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# Honoring the Truth in Post-Apartheid South Africa

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# Honoring the Truth in Post-Apartheid South Africa

## **Cover Page Footnote**

International Law; Commercial Law; Law

## Honoring the Truth in Post-Apartheid South Africa

*Justice Albert L. Sachs\**

I am going to tell you a story about the South African Truth Commission,<sup>1</sup> which may or may not be true. Let me change that. I am going to tell you stories about the Truth Commission, which may or may not be true. I am going to change that again. I am going to tell you stories about the South African Truth Commission and the telling of them may or may not be true. Historians are constantly dealing with and responding to the mutability of truth. Unlike a historian, however, I am going to leave it to you to discern what the truth is. At the end of my presentation, I am going to ask you: How do you determine the truth of the representation I just made to you? Is it a story, or many stories, or is it just a representation that, taken together or

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\* Justice of the Constitutional Court of South Africa. Justice Sachs matriculated at the South African College School in Cape Town in 1950, and attended the University of Cape Town, where he earned a B.A. and a LL.B. degree. Justice Sachs took an active part in the negotiations for a new constitution as a member of the Constitutional Committee of the ANC and of the National Executive of that organization.

<sup>1</sup> See Promotion of National Unity and Reconciliation Act 34 of 1995, 7 BSRSA § 1 *et seq.* (2000). The preamble states the South African Truth Commission's purpose as follows:

To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed . . . within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights . . . .

*Id.*

independent of the context, is true?

I start with a phone call. I am in my chambers in the Constitutional Court. The receptionist says, "Mr. Sachs, Henry is here to see you." I am quite eager to see Henry. He had telephoned me a week before to say that he had organized the bomb that was put in my car. He had applied to the South African Truth Commission for amnesty. "Are you willing to see him?," asked the receptionist, obviously in response to my silence. I said, "Yes."

The time for meeting Henry had arrived. I walked down the corridor to the security door and opened it with intense feelings of curiosity. Who was this person who did not know me, had not met me, had not quarreled with me, but who had tried to kill me? I saw him looking at me. Who is this person that he only knew about through photographs and intelligence, whom he had never met, never quarreled with, did not hate, whom he had tried to kill? Henry was a little shorter than myself and very lean. We walked to my chambers, and I can recall his stiff, yet proud, military gait. I accompanied him with what I regard as my ambulatory judge's style.

We sat down and Henry told me that he had been to university and that he was a good student. Henry also told me that he had been recruited into the army, where he had made rapid progress. He was very proud to have been asked to join an elite unit concerned with "special operations." One of those operations was to convert my Honda into an engine of assassination with a bomb. Although he claimed that the attack was postponed, he explained his role in organizing its execution. When the attack eventually took place, he was no longer involved. Henry nevertheless accepted responsibility for the bombing. We could have gone on for hours. He seemed aggrieved. He was out of the army now because he had injured his foot. As if to seek sympathy from me, Henry said the army had only given him a small pension for his service. The implication was that the same people who had once urged him on and rewarded him had forsaken him. He was nothing now, whereas I was a judge on the Constitutional Court of South Africa. Unlike Henry, I was honored and respected in society. Escorting him back to the security door, I recall that his initial swagger had been replaced by something more akin to a disconsolate retreat.

So what is this Truth Commission to which Henry had

applied? In August of 1993, about seven months before our first democratic elections, eighty-five members of the National Executive Committee of the African National Congress (ANC) were embroiled in fierce intellectual combat. An ANC report that documented human rights violations in ANC camps in Angola during the liberation struggle had prompted the debate. The report concluded that the violations were contrary to the mission and values of the ANC, and it therefore recommended some appropriate action by the National Executive Committee. In response to this report, we considered the formation of a Truth Commission that would publicly denounce and penalize the perpetrators of the violence in Angola. Some members of the Committee, however, felt that it was wrong to limit the inquiry to acts committed by ANC members only. These members pointed out that, as an emergency response to an emergency situation, the camps were staffed by young people without experience in the art of police interrogation. Although the ANC had established a code of conduct that prohibited any ill treatment of prisoners—possibly the only liberation movement in the world to do so—the supporters of the Truth Commission nevertheless felt that the undisputed occurrences of gross human rights violations required the fashioning of an appropriate remedy.

