focused on the need to come to terms with the past, but always with a readiness to forgive and to move on. It is not merely in the words that he uses, powerful as they are, but in his actions of reaching out to the very people who had put him in jail, who had kept him there, who had decimated his own party, who were responsible for torture and deprivation, detention without trial, mass removals, and so on. He stretched out a hand of reconciliation and friendship.

There are countless examples to illustrate this. One which had a bearing on our own work was told to Desmond Tutu and me during one of our breakfast meetings with him. Mandela told us that he had been approached by the head of his security unit, who informed him that he was going to release one of the security officers protecting him because it had been discovered that this particular young officer had been directly involved in the bombing of Khotso House, the headquarters of the South African Council of Churches, in 1988. Mandela told us that he had informed the head of security that he knew the young man, that he felt that this was something that had happened in the past, that he should be given another chance, and that he, the President, would not allow the officer to be removed from his personal protection unit. A couple of days later the young man came up to the President and began to thank him for having faith in him, but then broke down; he started weeping and expressed his appreciation to Mandela

for giving him a second chance. It is this spirit which infused the Commission itself and led Tutu on many occasions to echo it by stating, 'There is no one who is devoid of possible redemption. We cannot give up on anyone.'

The fact that the President supported the establishment of the Commission, and that he was directly involved in appointing the commissioners and selecting the chairperson and deputy chairperson, gave the Commission his personal stamp, not so much of authority but of compassion and support. Throughout the life of the Commission he insisted on its independence, but was never slow to defend it when it came under severe attack. I remember one occasion when General Bantu Holomisa testified before the Human Rights Violations Committee and made some very serious allegations about members of Mandela's Cabinet. Holomisa at the time was a senior member of the ANC and served as a deputy minister. Very soon after that he was sacked from his post and was strongly criticised by the ANC for his disloyalty. What troubled us was not that the President had decided to fire one of his own ministers and appoint someone in his place; that was his right and his business. What concerned us was that it might discourage other ANC people from coming to the Commission. I made a press statement to that effect. President Mandela replied quite strongly in his own press statement, saying that it was his right to appoint members of his Cabinet and deputy ministers, and that he didn't have to give any reason for doing so. I was pursued by the press to respond and I simply stated, publicly, that I would be writing to the President. Very soon afterwards I was asked if I had heard from him. I reiterated that I had written to him and was awaiting his reply. The next day I received a call from Mandela indicating that he had not received my letter, that he received over 1000 letters a day, and that the special group charged with the responsibility of passing on to him only those letters which were appropriate had erred in not putting my letter before him, because he personally wanted to see all communications from the TRC. He then asked if I would come and see him immediately.

I went that afternoon and told him that we as a Commission had never demanded that reasons should be disclosed for General Holomisa's dismissal, nor were we interested in interfering with the normal process of government or of party politics. I did say to him, and had stated this in my letter, that it would be 'unfortunate and of great concern to the Commission if General Holomisa's dismissal discouraged people from coming before the Commission'. I added that it would be helpful if it could be made clear that these events would in no way affect the support which the ANC had given the Commission thus far. His reply was that he agreed with what I had said and that he would welcome a public statement from me to that effect. I immediately issued a statement informing the public of our meeting; I said that there was no conflict between the President and the TRC, and that the ANC and the President in particular reaffirmed their request to all South Africans to cooperate in every possible way with the Commission. This is one of many examples of Mandela's fairness and his readiness to support the TRC.

He was enormously supportive of Tutu and me; he would take it upon himself to call us at times of extreme stress and would invite us to meet with him, usually over a very early breakfast, never to tell us what to do but to allow us to tell him what we were doing and what our concerns and anxieties were. There is no doubt that there were times when he disagreed with the actions we took. I think he hoped very much that we would simply ignore former State President P.W. Botha, and was not happy that we finally subpoenaed him. His own actions in telephoning Botha, urging him to appear before the Commission, offering to accompany him to the hearing, and discussing the matter with Botha's immediate family and friends are an indication of his total commitment to reconciliation rather than recrimination. But never did he intervene and suggest that we should stop what we were doing or do something that we were not doing. His persona reflected all that was good about the Commission – a deep horror of human rights violations, an anger at the horrific treatment

of so many hundreds and thousands of people, and yet a commitment to truth which would simultaneously work towards reconciliation. There are many countries whose representatives came to South Africa and many countries to which I travelled whose people were deeply envious, with good cause, of the fact that we had such a person as Nelson Mandela as the leader of our fledgling democracy, but no one appreciated him more than those of us who were in the cauldron of the Commission. It certainly assisted us enormously to do the work entrusted to us.

A third favourable condition was that the Commission was building on the successful political negotiations which had led to peaceful elections and the appointment of a democratic government. There was a sense that if we could succeed in the almost impossible task of bringing former enemies together at the table to negotiate a new Constitution and a new administration, then we could also try to deal with the past to help to consolidate that new democracy and to build a human rights culture, which until that time had never existed in South Africa.

A fourth feature was the existence of a very strong civil society. The fact that the overwhelming majority of South Africans had for so long been excluded from the parliamentary process and government at local, regional, and national level meant that there had been no point in forming political parties; a great deal of innovation, energy, and passion had therefore gone into the development of a strong civil society with one of the largest numbers of non-governmental organisations in the world. Some NGOs focused on legal issues, others on education, others on matters of religion, others were committed to caring for the victims of apartheid; they were involved in almost every area of life in the country. This meant that when the decision was made to have a truth commission in South Africa there were many who had had long experience working within NGOs who were available to serve on the Commission, as senior committee members and staff. It also meant that there was a cradle of support, and many

NGOs were directly involved in the numerous drafts of the Bill which finally became law.

After all, it was an NGO, Justice in Transition, that had created opportunities for conferences, workshops, discussion, and debate about the TRC, thus ensuring a very strong democratic process. Throughout the life of the Commission, a number of NGOs were directly involved, and many of them did outstanding work. But I think that the very busyness of the Commission made it impossible for ideal cooperation to exist, and the Commission itself must take some blame for not having had an even closer marriage with civil society. Some of this was by design, due to the belief that the Commission ought to keep a distance from various NGOs which had been very clearly anti-apartheid and therefore could be seen as being partial, for partiality was one thing the Commission sought to avoid. It is clear to me, however, that without the help of so many South Africans who had been directly involved in one NGO or another, the Commission would never have been able to achieve what it did.

