

Knowledge and Justice after the Truth and Reconciliation Commission

transcript of a conversation with Kendall Thomas and Alex Boraine at Bard

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Kendall Thomas

I would like to thank Tom Keenan for inviting me here and I'm very happy and pleased to be sharing this evening with Alex Boraine, who has done such an important work not only in South Africa, but on the national stage as well. I am going to talk to you for a few minutes about the project on which I am working. I cannot really share the whole project with you and it's holding a lot of balls in the air at once. I am not too sure that I am juggling them all successfully. What I have decided to do is not to talk about the all the elements of the project, but to isolate selected aspects from this paper which is called "What the Law Cannot Do - Postmodern Politics in Post-apartheid South Africa." What I thought I would do this evening is simply try to frame the passages of the paper that I would like to share with you in terms of what I think is a very real tension in the work of the TRC. It is a tension that is not unique to the TRC, and I hope will have an opportunity to talk with Alex Boraine about the ways in which some of the problems faced by the TRC are also being felt in other very different contexts in other countries that are facing this problem of transition. Let me see if I can very quickly frame what I want to talk about.

Very often in talking about this question of societies in transition one hears two different phrases. People would very often talk about the problem of democratic transition. And so the image there is of a transformation within a given nation or country or more nations or countries from a political regime which is characterized as non-democratic to a regime which is characterized as democratic. So that is about political transition from one form of political regime to another -- ideally from the anti-democratic to the democratic. On the other hand we hear

the phrase transitional justice. That is a phrase which in law has to do with the ways in which a regime in walking the path from the pre-democratic to the democratic tries to address problems of injustices which were committed in the former regime. So the question there is how does one go about devising a framework for identifying and adjudicating abuses under the former regime? So there is this question of a transition from a situation that was unjust to a situation which, if not fully just, is more just.

'There is a tension between those two conceptions, democratic transition and transitional justice. And the tension quite simply is the tension between law on the one hand and politics on the other'

Now there is a tension here between those two conceptions: democratic transition and transitional justice. And the tension quite simply is the tension between law on the one hand and politics on the other. One of my favorite films about South Africa is the film called *The Dry White Season*, based on the novel by Andre Brink. The film is not so great but there are a few really terrific scenes in it. Perhaps my favorite scene is a scene in which the central character in the film who is an Afrikaner school teacher goes to visit the offices of a human rights lawyer. The teacher, who is played in the film by Donald Sutherland, is seeking the lawyer's help in demanding a formal inquest into the murder of his gardener, a black South African who is alleged to have committed suicide while in police custody. The schoolteacher explains that he is interested in initiating legal proceedings because he wants justice for his dead employee. After listening quietly, the barrister, who is played in the film by Marlon Brando, offers this wry but rather sobering response. I quote here: "Justice and law. I suppose they could be described as distant cousins, and here in South Africa they're simply not on speaking terms at all."

In the past few years the world has watched with anxiety and admiration as the people of South Africa have struggled to find a common political language in which to conduct the conversation between these two long estranged relatives. The first difficult step in this effort was South Africa's negotiated revolution. I refer

here of course to the process that led to the release of black political prisoners, elections and the political transition that elevated Nelson Mandela to the state presidency and the establishment of a Constituent Assembly which was charged with drafting a post-apartheid constitution. The second no less demanding task was to create a new democratic constitutional order in South Africa and to secure its legitimacy, credibility and acceptance among the citizens it would govern. In May of 1996 the Constituent Assembly completed its work on the final constitution which was certified a few months later by the South African Constitutional Court.

It is not such much these questions of the constitutional law, however, about which I want to talk with you this evening. My interest, as I said to you, is in the TRC which is actually an institution which owed its existence to the earlier transitional and now superceded constitution. One of the central elements of the 1993 constitution was the requirement that the South African parliament adopt a law establishing mechanisms, criteria and procedures for granting amnesty to South Africans who committed politically motivated crimes under the old apartheid regime. As the Justice Minister Dullah Omar noted, the amnesty provisions were part of the bargain struck between the apartheid regime and its democratic successors. They were the creature of necessity. Absent some preliminary agreement on amnesty, they would have been be no political settlement between the ruling National Party and the opposition coalition. Five years ago now, the South African National Assembly enacted the Promotion of National Unity and Reconciliation Act of 1995 and some months later the government announced the establishment of the Truth and Reconciliation Commission, which consisted of human rights lawyers, activists, psychologists and clergy and was chaired by the Anglican archbishop and Nobel laureate Desmond Tutu.