One of our leading intellectuals stood up and said, in his high-pitched voice, “Comrades, I’ve learned something very interesting today. There’s such a thing as regime torture, which is bad, and ANC torture, which is okay. Thank you for enlightening me.” Then someone else stood up and said, “What would my mother say?”—his mother being the symbol of the hard-working, probably poor, thinly educated African woman with a strong sense of right and wrong in society. He continued,

My mother would say that there is something strange about the ANC. Here we are, exposing to the whole world the bad things that [the ANC] did in the course of a long liberation struggle. Maybe that’s right, but is it fair that those who had been killing us, torturing us, maiming us, and massacring us for centuries are now avoiding this same punishment? Where is the justice in punishing one sector responsible for fewer crimes when those guilty of committing the majority of crimes over a long period of time have neither acknowledged nor taken responsibility for their acts?

It was at that moment that a professor stood and said,

What we need in South Africa is a Truth Commission that will look across the board at all violations of human rights, without regard to their source. It cannot be the responsibility of only one political organization to do this. It is the responsibility of the State, the whole nation. We must do it in an evenhanded manner.

So, paradoxically, the idea of a Truth Commission in South Africa emerged because of the ANC's desire to build its democracy with clean hands and without secrets. In order to fight for justice effectively, you must adhere to your own precepts and values. Justice should manifest itself in your heart and actions. It is far more damaging to the cause of justice when those who believe in good and who are working for good act in unjust ways. There is a dangerous inconsistency when they behave like the racists, oppressors, or tyrants against whom they align themselves politically. Hope is threatened by such behavior. Even from a purely pragmatic, functional point of view, ordinary people will make enormous sacrifices for, and invest an enormous amount of energy in, that which they believe in and trust. The betrayal of that trust will undermine a movement's greatest source of strength. Ordinary people certainly empowered the South African liberation struggle in the course of very difficult, traumatic years.

My next tale takes place a few months later. I was in London reporting to the Catholic International Relations Institute, a non-governmental organization with ties to South Africa, on the status of our negotiations concerning the new Constitution. At the time, I thought we had signed, sealed, and delivered the Constitution. Fairly late one evening, however, someone apologetically delivered a fax from the Constitutional Committee of the ANC. The fax stated that a crisis threatened the elections due in a few months. For the first time in South Africa's history, the elections were democratic, with blacks and whites voting as equals on a common voter's roll. These elections represented our great struggle for independence, our sovereignty. Historically denied positions as equals in this society, the bulk of South Africans had never participated in democracy, and now this fax threatened their hard-earned right to vote. The security, military, and police forces of the apartheid regime claimed that then-President F.W. De Clerk had promised to give them amnesty in the new democratic South

Africa. They said they had faithfully protected the constitutional negotiations from right-wing threats and assaults. They also said they knew of right-wing plans to bomb the election. While they were willing to frustrate those plans, it was inhuman to ask them to guarantee the security of elections if they would end up going to jail afterwards. They were not threatening to attack the elections. Instead, they simply said, "We will resign. Let others try to make the elections secure." The forces felt betrayed by President De Clerk, who had made them promises in exchange for the performance of certain undertakings.

The ANC leadership respected the work that the security forces had done to protect the process of the constitutional negotiations. They also knew that no other security force was capable of preventing a bombing attack. By infiltrating these right-wing groups, risking their lives to get information in order to prevent the bombing attacks from taking place, the security forces demonstrated—I never thought these words would pass my lips—enormous courage. The ANC leadership believed, partly because of the nature of the undertakings, that something should be done to satisfy the claims that were being made. If the elections were disrupted, the only alternative was civil war. We would have won in the end, but only to inherit a devastated country. We would not have had President Nelson Mandela, nor a democratic Parliament, nor a Constitutional Court. We would have won, but what would have been the effect of callously saying to the security forces, "To hell with you! You committed crimes in the past and you want to get off the hook now? The commitments made by President De Clerk are binding on him and not on us." Faced with this dire situation, I proposed to link amnesty to the Truth Commission: if you come forward and acknowledge your misdeeds and that they were committed in the course of political struggle, whether on the side of the ANC or that of the apartheid government, then you shall be entitled to amnesty. We quickly drafted the postscript to the Constitution, which enabled the new democratic Parliament to adopt legislation that eventually would govern the truth and reconciliation process.

I stress that truth commissions are not pliable institutions that can easily be created and implemented to solve a country's social problems. They are not an easy way out of something difficult. They only work if established in response to ancient, historical

contradictions that cannot otherwise be resolved. For example, some people hope for a truth commission in war-weary Kosovo. Others believe that Australia should implement a truth commission to address the historic experience of the Aboriginal people and its tragic effect on that nation's conscience. Ultimately, truth commissions are tenuous enterprises that may or may not cure the ills of a given society. They are dependent on the circumstances and, in particular, the willingness of a community to heal together.