A further factor which assisted the Commission was the interest of the international community in its initiative. Not only were many governments, institutions, organisations, and individuals willing to offer advice, but several governments responded to our request for assistance, with direct financial contributions to the President's Fund, the fund set up to help victims with reparation and rehabilitation. In addition, a number of countries agreed to second staff, mainly policemen and women who could assist our Investigative Unit in their huge task of following up the stories told by victims and perpetrators. They not only provided a far greater degree of impartiality, but accepted responsibility for their airfares, accommodation, and salaries, so that we could have more than sixty investigators from the international community and South Africa working throughout the life of the Commission.

Another condition which has earned both praise and criticism was the religious character of the Commission. I

have already indicated that the overt religious character exemplified by Desmond Tutu, the ecclesiastical dress, the offering of prayers, and the use of Christian metaphor was both positively and negatively received. When the commissioners were first appointed, a special service of dedication was held in St George's Cathedral in Cape Town. While it was a Commission decision, it was certainly at Tutu's suggestion. At the service, which was attended by political, community, and religious leaders in large numbers, there was participation from Muslim and Jewish community leaders, who led the congregation in prayer. There were readings from sacred texts by members of the Buddhist, Christian, and Muslim communities. There was also a time of silence so that people from any religion, or no religion, could simply reflect on the challenge of searching for truth and working towards reconciliation. Each commissioner was called by name to move forward and receive a candle and an olive branch. Each candle was then lit from the large peace candle and the commissioners stood in a semi-circle facing the congregation. Following the order of service, the words of dedication were read by the congregation:

> We call upon you who have been appointed as commissioners of the Truth and Reconciliation Commission to acknowledge and recognise as a sacred trust the awesome responsibility that has been given to you.
>
> We pledge you our support and give you our blessing in the task that lies before you. And we ask that, in your work for truth and reconciliation, you will be guided by a wisdom greater than your own, a wisdom that knows and encompasses all truth.
>
> Will you dedicate yourselves to carry out the task that has been entrusted to you with the highest integrity, with impartiality and compassion for all, for the purpose of healing our nation?

The commissioners responded one by one, 'I will.' The service of dedication concluded with an address by President

Mandela, a response by Archbishop Tutu, and the singing of the national anthem, 'Nkosi Sikelel' iAfrika'.

I was somewhat critical of the general emphasis on the Christian faith, but there were many others who offered even sharper criticism than I did. Some felt that it excluded those from other faiths and thereby diminished the value of the Commission's work. Others who were of no particular faith felt embarrassed by the prayers and the singing of hymns and the occasional sermon at the end of the day's proceedings.

Against this criticism it must be noted that religion has played a dominant role in South African society. In the 1991 census more than 70 per cent of those who responded indicated some relationship with one or other of the major denominations of the Christian church. The remarkable growth of the so-called African independent churches is a further indication of the importance that religion plays in the day-to-day life of the overwhelming majority of people in South Africa. Of course it is true that there were many, particularly in the Dutch Reformed Church, who used religion to support the pernicious doctrine of apartheid and all its attendant horrors, but there were also many who, in the name of their Christian faith, opposed apartheid. Even when we as a Commission made no attempt to begin the day's proceeding with prayer or hymns, such action often came quite spontaneously from those who were attending.

One example occurred during a particularly difficult hearing in the small township of Boipatong. On 17 June 1992, forty-eight people, many of them women and children, had been massacred there. We therefore went there with a sense of foreboding. It was a cold and gloomy day, and people huddled together in the dilapidated hall in their hundreds. All the memories of that fateful night when so many people were killed in their homes came crowding back. The hall seemed full of ghosts. I stood outside in the minutes before the proceedings started. I was very nervous, as I think were my fellow commissioners. As we went into the hall we heard the sound of singing. Quite

spontaneously, those depressed, poor people of great sorrow and loss had started to sing a well-known hymn. It filled the hall, bringing a measure of light and hope, and was an indication of how religion, in the best sense of that word, had given an enormous amount of security, of comfort, to so many black people in particular who had had no place in the white man's scheme of things.

In other words, the search for truth, the truth-telling, was not something foreign. It was something that many, many people had experienced to a degree in their own churches and cathedrals. So, too, the commitment to reconciliation. This was a theme which resonated with so many of the victims who came to the Commission. Thus, even though there is certainly room for criticism, I think the religious nature of the wider South African community helped the Commission in its work. In a later chapter I will refer directly to the concept of *ubuntu*, which is very close to religious culture and African values.

A final factor which I think assisted the Commission enormously was the person of Archbishop Desmond Tutu. There is no doubt that the commissioners who were appointed had been publicly tested and tried, and each, in his or her own way, had a contribution to make, and made it. However, none of us was indispensable. There were other South Africans who could have served equally well on the Commission. With one exception. I don't think the Commission could have survived without the presence and person and leadership of Desmond Tutu. A Nobel Peace Prize laureate and a tireless fighter for justice in South Africa, he was a household name long before he came to the Commission. He had demonstrated in his life and work an enormous compassion for the underdog. His sense of humour, his twinkling eyes, his tiny stature, his presence rather than his performance, meant that he was and is an icon in South Africa. His choice by President Mandela was an inspired one. He assisted the Commission enormously in every possible way to become an instrument for healing, perhaps because he always saw himself and his colleagues on the Commission as wounded healers, not better than

anyone else, not wiser than anyone else, but simply people who had been given a job to do and who cared very deeply for victims and perpetrators alike. As Antjie Krog puts it,

> The process is unthinkable without Tutu. Impossible. Whatever role others might play, it is Tutu who is the compass. He guides us in several ways, the most important of which is language. It is he who finds language for what is happening. And it is not the language of statements, news reports and submissions. It is language that shoots up like fire – wrought from a vision of where we must go and from a grip on where we are now. And it is this language that drags people along with the process.[7]

These, then, are the favourable conditions which assisted the Commission to do its work. There are, moreover, some unique features which distinguish the South African model from any other truth commission that has taken place anywhere else in the world, and we will consider these now.

IT IS IMPORTANT to emphasise that the Commission was unique in nature and form. It is the only truth commission which has included amnesty as part of its proceedings. Every other commission has happened after, or has resulted in, a general amnesty. When we consider the nature of the South African amnesty provisions later in this chapter, we will look more carefully at the comparisons and contrasts, but suffice to say now that the main distinctive feature of the South African Commission is that it included not only victim hearings but also amnesty hearings. This was a very ambitious undertaking, and not without considerable risk. When the decision was first taken not to declare a general amnesty, there were many who stated that very few people, if any, would seek amnesty in light of the conditions that were imposed. We ourselves as a Commission never anticipated that we would receive nearly 8000 applications.

In the words of the Promotion of National Unity and Reconciliation Act itself, the Commission was charged with firstly 'facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of the Act', and secondly 'establishing and making known the fate or whereabouts of victims and restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims and by recommending reparation measures in respect of them'. The holding in tension of these two objectives gave a unique character to the South African Commission.