Now what I think I would like to do is rather than describing the specifics of the TRC, whose elements I will simply assume you know, I want to talk about the ways in which seems to me the TRC represents the effort to negotiate the tension between politics on one hand and law on the other; and to negotiate the gap between the law and justice. The specific thesis, however, that I want to advance, is that the conception of democratic

political culture to which the TRC gave rise, and which I think was reflected in its initial creation, is a postmodern conception of politics. That is to say, it is a conception of politics which resists many of the descriptive categories of a modernist politics and of a modernist political narrative that views the work of the TRC and indeed views the history of post-apartheid South Africa as a transition from a kind of pre-modernist, anti-democratic political culture to a modernist political culture based on the rule of law and completely circumscribed by the rule of law.

Before I proceed further, let me just say that this paper is a response in part to a discussion that has been going on in some theoretical circles about the very idea of the relevance for so-called Third World societies or for transitional societies of the idea of political postmodernism. There have been a number of criticisms of Northern intellectuals, I guess I am one of those Northern intellectuals, who try to import theoretical concepts or critical concepts from one very different context and then apply them to Southern or non-Western political contexts. What I am going to try to do is simply to suggest to you why it seems to me that the best way to understand the work of the TRC is by pulling some concepts which are distinctive to an analysis of politics which is postmodern.

Let me simply point out to you some of the features of the basic argument about what postmodernism is. Modernism is understood, certainly in the US and Western theoretical discourses, more generally as a way of thinking about the organization of government and about the law, as a way of thinking about the state, which takes its center of gravity from the idea of law. That is to say, in the American context, the distinctive feature of the American constitutional government is supposed to be the fact that ours is a government of laws and not men. Politics is largely conducted in terms of, and constrained, in this modernist political narrative, by law. So there is a privilege given, certainly in much Western political theory and Western constitutional theory to the idea of law. So the legitimacy of the political system is tested by the degree to which it adheres to basic norms of legal rationality: giving reasons for decisions, the state controlling what counts as a legitimate political action and how one goes about determining what is

illegitimate political action. A central role is given to courts and judges -- that is, it seems to me, at the heart of a modernist conception of the law. The great social theorist of modernity, Max Weber, placed great emphasis in his work on the importance of legal rationality as a way of understanding politics in modern societies.

'The TRC challenged in a number of ways that [modernist] account of political legitimacy, precisely because of the role that the law did not play in it.'

Well, it seems to me that the TRC challenged in a number of ways that account of political legitimacy, precisely because of the role that the law did not play in it. There was a criticism made in a book by a South African writer named Anthea Jeffery called "The Truth about the Truth Commission" in which she singles out as the most central flaw of the TRC the fact that the TRC stressed on the one hand that it was not the court of law and thus was not bound by the same rules of evidence as the courts and by legal technicalities, and yet acknowledged on the other side that while it was not a court of law it was still a commission of inquiry. Jeffery writes: "There is a contradiction in these statements. On the one hand, the TRC acknowledges that it is a statutory commission of inquiry obliged to make its findings according to established legal principles. On the other, it dismisses relevant legal rules as technicalities that might inhibit the claiming of compensation and would in any event take too long to fulfill." The TRC's refusal to accord with the established legal principles on the account that Jeffery offers of the TRC's work is a damning criticism. She says: " The fact that the TRC, a preacher of law, failed to abide by the legal principles makes its work illegitimate. In the name of reconciliation and a certain non-factual truth the TRC completely ignored the rule of law." Well, I think that this misunderstands from within a modernist political framework what the purpose of the TRC was.

So, let me just say that it seems to me that the TRC in rejecting elements of what might be called legal modernism was being faithful to the situation in South Africa at the time it began its work. As an initial matter, it is worth pointing out that the idea of

the rule of law in terms of which Jeffery and others have criticized the TRC was a crucial component in the legitimation of the apartheid regime. As Richard Able[?] and other scholars have pointed out, the very infrastructure of apartheid was constructed out of law. Thus, for example, at the 1986 opening session of the thoroughly unrepresentative parliament, then state president Botha could claim without apparent irony that: "We believe in the sovereignty of law as a basis of the protection of the fundamental rights of individuals as well as groups. There is no peace, no freedom and democracy without law." So the apartheid state was a scrupulously [?] one as a formal manner. And the legitimation of apartheid required its thorough legalization. That is part of the context, this legal context and this political use of the law in which the TRC did its work.

And although the TRC was a creature of law and was adjudged by the courts to be subject to at least some of the formal protocols of legal rationality, one of the most prominent post-modern characteristics of the TRC was its decidedly ambivalent and in some respects antagonistic relationship to the very idea of the law and to the idea of law which would have made the TRC subject in the final instance to the courts and more broadly speaking to the state. The TRC's ambivalent relation to the South African state can be seen on at least three levels. Genealogically speaking, the parliamentary decision to create the TRC was taken only after wide consultation with a number of different groups, many of whom, of course, were not state officials. As the legal scholar Martha Minow has noted, extensive public debate and involvement in the design of the TRC set it apart from other commissions. So institutionally, the Truth and Reconciliation Commission straddled the boundaries between the state on the one hand and civil society on the other, belonging fully to neither and yet drawing on aspects of both.