Parliament spent a year on the truth and reconciliation legislation. Although skeptical about the idea of giving amnesty, the South African community largely approved of the Truth Commission on the condition that its activities be made public. The former police forces under President De Clerk vehemently opposed the Commission, as did some in the black community, who felt that nothing could ever justify giving amnesty to people who had tortured, maimed, and killed those close to them. Certainly, the creation of the Truth Commission was not free of controversy. To this day, it remains an institution plagued by internal and external disputes.

Essentially, the Truth Commission was structured around three committees. The purpose of the first committee, headed by Archbishop Desmond Tutu, was to listen to the testimony of people whose rights had been grossly violated and to attempt to give some explanation as to how these terrible things happened. This section of the Truth Commission served the "little people" by traveling throughout South Africa and allowing the thousands of people in the townships and in the rural areas to voice their stories. Frequently, the proceedings began with a song or a hymn, depending on the place and the local culture. Someone would sit beside the person testifying and put an arm around him or her to give support, some water, a human hand. There were no cold witness boxes, like those found in a court of law. Literally thousands of stories were told all over the country. The testimonials had a ring of truth that people have when forced to bear, in addition to the pain of the original injury, the pain of their forced silence before the creation of the Truth Commission. Businesses were asked, "What were you doing other than making money?" The press was asked, "What were you reporting?" The judges smiled until they were asked, "Where were you?" They were asked, "How is it possible, in a learned country with an



active judiciary, that these terrible tortures could take place? How is so much violence possible? How is it possible that even the laws against apartheid were broken?" These questions provoked intense discussion and debate within our ranks. In response, the heads of our Constitutional Court and our Supreme Court of Appeals sent a powerful statement acknowledging, as no other judiciary has ever done anywhere in the world, our failure as an institution. The courts had failed to protest against the massive injustices imposed by the law. We also had failed to interpret the law in such a way as to make it more difficult, rather than easier, for the security police to commit their brutal acts against humanity. We, the judiciary, were bitterly criticized for not having gone to the Truth Commission to acknowledge our misdeeds like everyone else.

The Truth Commission's second committee dealt with reparations, a hot issue that may yet appear before the Constitutional Court. Should we demand that the perpetrators of human rights violations pay damages? How much money should they pay? Speaking not as a judge now, I feel human reparations are more essential than monetary ones. A student from my home said, "How much is your arm worth? Is it worth five, five hundred, five million, five trillion, five zillion dollars?" You cannot put a money price on freedom, the significance of your life, or the core values upon which you have built that life.

The third, and most scrutinized, committee of the Truth Commission, composed of two judges and a handful of lay people, focused on amnesty. Indeed, there have been some sensational cases. Five infamous policemen asked for amnesty. They testified that Stephen Biko had been belligerent. They said he lunged at them, they pushed him back, and then he slipped and hit his head against a radiator. The attorney for the family asked, "Where's the crime? There's nothing to give you amnesty for. If your story is true, you were acting in self-defense." The Commission, partly on this basis and partly because it felt that the policemen had not told the whole truth, refused to grant amnesty.

Another well-publicized case concerned the assassination of a leading ANC member and the General Secretary of the Communist Party of South Africa. The General Secretary had been jogging over Easter weekend. When he arrived home, a man pulled out a gun and shot him in the head. As he lay on the ground, the man shot him again and drove away from the scene.

Fortunately, the General Secretary's neighbor, who happened to be white, saw the murder and called the police. The assassin was found four minutes later, literally with a smoking gun. He and a colleague were sentenced to death. Ironically, the ANC opposed capital punishment and therefore indirectly saved his life. He applied for amnesty, but the committee rejected his petition on the grounds that he had not presented sufficient evidence that he was acting under political control.

There have, however, been many cases of barbarous killings where amnesty was granted. In a few instances, victims and families have indicated to the perpetrators that the story is over. If you tell the truth, you will be forgiven. But by and large, the position of most families has been, "It is not the government's or the Commission's decision whether to grant amnesty. Only we can do that."

Reconciliation cannot be understood simply as reconciliation between the individual victim and the individual perpetrator. It is not difficult for some of us because we see the perpetrators as indistinguishable from the diseased society that produced them. We want them to cast off their racist mindset, though we know we may be asking too much. Most people cannot and do not respond this way, and it would be impertinent to insist that they do. To my mind, reconciliation is not based on a one-to-one relationship. Although, as I have said, there have been some quite remarkable cases of forgiveness.