It has already been emphasised that another distinctive feature of the South African Commission was the democratic process that was followed. We need not go into detail here, except to stress that the role of civil society, the churches, opposition parties, and the government in drawing up the Act ensured maximum participation. The several drafts which were freely available to any person or organisation, the number of workshops and conferences held throughout the country, the public hearings by the parliamentary Portfolio Committee on Justice, and the manner of selecting the commissioners resulted in widespread participation. The fact that it was not a presidential commission, appointed by the President, but a commission established by a democratically elected Parliament, is also unique.

Thirdly, the proceedings of the TRC, unlike the Argentinian, Chilean, and Salvadorean commissions, or any others, were not held behind closed doors, but were open to the public. This resulted in maximum transparency as well as remarkable participation by many in South Africa and beyond her borders. We debated for a fairly long time whether or not we should allow cameras into the open hearings. What concerned us was that the cameras might intimidate victims who were already facing the challenging task of telling very personal and horrifying stories. We consulted widely and in the end made the

decision that cameras would be permitted, but that there would be a measure of control to protect victims from abuse. The general view among the NGOs which we consulted was that the stories the victims were going to tell were stories that the whole of South Africa needed to hear. I have no doubt that this was the right decision, and we were extremely well served by the media's coverage of the Commission and its hearings throughout its life. On the whole, the media were very cooperative, and the Commission was able to reach an agreement on guidelines for the presence of cameras at hearings. Overall, I think these guidelines met the criteria required for good media coverage but at the same time ensured dignity and sensitivity.

The judges serving on the Amnesty Committee were initially adamant that they would not allow cameras in their hearings. They were accustomed to the normal dignity of a court and felt that the cameras were a foreign intrusion and should not be allowed. I recall vividly the meeting Desmond Tutu and I had with the three judges at Bishopscourt to try to reach an agreement on this difficult issue. The Commission had already made its decision, but we felt that we had to give consideration to the judges and their concerns. We met over supper and we put our case as best we could. They were quite stubborn and were not inclined to change their minds. What I think decided the issue in the end was not the meeting of minds but the fact that there was a very important soccer match that Tutu wanted to watch on television, and so he finally said, 'The Commission has decided. We have listened very carefully to your objections, but they are overruled and now I must go upstairs!' He padded off in his tracksuit and left me with the three judges. One of them simply put his head on the table and bewailed, 'This is supposed to be a democracy!' After further discussion, feathers were smoothed and the judges grew a little calmer and agreed to allow, at least on an experimental basis, the use of cameras in the amnesty hearings. We never heard another word on the subject, and cameras were used in all public hearings.

I think what was appreciated by many, particularly in the rural areas of the country, was the opportunity to participate in four hours of live radio coverage every day, which, of course, included hearing the victims speak in their own language without commentary. Many people in South African can neither read nor write and depend on radio for information. Radio penetrates even the most remote areas of the country, which again meant that people who could never get to a public hearing, who knew very little about the finer details of the Commission, could listen and could participate in the hearings. There were regular features on all SABC news bulletins. There was also a regular forty-five-minute summary on television each Sunday evening, presented by Max du Preez. Tribute should be paid to Du Preez and his crew for the sensitive and professional way in which they covered the preceding week of TRC hearings. This particular programme attracted one of the largest audiences each week.

A further advantage of full media access to the public hearings was the generation of film and photographs far in excess of what has appeared in the media. This material will hopefully be used in the proposed archive for the benefit of scholars, academics, and interested parties for many, many years to come.

Finally, because the Commission decided not to hold public hearings in the major centres only, but travelled the length and breadth of the country, many people could attend these hearings and participate personally in the ritual which was being played out in the work of the Commission.

A fourth unique feature of the South African Commission was the powers granted to it by the Act. These included search and seizure as well as subpoena powers. The former was particularly important because we knew that long before the 1994 election, instructions had been given for the destruction of documents. This would have denied us access to a great deal of material and we were quite sure that certain state departments which were opposed to the new democracy would attempt to destroy even more

material or at least confiscate it and spirit it away. We also appreciated that many civil servants would do their best to obstruct the Commission's work. The powers of search and seizure were therefore extremely useful and were used on a number of occasions, particularly with regard to the former South African Defence Force.

The power of subpoena was used more as a threat than anything else. We rarely had to make use of it, but in the case of P.W. Botha it was of vital importance that we had this power. As I have recounted in Chapter 6, the former State President not only ridiculed the Commission and dismissed it with contempt, but also made it very clear that he would not attend any of its hearings. After thinking long and hard, we decided to subpoena him. We served the subpoena on his lawyers, but it was dismissed out of hand. We had no alternative then but to cite him for contempt, and we handed the matter over to the Attorney-General in Cape Town. After careful consideration the Attorney-General decided to proceed against Botha, and he was tried in a small magistrate's court in the town of George. Although his appeal was upheld, the sight of the once very powerful head of the armed forces, who had virtually held life and death in his hands, having to appear in court was a strong reminder that no one is above the law. Without the power of subpoena we would not have been able to bring so powerful a leader to answer to the law of the land.

In most instances we started off by inviting people who we thought had information that was necessary for us to fulfil our objectives. In the majority of cases the people who were invited, particularly from the police and the military, agreed to attend the hearings, and those who initially declined and were warned about the possibility of a subpoena very quickly changed their minds.

A fifth unique feature was the extensive mandate which the Commission chose to adopt. Instead of confining itself to hearing individual victims of human rights violations and perpetrators applying for amnesty, the Commission decided to hold special hearings and institutional hearings, because of apartheid's impact on every

area of life. As has already been discussed, the major benefit of following this course of action was that it gave institutions and senior people in those institutions an opportunity to account for the role that they played in the apartheid years, and also to point towards a new dispensation where institutions could be much more accountable in terms of fundamental human rights.

Commenting on the Commission's five-volume report, Albie Sachs states,

> It is not a dry governmental report, but a passionate memorial that resonates with the emotion of the hearings themselves. In addition it contains a serious reflection on how evil behaviour is condoned and spreads itself and on what institutional mechanisms and what kind of culture are necessary to prevent its reappearance.