This can be seen most prominently, it seems to me, in the role that religion and religious ritual were to play in the TRC from its inception. The influence of religious leaders and organizations in shaping the basic terms of the TRC's work provoked some criticism. The University of Cape Town professor and human rights activist André du Toit objected that religious style and symbolism had supplanted political and human rights concerns.

Operationally, although the TRC owed its existence to positive law, it was not categorically bound by it. To take a specific example, although the TRC had been required to conform to basic principles of due process, it was not bound by more technical rules of evidence and procedure. So the law contributed to, but did not fully or finally control the work of the TRC. This explains in some measure the willingness of the TRC to be open to claims which were forged in the language of custom and of customary law. Now strictly speaking, violations of custom lay beyond the scope of the commission, but customs still entered not only into the formal space of the hearings, but into other practices that emerged in the context of the TRC.

Here I would have shown you a little clip from a documentary by Bill Moyers which recounts the gathering of a group of South Africans, some of whom had testified before the TRC as victims at the site at which the sons of some of the individuals in the documentary had been killed. With the support of the TRC this group of South Africans was taken to this site about which they found out during the course of testimony at the TRC where among other things they engaged in a customary ritual the purpose of which was: a) to acknowledge the death of their loved ones and b) in the absence of their ability to give them a proper burial to ceremonialize those deaths many years after in fact they had taken place. So part of the work of the TRC notwithstanding its formal mandate seemed quite clearly to be sensitive to the claims of custom.

A second post-modern feature of the TRC had to do with the radical pluralism of its practice of which I think the sensitivity to the custom is just one aspect. The TRC was a kind of nomadic institution. That is to say, unlike a court whose sessions take place in one building to which litigants come, to which lawyers come, the TRC undertook its work throughout the country and so engaged in collecting testimony in cities and towns throughout South Africa. This reflected I believe an active engagement and an interest not only in the persons who came to tell their stories before the commission, it also revealed the commission's recognition that the reconciliation it was seeking to achieve demanded a kind of pilgrimage to places throughout South Africa where the recounted events took place. This was not the case in

other words of people having to come either to provincial capitals or to the national capital to seek of government to make their claims. This was to the contrary, an instance in which those who had been officially deputized to take these stories, went to the persons who have these stories to tell, either as victims, or in deed as abusers of human rights. This de-territorialization of the commission's work might be read in post-modern terms as an enactment of the de-legalization that characterized the amnesty hearings themselves.

'The electronic mediation of the commission's proceedings through the use of the broadcast media ... seem to be a kind of post-modern intensification of enlightenment notions of political transparency.'

Although I cannot do any more than remark it, the television broadcast of the TRC hearings might also be deemed an effort to open up and extend the terrain of the post-apartheid public sphere. My claim here would be that the electronic mediation of the commission's proceedings through the use of the broadcast media -- not cynically construed, as some people did construe it as a simple spectacularization of human suffering -- the radio and television broadcast of the TRC hearings also seem to me to be a kind of post-modern intensification of enlightenment notions of political transparency. People who were not able to be in the room to watch the proceedings of the commission were able nonetheless to witness those hearings throughout the country through the medium of the electronic mass media.

Finally, the proliferation of the politics of the TRC can also be seen in the role it played in developing of the culture of democratic citizenship. In addition to its formal hearings, the Truth and Reconciliation Commission established a number of grassroots programs that allowed victims of human rights abuses to tell their stories in less formal settings. One of these was the Kulumani support group, which met in a small hall in the downtown Johannesburg and in other sites throughout South Africa. Kulumani, "let's speak out" in Zulu, was a parallel process to the commission hearings which educated people about how the commission worked and encouraged them to come forward

with their stories. The group passed their stories on to the commission, and as one founder of the group put it: "We provide people an opportunity to talk. Talking does not oblige them to do anything, but if they are interested in getting their story known, we will help them. We just want the lesser known victims to get a fair deal." In a country where nearly 60 percent of the black populous is illiterate, forums such as the Kulumani program seem to me an exemplary instance of the affirmative post-modern politics of the TRC process.

Many of the South Africans who participated in these informal hearings are bearers of what Michel Foucault has called "subjugated knowledges." In telling the story of their experience of apartheid, the South Africans were receiving a political education which enabled them to speak for and represent themselves in domains which were formerly defined as normally excluding them. We might say then that the TRC process served as the site for the elaboration of a new civic discourse ethics, which aimed to develop a culture of political speech that would overcome the discourse of terrorism that characterized the age of apartheid.

It has to be said moreover that the civic discourse to which the TRC committed itself involved a project of democratic convention, not only for the victims of apartheid, but for the beneficiaries of that system as well. The former adherents of the apartheid found themselves free to undertake an exploration of what it meant to be a South African citizenship in the context of the politics that did not demand the degradation or denigration of the other.