Typically, the evolution toward reconciliation is more subtle. People acknowledge the experience of apartheid in a roughly equivalent way. There is a miraculous conversion of knowledge into acknowledgment. Knowledge is having the information and the statistics. For example, we all know there was torture and assassination. Acknowledgement, on the other hand, is establishing a connection with that information. Acknowledgement is a personal, intimate, and emotional acceptance of a degree of responsibility. Through the reconciliation process, we first acknowledge the pain of those who had to suppress the *knowledge* of their pain. The perpetrators acknowledge, if not fully or whole-heartedly, what they have done. The perpetrators, the killers, the torturers themselves come and are coming forward, not because they blame the ones who were terrorized, not simply as accomplices being granted

immunity if they denounce others, but as people given the opportunity to speak the truth. By giving information, they fill in the critical gaps of our collective memory. The truth and reconciliation process is a record of real life by those who were actually involved in the tragedies. It transcends its own drama and extracts the delicate pith of the experience.

The Truth Commission deeply affected our nation's consciousness. Those who had been oppressed and had suffered the violence were liberated by the world's acknowledgment of their experience. At long last, the world heard the extent to which high authorities were involved in the atrocities, including germ warfare. People came forward who otherwise might have said, "I was just going about my business. I do not bear any responsibility."

Today, we are still building our nation. Some are still learning that a nation is characterized by the diversity of its people. People who speak different languages and who are from different cultures still share certain basic understandings. If we allow bitter division and opposition, even in terms of memories of the past, our future will be based on separation and mistrust. To me, that is the biggest gain—the extent to which apartheid has been exposed as something beyond institutional racism. The bitterly cruel methods used to sustain it, the lies told, and the misinformation and the deceit involved—all that has come out. It has changed the moral balance in our country and made other kinds of transformations possible. To me, that is the most significant gain. The Truth Commission itself does not create, restore, or establish a balance of fairness and trust. Instead, it facilitates these processes. Unless the ideals of the Truth Commission are confirmed in reality by the South African people, so that whites are not living in relative affluence while blacks overwhelmingly are living in poverty, then the full story of the Truth Commission will never be complete. Still, the Commission is part and parcel of a much wider process that, at the very least, creates a moral climate in which it is easier to give social and economic transformations a chance to take place. The public participates in the process by watching television, reading newspapers, thinking about it, talking about it, denying it, counter-denying it, and debating over the dinner table whether to switch the television on or off. The Truth Commission is not just an agency that records our history, but rather a landmark

in our history.

What are the international implications of South Africa's Truth Commission? While I believe our Truth Commission functions extraordinarily well, not every country can secure justice by these means. For example, I completely support the prosecution of General Augusto Pinochet in Chile. With this situation, I see differences of principle. First, General Pinochet gave himself amnesty. In South Africa, the main representatives of the oppressed people themselves negotiated and agreed to it. Secondly, General Pinochet has never acknowledged the criminality of what happened—the murders and assassinations. It is that total refusal to bend the knee which creates such a profound sense of rancor, a sense of arrogant perpetuation of the denial of the cruelty. In South Africa, the Truth Commission was based upon the acknowledgment that terrible things happened. Third, the amnesty given in Chile blanketed all actions during a certain period. To receive amnesty in South Africa, each perpetrator must come forward, one by one, to tell his or her story. This process puts a face on the cruelty. In South Africa, the perpetrators acknowledge their crimes, and shame is their punishment. It is not easy to go home to your children in the evening, who have seen your testimony on television about the bodies that you buried and the lies that you told. Shame, however, gradually dissipates as one reintegrates into society. In Chile, the perpetrators have been shielded from their lies and their shame. These differences indicate that one cannot adopt a categorical position with respect to either international criminal courts or truth commissions. Without the threat of prosecution in South Africa, no one would have come forward to the Commission. A simple calculation was made: "I might be prosecuted. I might go to jail. I am given this opportunity." At the end of the day, we learned information that we would never have known otherwise, information that would have remained behind a wall of total silence.

I believe that the international community should support the International Criminal Court. I would like to see all the nations of the world, the United States included, place themselves within its jurisdiction. At the same time, truth commissions (and there have been over twenty) have a considerable role to play alongside, and sometimes instead of, ordinary prosecution. There are many circumstances where prosecution is impossible because history has

moved on and there is no one left to prosecute. But in these situations, storytelling is still necessary and acknowledgement is still vital. It enables people to feel they are in the same country, not two, three, four, or five separate countries.