He adds, 'That was one of the greatest objectives of the Commission, not simply to let the pain come out but to explain the conditions that permitted gross injustice to flourish and so to ensure that these things did not happen again.'[8]

Some argue that by focusing on gross human rights violations the Commission let off the hook the beneficiaries of apartheid, who were able to ascribe the responsibility for the worst of these atrocities to the police, the military, and the liberation movements. But this is to miss the impact of the hearings, which made it impossible for the beneficiaries to persist in denial. Furthermore, because there were institutional and special hearings, many powerful people who complied with apartheid could not escape their own accountability. As Albie Sachs puts it,

> Business, where were you? Business was making money, business was cooperating directly with the security forces, supplying explosives, trucks and information. The press, where were you? There were some brave newspapers and wonderful journalists, but by and large the press was racist in its structure and fearful in its thinking. The legal profession, the judges, where were you? We judges, old and new, had hard debates in our own ranks. The strongest view was that the judiciary had contributed substantially to injustice by enforcing racist laws and showing an unacceptable lack of vigilance in the face of accusations of torture and abuse.[9]

In the recommendations made by the Commission to government it is hoped that the lessons learnt from sins of omission and commission, not only by individuals, political parties, and state machinery, but also by institutions, will guide all of us into a more decent and just society.

A last point to stress is that after considerable discussion it was decided that the Commission would make public the names of the alleged perpetrators. This was in strong contrast to the Chilean and Argentinian commissions. Some names were mentioned in the Salvadorean Commission, but those people were immediately granted general amnesty by the President of that country when he received the report. We decided that the naming of perpetrators, while raising the risk of denying due process, was important in terms of accountability and acknowledgement. The main point was that we gave people who were named an opportunity to make their own response. We followed this procedure in the hearings, where we stressed that at the time of the hearing no findings were being made. Before we included names in the final report, we sent notices informing people of our intention, and invited them to respond in writing if they had any objections to being so named.

As already indicated, one of the most far-reaching unique features of the Commission was its approach to amnesty, and we will need to consider this in some detail.[10]

Amnesty was made possible in exchange for truth. The South African model was very different from one that grants general amnesty. Firstly, amnesty had to be applied for on an individual basis; there was no blanket amnesty.

Secondly, applicants for amnesty had to complete a prescribed form, published in the *Government Gazette*, which called for very detailed information relating to the specific human rights violations. Thirdly, applicants had to make a 'full disclosure' of their human rights violations in order to qualify for amnesty. Fourthly, in most instances applicants would appear before the Amnesty Committee, and these hearings would be open to the public. Fifthly, there was a time limit set in terms of the Act. Only those gross human rights violations committed in the period 1960 to 1994 would be considered for amnesty. Furthermore, there was a specified period during which amnesty applications could be made, from the time of promulgation of the Act in December 1995 to 10 May 1997.

Only those acts which were demonstrably political would qualify. These were to be judged according to strict criteria:

> Whether a particular act, omission or offence ... is an act associated with a political objective, shall be decided with reference to the following criteria:
> - The motive of the person who committed the act, omission or offence;
> - The context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
> - The legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
> - The object or objective of the act, omission or offence and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
> - Whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation,

> institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
> - The relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued.

However, acts committed for the following reasons would not qualify:

> - For personal gain: provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or
> - Out of personal malice, ill-will or spite, directed against the victim of the acts committed.

The provision of amnesty to perpetrators of gross human rights has been and remains a source of heated debate and controversy in the international human rights community. South Africa, despite the uniqueness of its amnesty provisions, has not escaped this debate. Many prominent jurists and human rights activists are utterly opposed to any form of amnesty; this opposition arises in the main from the many cases of general or blanket amnesty which have been granted in countries that have moved from dictatorship to democracy. The following quotes sum up the contradiction in 'blanket amnesty':

> 'How can I ever have peace when every day I risk meeting my unpunished torturer in the neighbourhood?' – tortured ex-political prisoner, Argentina

> 'How is reconciliation possible when lies and denials are institutionalised by the responsible authorities?' – human rights activist, Chile

> 'No government can forgive, no commission can forgive. They don't know my pain. Only I can forgive and I must know before I can forgive.' -- widow testifying at a TRC hearing in South Africa in 1997

I first came across the general antipathy towards amnesty in human rights circles when I attended a conference in Guatemala in 1995. There were representatives from many parts of Latin America, and when I presented my paper on the proposed South African Truth and Reconciliation Commission, underlining that a limited form of amnesty was being envisaged, there was an outcry from many of those present. There was little willingness to distinguish between one kind of amnesty and another; all amnesties were anathema. Although I was surprised at the time, I realised soon after that most of the sharp criticism of amnesties came from people who had suffered themselves or who had worked directly with victims of human rights violations and had seen perpetrators getting away without any punishment or prosecution, or even accountability. The fact of the matter is that many countries in Latin America in the last decade or more have granted amnesties to perpetrators. An obvious example was the granting of blanket amnesty by General Pinochet in Chile in 1978. This was soon followed by the Brazilian military in 1979 and the Argentinian military in 1983. Amnesties were granted by the civilian government in Uruguay in 1986 and, following the report of the United Nations Commission on the Truth for El Salvador, by President Duarte in El Salvador a year later. I share the view that general amnesties in relation to gross human rights violations granted by previous regimes are unacceptable and should not be respected by the international community.

While the South African amnesty model has been described as the most 'sophisticated amnesty undertaken in modern times, if not in any time, for acts that constitute violations of fundamental international human rights',[11] it has nevertheless been the subject of considerable debate; there are those who, while recognising the uniqueness of

the South African approach, still have reservations about whether or not prosecutions would have been the better course of action. Even those who acknowledge that South Africa made the correct decision do so with a measure of reluctance, largely, I think, because they are nervous that other societies may want to follow our example. Therefore there is usually a strong emphasis on the special circumstances which obtained in South Africa, and it is argued that the South African model cannot be imposed on other societies. There is merit in this argument, but it can be taken too far. There may well be countries in transition which could, with profit, learn from the South African approach.

At the same time, it should not be overlooked that many individuals and families who had themselves been victims of gross human rights violations, or who were relatives of those who had undergone harrowing experiences, expressed their unhappiness and anger at amnesty being granted and demanded their day in court. Their approach was very much along the lines of 'an eye for an eye'; they argued that perpetrators should not be allowed to get away with their crimes, that justice was being denied, and that the only source of comfort to them would be to see the perpetrators in court. We have already discussed the view of the Biko family and others, and a number of victims who attended amnesty hearings urged the Amnesty Committee not to grant amnesty because in their view the offences were such that the perpetrators ought to stand trial.