Indeed, what was being forged was a concept of democratic citizenship in which democratic identity was being forged through alterity. That is, the vision of politics that informed post-apartheid political culture was anchored in a commitment to an ethic of mutuality, which is best captured in the traditional of black African concept of ubuntu -- in the notion that people are people through other people. Post-apartheid political culture harnessed this pre-modern communalist ethic and put it to stunning post-modern use. Thus, for example, the South African Constitutional Court relied on the notion of ubuntu to declare

capital punishment unconstitutional and the idea of ubuntu figured prominently in the TRC's own work. As Desmond Tutu put it, "Ubuntu says: I am human only because you are human. If I undermine your humanity, I dehumanize myself." That is why African justice is restorative rather than retributive. Ubuntu does not demand a subversion or the objection of thyself for the sake of the other. Rather, it conditions the realization of thyself on a recognition of oneself in the relation to, or more precisely through the other. As a jurisprudential conception then, ubuntu embraces the radical reality of an ethical relation among citizens that exceeds and overruns the modernist idea that political subjects are the bearer of individual, *a priori* rights against other individual rights bearers from whom we can seek justice, justice more often than not of the retributive kind. Moreover, the concept of ubuntu offers an alternative to the vision of human rights which reduces human rights to the domain of individual rights and thus to a modernist conception of human rights.

This post-modernist understanding of the ways in which law is not identical to the ethical concerns that are the heart of the human rights discourse, this post-modernist understanding, if you will, of the limits of the law, can be seen in at work in Tutu's response in an interview to the charge that the TRC was too victim-friendly and had implicitly used its power to cede the moral ground to one camp in the post-apartheid struggle, to set the record straight. Tutu's remarks are instructive. He said: "The act is quite clear. We are first of all enjoined to be independent and impartial. Second: a victim is a victim is a victim. There is no distinction between someone who is a victim of human rights violations perpetrated by, say, the liberation movements, or one who is a victim of violations perpetrated by the apartheid dispensation. Once someone comes before the commission and we say yes, a gross human rights violation has happened, we do not ask: what is your political affiliation? In a matter of amnesty, no moral distinction is going to be made between acts perpetrated by the liberation movements and acts perpetrated by the apartheid dispensation." In the interview from which I have been quoting, Tutu then goes on to say: "We can make that distinction, as most human beings would. But the act itself makes that moral distinction superfluous."

'The ethical obligation for judging the truth of the stories recounted before the TRC cannot base itself on or hide behind modernist legalistic conceptions of rights and responsibility. The law in short, provided no certain warrant, no solid ground and no privileged position from which to anchor and orient judgment.'

For me, the superfluity of ethical or moral over legal judgment, the ethical obligation for judging the truth of the stories recounted before the TRC, cannot base itself on or hide behind modernist legalistic conceptions of rights and responsibility. The law in short, provided no certain warrant, no solid ground and no privileged position from which to anchor and orient judgment. Tutu clearly recognizes that this dissolution of modernist markers of legal certainty does not foreclose or absolve South Africans from ethical judgments, from making ethical judgment about the meaning about the stories told about apartheid by victims and perpetrators alike. In other words, as Thomas Keenan here has argued in his book *Fables of Responsibility*, "the ethical responsibility to take sides can be exercised only in and indeed constitutes a political space that we might call democracy." That space is the site of the split if you will, between law and justice, which has to be maintained in order to preserve the particularity or the specificity of the political domain without which no responsible judgment is possible. As one commentator has put it: "Democracy maintains a split between law and justice. It accepts a fact that justice is impossible, that it is an act that which can never be grounded in sufficient legal reasons. It also knows, that precisely because of this split law can never be completely just. We could even say that law in itself is unjust, yet precisely in its injustice it leaves open the space of democracy. Democratic politics recognizes that any law that claims to do justice is a law whose reach always exceeds its grasp."

As I see it, this recognition of the exorbitance of justice is what underwrites the project of democratic invention in South Africa in which truth is the name of political situation that resists the jurisdiction of the law and in which reconciliation is the name of an ethical relation that resists the claims of law and the

modernist conceptions of law to finally adjudicate the truth of the apartheid regime or to reach the reconciliation towards which the commission gropes. The point here in a word is that the heart of the critique that people like Anthea Jeffery and others have made about the refusal or the inability of the TRC to negotiate the law on the one hand and its commitment to doing something that cannot be circumscribed by law, is misplaced. If we see the TRC as an effort institutionalized to create or to contribute to the creation of a democratic culture of human rights, then the argument that the TRC has failed to adhere to the forms of modernist of legal rationality is an argument that at the end of the day misunderstands what the post-modern project of the TRC as I have described it is.

This has been a very compressed statement of the basic moves in the paper from which I have been reading, but one which I hope will open some questions that we can discuss in a greater detail in a few minutes. Thank you.