Not long ago, I was at a party. It was the end of the year, and I was very tired from working hard. Suddenly a voice said, "Albie." I turned to see a face, a bit familiar. "Henry," I said, hardly expecting to find him there because it was not his kind of scene. We got into a corner and I said, "Henry, what happened?" Over the loud music he said, "I went to the Truth Commission. Bobby, Sue, and Faruk came to see me." "You met Bobby, Sue, and Faruk?" I asked. They had been my mates in exile, and he was calling them by their first names. I had told Henry at the end of our first meeting, "I cannot shake your hand. But if you help the Truth Commission, maybe we will meet again someday. Who knows what will happen." Faced with this second meeting, in the middle of a holiday party, I shook his hand and said, "Henry, you have helped the Truth Commission." He went away absolutely elated, and I almost fainted into the arms of a friend. This story makes for a very lovely conclusion to my stories about the Truth Commission. I later read that Henry testified to the Truth Commission that the bomb was actually intended not for me, but my mate Henry Snyder. Henry Snyder and I are having a big fight these days. He says it was his bomb and I say it was mine. I wrote to the Truth Commission and said, "If Henry tells the truth, then I have no objection to his petition for amnesty. In fact, I report to his being re-integrated into the South African community." Maybe when I get back from this trip to the United States I will find out the actual decision. And then there will be something else, and then something else. The Truth Commission, as an engine for collective healing, will continue interminably.

Is my story true? Is my story one or many? Are they true? Was my painting of the story true? Is there a difference between the painting of the story or the substance of the story? How do you decide? As a lawyer, I have many complicated predictions about the Truth Commission. What is truth? It is such an arrogant enterprise. You cannot find it, put it in a box, and say to the world, "Here is the truth." Truth by its very nature is elusive and dynamic. Yet we have a Truth Commission. I still struggle to understand why there is so little truth in a court of law and why

court records are so useless to historians tracing the evolution of a society, whereas the truth came out in grand proportions in the Truth Commission, without the kinds of crises that are designed to achieve truth.

In the search for "truth," I use a fourfold test. First, I look for "microscopic" or "forensic" truth, which is based upon established variables within a field and their relationships to each other. This is the type of truth used in a court of law or in natural science, where a hypothesis is advanced and is tested according to its relationship to the variables. Second, I look for "logical" truth—the truth inherent in a proposition after certain inferences and deductions are considered. For example, my agent in New York once told me, "Let's face it, Albie—men are a fundamentally flawed species." I am a man, and therefore it flows that I am fundamentally flawed. That is logical truth. Third, there is "experimental" or "experiential" truth. I always believed that experiments were limited to Bunsen burners, drops, and measurements. Then I read about Mahatma Gandhi's life in South Africa. When Gandhi observed black African prisoners eating their meals without condiments, he experimented by also going without seasoning because he wanted to understand the experience of those treated as the lowest and the least in society. Gandhi also served as a military nurse in Natal, with local forces sent to crush a Zulu rebellion. As the Zulu prisoners bled profusely from their wounds, Gandhi sponged down their backs, even in the soldiers' presence. He later decided that, for him, the body could no longer be a source of pleasure if it could also be the locus of so much pain. He gave up sex. He did not consult his wife when he made that decision. What emerged from these experiments was the Gandhian philosophy. This philosophy was developed after he looked into his own life for transformation. Gandhi actually lived experiments to certain conclusions, and the theories came afterward. Ironically, with the spread of Gandhian philosophy, people tried to be good Gandhians by living by a list of do's and don'ts for every situation. For most of us, it is the experiential dimensions that lead to the truth. The fourth type of truth is "biological" truth—wherein the three kinds of truth interact with each other.

Again, are my stories true? If you use microscopic truth, you might say, "Is what he says compatible with the information at

hand?" Is there some logical incoherence, things that do not match? Experientially, how does each one of you feel based on your life experiences, senses, and responses to this speech? Has this been an interesting moment in the life of the proceedings today? In the life of your faculty? Does it have a meaning that goes beyond what I am saying? Does it have an experiential life? Does it have its own kind of drama? Is it part and parcel of biological truth? Truth is seen, felt, experienced, and recorded in myriad ways by different people. Certainly the dialogue never ends. It has a richness and a texture, a credibility over time. From my point of view, you can never lose the battle for truth.