In a more formal sense, there has been a long, ongoing debate in the international human rights community, where the classic response to gross human rights violations is prosecution. This point is well articulated in a seminal article by Diane Orentlicher, entitled 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime'.[12] Orentlicher argues that states have a duty to prosecute and that the international community should take action against states that refuse to do so. It is her contention that amnesty contradicts the rule of law and damages perceptions of justice which require that

people be answerable for what they have done. Carlos Nino, replying to Orentlicher's unqualified stance, argues, 'Rather than a duty to prosecute, we should think of a duty to safeguard human rights and to prevent future violations by state officers or other parties.' Nino concedes that there are instances, which ought to be condemned by international law, in which certain governments violate human rights in a direct and active way, but he argues that 'The factual context may frustrate a government's effort to promote the prosecution of persons responsible for human rights abuses except at the risk of provoking further violence and a return to undemocratic rule.'[13] Despite this very important qualification to the dogmatic demand on states to prosecute, the model followed by international law remains that of the Nuremberg trials held in Germany in 1946, as well as the International War Crimes Tribunals set up in The Hague to prosecute human rights violators in the former Yugoslavia and Rwanda.[14] It should be noted, however, that these tribunals are the exception rather than the rule, because they were appointed to address extreme situations such as genocide. Usually the responsibility to act has fallen on the states concerned.

There is no doubt that there are a number of advantages to prosecutions for gross human rights violations. Firstly, prosecution establishes the general principle of retributive justice, that perpetrators cannot be allowed to get away with their actions, that there is a price to be paid, and that it is not only fair but right that accounts must be settled.

Secondly, prosecution reduces the possibility of private revenge. It is argued that if a state does not take action through its normal criminal justice system, then individuals and groups could be tempted to take the law into their own hands. In a fair trial, the accused is given an opportunity to defend him- or herself, to explain and even to justify his or her actions. It is no longer a private matter; it is part of the community process and part of the record and history of that community.

Thirdly, by its very nature a trial will give access to a considerable amount of information about the crimes that

have been committed. This information is not merely subject to the whim of the accused or even of the prosecutor but is subject to strict cross-examination and rules of evidence which make the information quantitatively more reliable.

Fourthly, prosecution can educate the populace about the extent and definition of the violations committed. This form of education could serve as part of the record available to the general public and to an extent could be a strong signal that those who transgress will not go unpunished. Thus, prosecutions are a guard against impunity and the risk of future violations.

Fifthly, prosecution has the potential to grant closure to both perpetrator and victim. When the final decision is reached, there is a sense of relief; the matter has been dealt with and the victims can now get on with their lives. There is, therefore, a return to normality and a facing up to the consequences of the acts committed.

All the above advantages of prosecutions must be taken very seriously, particularly in light of the need to restrict impunity. However, trials and prosecutions are not above criticism. In the case of widespread gross human rights violations over a long period, a critical question is, whom do you prosecute? Even in the Nuremberg trials it was impossible to deal with any except some of the very top echelon of Nazi leaders, and many escaped the net. In the subsequent trials that were held, 85 882 cases were brought to trial in a country where hundreds of thousands of people had been directly involved in the Holocaust (it is worth noting that from these more than 85 000 cases, only 7000 convictions were secured).[15] In more recent times, more than 9000 people disappeared in Argentina during the military dictatorship. It was impossible for the criminal justice system to place everybody on trial; instead, the state decided to prosecute only a handful of leaders of the junta.

An even greater problem surrounds the attempts to deal with perpetrators in the former Yugoslavia. Very few of the large number of perpetrators will be prosecuted

Inevitably, arbitrary decisions have to be made, and it becomes impossible for even an international war crimes tribunal to try everyone directly involved in 'ethnic cleansing' or genocide. How fair then is the process? What about those who are not tried, and how just is the system for the few who are put on trial? Are they the scapegoats who must bear the sins of the many? The most relevant case is that of Rwanda. It is estimated that over 800 000 people were killed there in three months. Thousands of people have since been arrested, but such was the nature of the butchery that took place, which was not by aerial bombing or massive instruments of war but largely by one individual killing another, that at the very least more than half a million people ought to have been arrested. More than 100 000 people have been incarcerated in very crude and inadequate conditions, and have been awaiting trial for more than five years. It is clearly going to be impossible to have a fair, meaningful trial for every one of them. Thus, ironically, the search for justice is shot through with injustice.

There are cynics who argue that if one has enough money one can get away with almost anything. It is true that wealthier perpetrators have access to excellent legal representation, and it is an extremely difficult task for the prosecution to produce irrefutable evidence leading to their conviction. Thus, in many court cases the charge is not proven, which leaves the victim frustrated and often angry.

It is also a fact that in a criminal court it is always difficult and very often impossible to achieve accountability beyond that of the individual or individuals who are on trial. In other words, it is difficult in a trial for account to be taken of those institutions which created the climate, and in some instances gave the orders, for human rights violations to take place.

In a criminal trial, punishment is seen as the final word. But in a deeply divided society, punishment cannot be the final word if healing and reconciliation are to be achieved, because the human rights violations have taken place within a particular context. It can be argued that

when abnormal situations become so constant as to make them seem almost normal, abnormal measures have to be used, because the law on its own cannot be expected to deal with the consequences of large-scale massacres, crimes against humanity, genocide, 'ethnic cleansing', and the like.

In the last decade, an alternative to criminal trials which has been used in many parts of the world is what has come to be known as a truth commission.[16] While there are wide differences between the various truth commissions around the world, the main theme is the attempt to get at the truth of the past in relation to gross human rights violations and to record the findings so that they are publicly available. However, as has been emphasised, the South African Truth and Reconciliation Commission is the only commission that has incorporated amnesty within its framework, and it is this commission that is the focus of our study.

The South African Commission deliberately avoided granting a general or blanket amnesty; instead, amnesty was exchanged for truth. It is worth noting why South Africa chose this route rather than prosecutions. As has already been discussed, the transition from oppression to democracy was achieved not through a violent overthrowing of the state but through negotiations between the state and the liberation movements. Therefore a compromise was inevitable, and one of those compromises was the provision for amnesty. Judge Marvin Frankel's comment in this regard is particularly helpful and instructive:

> The call to punish human rights criminals can present complex and agonising problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode – trials of war criminals of a defeated nation – was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators.
>
> 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 the police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight 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 sympathisers in the population at large. If they are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.

These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of terror, similar problems will continue to arise.

Since the situations vary, the nature of the problems varies from place to place.[17]

It is worth referring again to the postamble to the Constitution, which incorporates the agreement reached between the two major parties, the African National Congress and the National Party. The emphasis from the outset was on reconciliation in order to achieve unity:

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives 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 new Constitution and these commitments, we, the people of South Africa, open a new chapter in the history of our country.

Another important reason for offering amnesty as part of the TRC was the threat by the security forces that they would not defend the peaceful process of the election and indeed would make a peaceful election impossible. Bearing in mind that the security forces had protected the negotiation process, without which the transition to democracy would have come to a dismal halt, it was felt that the threat had to be taken very seriously and that amnesty would have to be provided for.