Alexander Boraine

First let me say a word of appreciation to Tom for inviting me here. This is my second visit here -- in fact about 18 months ago there was a major conference here in which I took part and it was my first taste of some of the ingenuity of Bard and its differentness if you like, and I am very pleased to be here tonight. Then let me hasten to express my really quite profound appreciation to Kendall for his not only sympathetic, but sensitive and insightful interpretation of what some of us were trying to do in South Africa. I have very rarely come across the insight that I have listened to tonight.

I think that he has expressed far more ably what some of us were trying to do in attempting to meet the critique of the TRC. And let us be upfront, the TRC is not without its faults and shortcomings, but I think the major thrust which I think has been very ably defined tonight has not always been my pleasure to listen to and I am really grateful for that.

I suppose I would come at the tension which was referred to at the opening remarks, which I think is absolutely right that does exist, the tension that cannot allow really either arm of that tension to collapse without doing some violence to what the Truth and Reconciliation Commission was all about. To put it in another way, that there would be many people who would argue that the major problem with the South Africa's commission was no so much that it held politics on the one hand and law on the other. Or some would put it between justice and truth. I would argue that the Truth Commission held a very different definition of justice, a wider definition than a normal narrow or modernist interpretation or retributive interpretation. So I would argue that yes, it was justice, attempted at the very heart of the commission, but it certainly could not be interpreted in a very narrow framework of retribution, but rather in the wider context of restorative justice, to which obviously Kendall referred to in his closing remarks.

'Central to the commission was the place of the victim rather than the focus on the perpetrator'

I think that central to the commission was the place of the victim rather than the focus on the perpetrator, which is obviously very often at the very heart of laws, and of courts and of judges. We make really no apology for placing at the very heart of the commission's life and its work the victim. So often it is that person who is left on one side and where the focus is on the retributive justice and who the victim is and their concerns and the need for restoration to moral and human dignity is so often either ignored or in part obscured.

What I want to try to do is perhaps to take the commission and that South African model and ask whether it is exportable, if you like. Was South Africa so unique of that what took place there really cannot be looked at anywhere else. [inaud] It is true that there were unique features in the South African model. And it is true that the negotiation process which took place in South Africa has a quality about it which you very seldom find anywhere else and it is this almost mysterious resolution of conflict which took

place there which makes some people really shake their heads and wonder what had happened, because the normal interpretation of where South Africa was going ten years ago and more was that this was moving inexorably towards some kind of bloodbath. And there did not seem to be any other way of arresting this inevitable course of history. I think there are still many who in South Africa and outside of South Africa wonder how it was possible to come so close to the precipice and not to fall over.

I am not going to spend a lot of time trying to answer that question, I simply raise the fact this was a quite remarkable event in African, Southern African and world history if you think of what has taken place in so many other parts of the world.

I think more specifically, there could also be argued that there are unique features to the South African model. One in the sense of process, and Kendall has already referred to that so I am not going to label the point. But there is no doubt that by deliberate design an opportunity was given to so many groups and people in South Africa to participate in the evolving Truth and Reconciliation Commission. It is very different, for example to the process which took place in Argentina, Chile, those of you who are familiar with the Kosovo events that took place will know, that the Chilean commission for example was announced by the incoming president who decided almost by fear that there is going to be such a commission and the appointed group of people without any real democratic consultation to do the work of that commission. Eight commissioners were appointed and told they had to as far as possible to find out the truth of the conflict and to see to what extent there could be reconciliation in a new society.

The South African process was very, very different. Right throughout the country there were many workshops where civil society came together to look at the proposal for such a commission and gave enormous input to actual finished product, if you like. And a part of that of course was that it was based on an act of parliament rather than a presidential action -- which meant that it could not be imposed, it had to be debated in a democratically elected parliament after going through exhaustive

discussion in public in the Standing Committee on Justice, where individuals and groups could offer their own ideas, thoughts and concerns.

'We kept coming across very, very remote rural areas where you would see a group of people sitting around a little radio and listening to a transcript and often live, directly from the commission's proceedings - it was not something far, something out there, something official, it was as close as that voice on a little tiny transistor radio.'

The second area where South Africa was unique, quite different from any other commission that I know, was of course its public nature, the fact that it was not conducted behind closed doors, as was the Chilean or Argentinean or even the much recent example of Guatemala and El Salvador and so many others. It is not to critique those, although my strong view is that the transparency that took place in the South African commission was absolutely right, particularly against the background of lies and deceit and cover up which was the order of the day in way South Africans did their politics and everything else. The whole system of apartheid permeated into every area of life. Suddenly, you had a commission which from day one was open to public and therefore open to the television and radio, which meant that: 1) anybody could attend any hearing anywhere and 2) that the camera was there from the very opening day so that the whole nation was participating on a daily basis. And in particular because so many people of South Africa are illiterate, functionally illiterate, you had the access through radio and radio is relatively cheap and is accessible and is in different languages, indigenous languages which meant that we kept coming across very, very remote rural areas where you would see a group of people sitting around a little radio and listening to a transcript and often live, directly from the commission's proceedings - so that it was not something far, something out there, something official, it was right as close as that voice on a little tiny transistor radio. So sure, that was a very unique aspect of the commission's life and work, and deliberately so. It was felt that this was not something that had to be confined to the elite but really needed to be a part that would be passed on the entire country.