There are, however, a number of other factors which would have made prosecutions in the South African context very difficult. Firstly, the very nature of apartheid was all-pervasive, and it would have been extremely difficult to know whom to prosecute and whom not to prosecute. If all those responsible for the policy and the implementation of apartheid were to be prosecuted, the numbers would have been in the hundreds of thousands and the criminal justice system would have been strained far beyond its limits. Secondly, a decision would have had to be made about what time span the prosecutions would cover, because apartheid had been in existence for decades. Thirdly, the resources available to the state were extremely limited in terms of human skills, and, because the overwhelming majority of officers of the courts, including magistrates and judges, were white, prosecutions may have resulted in a large number of resignations or at least a lack of cooperation. Fourthly, the criminal justice system had relied very heavily on harassment and torture in order to secure convictions, and the entire police force would need to be reformed before they could be entrusted with the responsibility of maintaining due process when bringing people to trial. Fifthly, the costs of trials would have taken resources away from essential social development. The demand on the fiscus for housing, education, health care, job creation, and so on meant that virtually all social services would

have had to be put on hold if a huge outlay were to be expended on long and protracted trials.

I think it has to be accepted that it is no simple matter to obtain a conviction in a court of law. If there had been trials in South Africa there is a strong possibility that the majority of those accused would have been found not guilty because of a lack of skilful prosecutors and a lack of evidence.

Now that we have looked at the advantages and disadvantages of prosecution, let us consider briefly what the South African TRC model can and does offer over the benefits of prosecution that have been referred to above. Firstly, insofar as information is concerned, both qualitatively and quantitatively, the TRC has been able to secure information far beyond what any trial could have elicited. The information is contextual, exploring people's motives. The victim hearings in particular meant that thousands of those who had endured human rights violations could, in their own languages, in their own styles, at their own pace, and without cross-examination, tell what happened to them. In the case of perpetrators, because amnesty was conditional on telling the truth, full disclosure was part of the demand. In the confessions offered by those applying for amnesty, very wide and detailed information was made available, not only to the Amnesty Committee but to the whole of South Africa, because of the public nature of the hearings. The silence was broken and at least a measure of truth was revealed.

The Constitutional Court noted how the amnesty provision would deal with the problem of getting to the truth and dealing with the hurt of the past:

> The Act seeks to redress 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 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 incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which 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.[18]

It is understandable that many are suspicious of any commission labeled a 'truth commission'. It has ominous, Orwellian overtones which put people on their guard. Antjie Krog, in her inimitable way, puts it well when she tells of her own difficulty with the word 'truth':

> The word 'truth' makes me uncomfortable. The word 'truth' still trips the tongue. I hesitate at the word. I am not used to using it. Even when I type it, it ends up as either 'turth' or 'trth'. I have never bedded that word in a poem. I prefer the word 'lie'. The moment the lie raises its head I smell blood. Because it is there ... where the truth is closest.'[19]

Despite the understandable reservation regarding the search for truth, it is a fact that a commitment to history involves a search for an objective truth. The Commission therefore unapologetically set out to try to reach a public and official acknowledgement of what happened during the apartheid era. If only to counter the distorted and partial recording of history in South Africa it was necessary that there should be an accurate record of the period under review. Colin Bundy reminds us that "The establishment of the objective truth is part of the struggle for the control of

history. It plays a central role in society's redefinition of itself.'[20] Rundy argues that the provision of accurate and authentic facts discredits the distorted version of history provided by the previous regime and prevents that version from being perpetuated in school and university textbooks and in people's memories. The truth that emerged in the stories told by victims and perpetrators challenged the myths, the lies, and the half-truths conveyed and distributed at every level by the former regime. I am unashamed in my belief that, in the South African context, history has to be rewritten and that the TRC has made a significant contribution to this end. This is not to argue for one group's truth to be replaced by another, but rather for the enlarging of the boundaries, a testing of different claims, so that a fuller and more precise picture begins to emerge.

In its final report, the Truth and Reconciliation Commission distinguishes between four kinds of truth. The first is objective or factual or forensic truth. The Act which governed the work of the TRC required it to 'Prepare a comprehensive report which sets out its activities and findings based on factual and objective information and evidence collected or received by it or placed at its disposal.'

This requirement operated at two levels. Firstly, the Commission was required to make public findings on particular incidents with regard to specific people – concerning what happened to whom, where, when, and how, and who was involved. In order to fulfil this mandate, the Commission adopted an inclusive policy of verification and corroboration to ensure that findings were based on accurate and factual information. The Investigative Unit, which had more than sixty trained investigators at its disposal, did a yeoman task in seeking to corroborate and verify testimonies, whether they were from victims or perpetrators. Secondly, the Commission was responsible for findings on contexts, causes, and patterns of violations. It was this search for patterns underlying gross violations of human rights that engaged the Commission at a very broad and deep level.

While the Commission, through its Investigative Unit, its database, and its Research Department, attempted to do all of the above with the highest degree of efficiency possible, there were always limits in the search for truth and even in truth-telling. While I think Michael Ignatieff underestimates the influence and impact of some truth commissions, nevertheless his comments are salutary:

> All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse. In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims in the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people.[21]

It follows that in the South African context it is no longer possible for so many people to claim that 'they did not know'. It has become impossible to deny that the practice of torture by the state security forces was not systematic and widespread, to claim that only a few 'rotten eggs' or 'bad apples' committed gross violations of human rights. It is also impossible to claim any longer that the accounts of gross human rights violations in ANC camps are merely the consequence of state disinformation.

The second kind of truth is personal or narrative truth. Through the telling of their own stories, both victims and perpetrators have given meaning to their multi-layered experiences of the South African story. Through the media these personal truths have been communicated to the broader public. Oral tradition has been a central feature of the Commission's process. Explicit in the Act is an affirmation of the healing potential of truth-telling. One of the objectives of the TRC was to 'restore the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of which they were the victims'

It is important to underline that the stories we listened to didn't come to us as 'arguments' or claims as if in a court of law. They were often heart-wrenching, conveying unique insights into the pain of our past. To listen to one man relate how his wife and baby were cruelly murdered is much more powerful and moving than statistics which describe a massacre involving many victims. The conflict of the past is no longer a question of numbers and incidents; the human face has shown itself, and the horror of murder and torture is painfully real.

By facilitating the telling of 'stories', the TRC not only helped uncover the existing facts about past abuses but assisted in the creation of 'narrative truth' – the personal story told by a witness. This enabled the Commission to contribute to the process of reconciliation by ensuring that the silence shrouding individual subjective experiences had at last been broken, by 'restoring memory and humanity'.[22] A great deal of this material has been recorded in the Commission's report, but together with the report must be seen the transcripts of the hearings, individual statements, a mountain of press clippings, and video material. This material will be an indispensable resource for historians and other academics and researchers for years to come.

The third kind of truth is social or 'dialogical' truth. Albie Sachs, even before the Commission began its work, talked about 'microscope truth' and 'dialogical truth': 'The first is factual and verifiable and can be documented and proved. Dialogical truth, on the other hand, is social truth, truth of experience that is established through interaction, discussion and debate.'[23]

People from all walks of life were involved in the TRC process, including the faith community, the former South African Defence Force, NGOs, the media, the legal and health sectors, and political parties – and obviously the wider South African population through the media and public scrutiny. What I am emphasising here is that almost as important as the process of establishing the truth was the process of acquiring it. The process of dialogue

involved transparency, democracy, and participation as the basis of affirming human dignity and integrity.

Finally, the fourth kind of truth is healing and restorative truth. The Act required the TRC to look back to the past and to look to the future. The truth which the Commission was required to establish had to contribute to the reparation of the damage inflicted in the past and to the prevention of it ever happening again in the future. But for healing to be a possibility, knowledge in itself is not enough. Knowledge must be accompanied by acknowledgement, an acceptance of accountability. To acknowledge publicly that thousands of South Africans have paid a very high price for the attainment of democracy affirms the human dignity of the victims and survivors and is an integral part of the healing of the South African society.

In summary, one of the major advantages of a truth commission committed to discovering the truth is that it involves what could be termed inclusive truth-telling. The TRC had a specific and limited mandate, but its attempt to help restore the moral order must be seen in the context of social and economic transformation. These are two sides of a single coin. Truth-telling is a critical part of this transformation which challenges myths, half-truths, denials, and lies. It was when listening to ordinary people relating their experiences under apartheid that one was able to understand the magnitude and horror of a system which damaged and destroyed so many over so long a period. It also reminded the Commission forcibly of the maldistribution of assets and the legacy of oppression which makes transformation so difficult. Therefore the work of the Commission was not a one-off event, a kind of cure-all. The process has only started and has to continue, and the public and private sectors have to accept leadership in this regard. In particular, those who benefited from the long years of discrimination and inequity have a particular responsibility.

This means that dealing creatively and honestly with the past isn't a question of laying the blame on the

military, the police, the politicians, the liberation movements, but also on the beneficiaries of apartheid, who were largely white. In searching for the truth, political accountability is important, but apartheid could never have survived without being buttressed by those who benefited from it.

There are several other differences between a trial and a truth commission. The first concerns the quality and quantity of information and access to the truth. In an article in *Africa News*, Babu Ayindo makes a contrast between the International War Crimes Tribunal for Rwanda held in Arusha, Tanzania, and the Truth and Reconciliation Commission in South Africa. He observes that in the Tribunal witnesses were brought into a foreign world where legal representatives were dressed in Western attire, and the proceedings were formal and followed the tradition, both in procedure and in dress, of a court of law. He contrasts this to the South African Commission, where witnesses were embraced and supported throughout the proceedings, where there was time and space to 'weep and lament'.[24]

Ayindo also observes that the witnesses at the Tribunal seemed to be on trial rather than telling their stories. The stories had to be consistent with what they had told the investigators. The witnesses had to restrict themselves to what they had seen and heard and not describe what they had felt. There was little opportunity for them to embark on a journey of recovery. The witnesses desperately needed to know why their loved ones had been maimed or killed. Answers to such questions, which are vital in the healing process, are not what a tribunal or a court of law deals with. Ayindo argues further that while he has a respect for history he believes that a fixation on the past will not foster a healthy future for Rwanda. In his view, the Tribunal stubbornly focused on the past. The South African TRC, he writes, seemed more focused on the future 'so that the dark history illuminates the present and guides the future'. He concludes that the TRC', despite its apparent lack of a comprehensive recovery programme for apartheid victims and

its occasional theatrics, 'serves as a more assured path for the restoration of relationships and the peace of posterity'.[25]

Secondly, the point was made earlier that a benefit of prosecution is to limit the likelihood of revenge being taken by victims in the absence of state action. This may well be true, but the same advantage could be attributed to a truth commission which performs its work in public so that victims can at least see that the truth is being sought and in many instances told, and that a measure of accountability is realised. It is noteworthy that there was not a single case of vengeance taken by any victim or family of a victim in response to the grotesque stories told by security force members and other perpetrators. As far as I am aware, no perpetrators received even a threatening telephone call after giving public evidence of killing or torturing people. Although we had a witness protection programme, there was never any serious threat to those who received such protection. Furthermore, the public shaming of the perpetrators was at least as effective in this regard as conviction in a criminal trial. It was no easy thing for perpetrators to describe their evil deeds with family, friends, and society looking on.

Thirdly, as has already been mentioned, in a trial the accused participates, detailing the violations and sometimes even justifying them. A truth commission, however, affords an opportunity not only for perpetrators but also for victims to tell their own stories. In a court case this is very often through the mouth of the legal representative, and indeed in many instances even those on trial do not have to take the witness stand themselves to account for the charges against them. In a truth commission the application is completed by the person seeking amnesty, and the applicant faces the Amnesty Committee in public and can be cross-examined by legal representatives of the victims and by the victims themselves. Therefore, victims and perpetrators appear together in a truth commission. This is a ritual, if you like, played out with all the actors present and speaking for themselves, and can be part of the healing process.

Fourthly, in terms of upholding, enforcing, and strengthening the rule of law, in amnesty hearings the emphasis is not only on obtaining knowledge but also on acknowledgement. This is at the very heart of the applicant's story. While the applicant may argue that he or she was under orders, he or she describes the events as a participant in the atrocities committed. He or she accepts accountability. But his or her actions are also put in context. The applicant very often describes the training he or she received as a soldier or as a member of the police force, the orders that were given, the chain of command, the process which involved the violations of human rights. Therefore the rule of law is strengthened in an amnesty hearing, as it is in a trial.

Fifthly, I would suggest that a truth commission is more able and better equipped to provide education for the general public about human rights than is a court of law or a tribunal. In South Africa the amnesty hearings were open, and were made available to the general public through the media. A five-volume report outlining the TRC's findings was presented to President Mandela and to Parliament and is freely available to all. This report contains not only the information that was gathered but also a large number of recommendations. A key recommendation is that the report should be made available to the general public not merely in its final form but also through paraphrasing, editing, through video and audio cassettes, to schools and tertiary institutions, non-governmental organisations and churches, workshops and conferences. Built into the South African model is a process of education which far exceeds that of a war crimes tribunal or a normal trial. The life and legacy of the Commission are geared towards education of the general populace.