I think the third unique feature, probably its most controversial feature, was the whole question of amnesty. And I want to return to that in a moment, but simply to say that I think the most vociferous critics of the South African model were [criticizing] because there was a limited form of amnesty that was offered.

Fourth and last point that I want to make in terms of its unique character in relation to any other commission that I know is the powers that were given to the commission by an act of parliament. The power of subpoena, and let me just illustrate what I mean and how far reaching this was. If you take Pinochet, the Chilean commission requested Pinochet to appear before court albeit in camera and he was able to totally dismiss this and say there is no way I am going to appear before you, and of course that meant that no one from the military establishment appeared before the commission and their presence could not be demanded. I think we learned from that, and [inaudible] the fact that we could subpoena those who refused the invitation and those who denied or rejected that subpoena of course were in subject to law. Of course the example of former state president Botha is an example of that.

Now let me return for a moment to the amnesty provisions. I am not going to go into detail, I am just going to say that the choice that the South Africa had in a moment of absolute crisis when the former generals and the army and police demanded amnesty as a part of the quid pro quo of the negotiated settlement that the response that South Africa could have made was to offer a general amnesty which of course was very common and has happened over and over again in most transitions, not some, but most. How was it possible for us to resist that? I think the post-amble which allowed for amnesty, and it was quoted earlier so I am not going into that, offered South Africans an opportunity to grant a general amnesty, which was the demand, or we could use the second clause of the post-amble which talked about amnesty in terms of certain criteria. We deliberately fastened unto that which made amnesty conditional upon individual application and public testimony and full disclosure.

That of course is very, very different from writing a law which

grants general amnesty to everyone that was involved in the conflict of the past. It meant that every person who wanted to take advantage of that had to apply in person, had to state their application, not only on the form, a statutory form, but also in public. And I think that this is the classic uniqueness of the South African model that it held this intention. The victim hearings which took place first again by desire, so that the focus would be there, even though many of us, many people argued and pleaded that we should start with the perpetrators. That would again be exactly the normal approach. So what we tried to do is to say the first people who are going to be heard would be those who had never been heard, those whose voices had been suppressed, the voiceless. So the silence was broken when very ordinary people were given an opportunity to tell their stories and to tell them in an atmosphere which was conducive and sympathetic rather than foreign. A young writer described the difference between the tribunal for Rwanda where you had the judges in the judicial attire and courtroom procedures which made it extraordinarily difficult for victims to feel relaxed.

What the South African commission attempted to do, and was a part of the act and deliberately written in there, that victims should be received with compassion, so that they would speak in their own language, they were always accompanied by some counselor who was trained to be alongside that victim, that they were welcomed as very important people. And bear in mind that these are the very people who when their sons or daughters or mothers or fathers or brothers or sisters were killed or tortured or harassed or abducted had no dignity, no place to go. Time and time again we would hear victims tell us how they heard that their son or daughter disappeared after interaction with police in some demonstrations or some raid by police and mothers usually, sometimes fathers, would go to police station and ask as to what has happened to their boy or their girl of 16, 17 and even younger in many instances. And they were rejected, they were driven away from every state institution, whether it had been a police station, whether it would be a hospital or clinic or whether it would even be a morgue in their desperate attempt to find out where these people were. By contrast, then there was here a commission and the way it was understood by the victims was not that this was a commission appointed by Parliament, for

them this was Mandela's commission. This was the man who had urged that such a commission should be appointed so in many senses they felt that were being received by this almost apostle of reconciliation who had himself paid a huge price of 27 years in jail and comes out apparently without any bitterness whatsoever. It was that kind of ability to put the focus on restorative justice, these people were getting in small measure some justice, at long last they were able to say this is what I have been waiting for.

When they were in jail many of them, the jailers said to them, and it was quoted many times: "Nobody can hear your cry. Nobody can hear your cry when we torture you." And suddenly they were being heard, and I think this ability to hold intention of victim hearing on the one hand and the confession of the perpetrator on the other, because that too was in public, that was their story of what they had been involved in and sometimes those stories were extraordinarily cruel as you see in the film. There is no way that I can take you there and help you to hear these stories unfold and all its horror.