Sixthly, a truth commission is far better able to ensure reparation and rehabilitation for victims. The Act governing the South African Truth and Reconciliation Commission required that a special reparation committee had to devise a policy of reparation and rehabilitation and to make it available to Parliament for a final decision. It

should be stressed, however, that reparation and even rehabilitation can begin to take place only when the silence is broken and people are empowered to tell their own stories for the very first time. This is probably the greatest reparation and rehabilitation anyone can be offered. The Reparation and Rehabilitation Committee worked out an elaborate and extensive programme, details of which can be found in the final report.[26]

Seventhly, the holding of trials certainly can and does act as a powerful deterrent. But a truth commission of the South African model allows for the disclosure of names, which is rare among truth commissions and certainly reminds its very wide audience of the consequences of not applying for amnesty. In other words, amnesty has a short shelf life. There was an end date and if people had not applied by that time they could not qualify for amnesty. This resulted in a certain urgency. Furthermore, the Commission recommended in its report that those who had not applied for amnesty and who were strongly suspected of committing human rights violations ought to be prosecuted.

Finally, what a truth commission can do, and what the South African Commission certainly attempted to do, is to seek not only knowledge, acknowledgement, and accountability, but also restoration. One of the primary motivations for and objectives of the Commission was to bring about a measure of healing to a very deeply divided society in which many citizens have been severely hurt. The search for reconciliation and restoration is in my view an integral part of coming to terms with the past. It is not enough simply to punish perpetrators. Not only is broader reconciliation and restoration necessary and morally right, but it also places the focus not so much on the past but on the present and the future. We come to terms with the past not to point a finger or to engage in a witch hunt but to bring about accountability and to try to restore a community which for scores of years has been broken. The South African Truth and Reconciliation Commission unashamedly sought to advance the process of reconciliation, despite all the

problems inherent in that task. The act of amnesty involves pardoning offences, bringing the perpetrator back into society, and helping to restore to victim and perpetrator the dignity which both have lost. In this regard a truth commission, especially in the South African context, was not 'second best'. As Aryeh Neier, president of the Open Society Institute in New York, puts it,

> Indeed, in the specific circumstances of South Africa, it is not easy to quarrel with Archbishop Tutu when he contends that the Truth and Reconciliation Commission process of providing amnesty in exchange for acknowledgement and full disclosure, with prosecution as an alternative for those who do not acknowledge and disclose, served the country better than a process that would have relied solely on prosecutions.[27]

The question of reconciliation will be dealt with in a later chapter, but suffice to make the point that a truth commission has a greater potential for achieving this than prosecution and trials.

Even in the case of genocide or 'ethnic cleansing', where punishment is necessitated by the very nature of the crimes committed, there ought to be scope for additional strategies so that we do not rely only on trials and tribunals. Certainly we must take very seriously the gravity and extent of the violations, and accountability is demanded. But that is not the last word. In a deeply divided society like Bosnia, for example, perhaps there should not only be the War Crimes Tribunal in The Hague, but consideration should be given to a form of truth commission which would not include amnesty but would create an opportunity to stake out a common truth where truth is in dispute. Attempts could also be made to bridge the wide cleavages which exist between Serbs, Croats, and Muslims in that region. Certainly the War Crimes Tribunal on its own will not achieve this and may even exacerbate existing hostilities between opposing groups. Serious consideration should be given by the international community, and above all by the people of Bosnia themselves, to the

introduction of additional mechanisms to bring about a measure of unity and healing in that country.

The same could be said of Rwanda, which remains at great risk, not only because of the instability of Burundi and the Democratic Republic of Congo, but also because of continuing internal strife and friction. Trials on their own will not bring about a restored society, and the possibility of a truth and reconciliation commission should not be ruled out.

The South African Commission, with its amnesty provisions, meets international obligations in a number of important respects. It has consistently sought to establish truth not only about victims but also about perpetrators. It has stressed the need for the development of a human rights culture and has made a number of recommendations in order to try to bring that about. A comprehensive policy of reparation is now before Parliament and awaits implementation. The emphasis in the amnesty process has been on full disclosure, and the very fact that some applicants have been denied amnesty strengthens the integrity of the amnesty process. It can be argued very persuasively that the Commission prevented further violence, and this is a major international obligation.

The decision against amnesia on the one hand and trials on the other was not merely a choice by one particular party or group but arose from a very careful parliamentary process and involved all the major political parties. The nature of apartheid crimes was so extreme and so pervasive that it would have been impossible to draw a line as to who should be prosecuted and who should not. Finally, the emphasis is not merely on the past but very much on seeking reconciliation and healing in the new dispensation.

It is clear that South Africa did not transgress any of the demands of international law, as embodied in the Geneva Conventions. It is true that the Conventions refer to 'grave breaches' which constitute war crimes for which states have a duty to prosecute. It is also a fact that South Africa signed the Geneva Conventions in 1948. But the Conventions apply only to international conflicts, and

there is no obligation for states to prosecute these 'breaches' when no international conflict exists.

Many commentators have described the South African conflict as a low-level civil war or as an 'undeclared war'. But neither the state nor the ANC ever formally described the conflict as a state of war.

In an unpublished MA dissertation, Cherry Annette Hill refers to Article 1(4) of the First Protocol of the Geneva Conventions, which 'recognises the struggles of national liberation movements or specifies that they are to be considered subject to the international laws of armed conflict'.[28] But any technical obligation upon South Africa to prosecute those guilty of gross human rights violations falls away as far as the period of the TRC is concerned, because South Africa signed the additional Protocol of the Geneva Conventions only in 1995.

It is my view, therefore, that the South African decision not to prosecute does not in any respect put it in breach of international law. It should be borne in mind, however, that although South Africa said no to prosecutions it also said no to amnesia, and the TRC, through its public hearings, its findings, and its final report, went beyond the accumulation of knowledge to acknowledgement and accountability of human rights violations which had so grievously harmed the majority of South Africans.

It is very important to bear in mind the Commission's determination to avoid impunity. In Volume 5 of our report, we emphasise the need for accountability in the following terms:

> Where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. In this regard, the Commission will make available to the appropriate authorities information in its possession concerning serious allegations against individuals (excluding privileged information such as that contained in

amnesty applications). Consideration must be given to imposing a time limit on such prosecutions.

Attorneys-General must pay rigorous attention to the prosecution of members of the South African Police Service (SAPS) who are found to have assaulted, tortured and/or killed persons in their care.

In order to avoid a culture of impunity and to entrench the rule of law, the granting of general amnesty in whatever guise should be resisted.[29]