'The perpetrator corroborated the very stories that we heard from the victims: "Yes, it was true, we did torture" - and by name, and place and date. If that is not forensic truth, in a very real way, than I am not sure what is. '

Now how do you do that, how do you give voice to the victim on the one hand and enable the perpetrator to tell their story on the other? There was verification, this is what Anthea Jeffery misses totally. The corroboration came, not by us simply listening uncritically to the victim, but when the perpetrator corroborated the very stories that we heard from the victims: "Yes, it was true, we did torture" - and by name, and place and date. If that is not forensic truth, in a very real way, than I am not sure what is. There was corroboration and every victim's story had to be collaborated. If it could not be, they could not be declared formally a victim and therefore able to receive a reparation.

How do you build in accountability, which was one of the goals of the commission, and at the same time have a commitment to a new political dispensation of consolidation of democracy and of

growing a human rights culture which had never ever existed in the country? I think the only way to do that is not to forsake the justice but to redefine justice in terms of not only retributive justice, but of restorative justice.

Now the final question I want to ask is: Can it be exported? Is it desirable that it should be? Let me tell you that because of the public nature of the commission and because of its uniqueness there are countries all over the world that are asking as to whether or not they can learn from the South African model. This is a remarkable thing. South Africa was the polecat of the world - - rightly so -- because of its racist and unjust policies. No one would want to look to South Africa, except with horror and critique. Suddenly, we are embarrassed by the number of countries that are sending delegations to South Africa, not only of lawyers, not only of sociologists, not only of politicians, but of people in government. And which are these countries? Cambodia, yes, Northern Ireland, indeed, Sierra Leone, Nigeria, Indonesia, Serbia, and this week Columbia. How remarkable!

But let me focus only on one and because I was involved directly in the commission I have been asked to go to all of the countries that I have just referred to and many of which I have been doing. Northern Ireland on five occasions, meeting a wide cross-section, as you know there has been a real dip in the whole process there, I have just come back from there. On Thursday I go to Serbia, Belgrade, to sit with opposition groups to talk about what can be gleaned and learned from the South African process. Everywhere I go the first thing I say is: South Africa is not Northern Ireland. South Africa is not Indonesia, and so on. But there are certain things which seem to resonate, it's so obvious when you think about it. Human rights is indivisible, so there is a direct linkage between a victim community where gross human rights violations have taken place, and community of suffering, a community that does not want to continue in that way but wants to move beyond that to a new society, to a new structure, to a new beginning.

Let me take Bosnia. Here you have the world gazing with repugnance as to what happened there, and rightly so. But now we have got a tribunal in Hague for former Yugoslavia and it

seeks to indict the leaders of that genocide or ethnic cleansing. Why did they only indict the leaders? Because so many people were involved it would be certainly impossible to indict everyone. So you never can have full justice. Not everyone will appear or will be prosecuted, so immediately you have the process of selectivity and therefore politics and there is no such a thing as pure justice.

'Is there a possibility of bringing some kind of commission into being in Bosnia where people can listen to each other's stories and begin to evolve a common memory or a part of a common memory, where people can start building a new society? Or must they always be separated by peacekeeping forces, forever?

But what do the people of Bosnia say? The ones I have met support the tribunal but say it is not enough. Twenty thousand women were raped in Bosnia. Is it enough to have a tribunal in a foreign country, miles away in, a foreign language or is there a need for something indigenous, on the ground where people's voices can be heard in their own communities? Is truth being contested in Bosnia? Yes, it is. The Muslims will say we are the biggest victims and the Bosnians will say the same and the Croats will say the same. Can they believe that other people also suffered? It seems that it is very difficult for them to do that. Is there a possibility of bringing some kind of commission into being where people can listen to each other's stories and begin to evolve a common memory or a semblance or part of a common memory, where people can start building a new society? Or must they always be separated and kept away from each other's throats by peacekeeping forces, forever? If you look at Cyprus you know exactly what I mean. A line that is drawn and without continued intervention violence will reoccur.

How do you stop the society from perpetuating its cycle of violence? Through punishment alone? Through retributive justice alone? Or is it possible to have complimentary justice where you have both retributive and restorative justice as a real possibility? I think this is where perhaps South Africa can make a modest contribution. The whole focus on victims rather than the

perpetrators without excluding either, the whole focus on restoring the society or community, of building a peace, of consolidating a democracy, of establishing a human rights culture, I think that is a worthwhile goal. I think with all its weaknesses and all its problems, South Africa has started a new process which I think can be attempted and clearly there are those, including the president of Indonesia, where they are working now on a new bill for parliament for a truth and reconciliation commission as well as a human rights tribunal. A holistic approach, very tricky. Can you imagine if Indonesia goes the way of the former Yugoslavia? What would happen there? Is it not worthwhile attempting to do something which is politically, legally postmodern? I think it is.

Questions:

Q1:

Let me pursue two questions. Let me just start out with some skepticism about the modern and postmodern structure as you stated. As you characterize the features the whole process which you labeled postmodern it sounded to me like dimension of reality that we were trying to find for centuries in theories of law, labor law for example. Also in the US progressive approach to law as problem-solving, is on one hand labeled progressive as in that sense as postmodern, on the other hand many of these features are present there, but they are in different combinations, they are not combined with identity of politics, they are associated with class politics, with different kinds of perceptions if dimensions of justice. So that is a first question, whether that analytical move may not have some disadvantages, by making that contrast model so that the critique of this specific form of reality is inhibitive because criticism seems to be something forced to be modernist. So I have that first which seems to be pretty conceptual question. So my two questions are: whether the concept of post modernity versus modernity helps us as much as you think it does, especially with other forms of de-formalized reflexes. And the second question is about the varieties of democratic discourse and whether there might not be in this particular process, given the importance of the human rights dimension and the importance of humanization of relations, whether there is not at the same time an

impoverishment of the other resources that a democratic system also needs to have.

Kendall Thomas:

Important questions both. Let me just say briefly in response to your first question in which you have expressed some skepticism about whether those features of the TRC I have described are truly postmodern or are not rather seen as parts of the elements of legal modernity.

Q1:

I was questioning the disjunction

KT:

One could simply say that what postmodernism in politics is about is an intensification of modernity. There is a whole lot that could be said there but the distinction to me is between an understanding the law and politics which has a metaphysical foundation in a certain idea of the state as a ground of the TRC and an alternative understanding which understands issues of political legitimacy that law raises to be questions that ultimately do not have that kind of a metaphysical foundation. That is the gross distinction rather than the formal distinction between legalization and non-legalization. But it seems to me that in each of the instances that you mentioned of a sort of de-formalized legal procedures the state stands as a final guarantor, in the labor law context certainly for enforcing whatever settlements are reached informally and you know the state can force people to the table in a way that suggests that our labor law can be described as state-centered. But we will talk about that I hope in a greater detail, because I think that the second question seems to me where the action is. What kind of democratic discourse is generated by the language of victimhood and what sort of false solidaristic expectations are going to be formed that cannot possibly be met. I would simply say here that as I understand it there would be two components to the transitional justice and I believe is called for in South Africa. One of them is the kind of dialogic or narrative justice of the commission, a kind of justice the heart of which is about recognition of the harms that had been afflicted on people and the provision of the form in which people can speak and be heard and listened. These are forms of

justice. It is not exactly an ideal. Truth is a form of justice but it is a discursive form of justice, a dialogic of justice which is not restorative in some true sense, but is reconciliatory. I am skeptical about the possibility of a restorative justice in society which has been so deeply raked by violence. The most that we can hope for perhaps is reconciliatory justice, but that is enough.

'Maybe one of the things that the TRC can also authorize is a kind of a model for retributive justice which is built on the basis of this dialogic truth of victims telling their stories and perpetrators telling their stories and thus creating a kind of dialogic context in which redistribution will make sense as something other than a violent expropriation of someone else's property, but as a human rights question.'

The second component of this transitional justice, however, as it seems to me, is the redistributive justice. So in addition to the politics of recognition I would argue for a politics of redistribution which is not taking place in South Africa. It is difficult to know whether it can take place, given the degree to which international financial institutions like IMF and World Bank have interest in not permitting too much redistribution in South Africa. And I am rather less hopeful about the possibilities there and to the extent that I am rather less hopeful about those possibilities and concerns you raised about the dangers of creating solidaristic expectations among people through the work of the TRC, about how that reconciliation would not merely be symbolic, acknowledging the importance of symbolic reconciliation and creation of civil society, but also material and economic. That is a crucial question and one which I think South Africa will have to grapple, but which I do not think can be laid at the feet of the TRC alone. The TRC is a qualified success. I am waiting to see what sorts of reparations come out of the TRC, because it may be that one of the things that the TRC can also authorize is a kind of a model for retributive justice which is built on the basis of this dialogic truth of victims telling their stories and perpetrators telling their stories and thus creating a kind of dialogic context in which redistribution will make sense as something other than a violent expropriation of someone else's property, but as a human

rights question.

Alexander Boraine:

I too think that the second question is fundamental. The restoration of the moral order and economic justice are not two separate things, there are going to be two sides on a single coin, I realize that. I do not think that the ritual process has given false expectations though, I think it has countered the possibility of personal revenge, to take it into your own hands. As it were, the choice was 25 years of prosecutions, 50 years of prosecutions or amnesia or something which would give some sort of justice, truth and new beginning. South Africa like some other societies is a very badly damaged society. I do not apologize for the word healing. There needed a some kind of ritual which says "you are important, we care about you, you count for something, you are not this a sort of lost generation of this country, you are a part of it."

<http://www.bard.edu/hrp/images/boraine1.psd> It does also show very clearly that without new economic redistributive opportunities, then I think the whole idea of this restoration of moral order is going to be so badly tarnished to make it look quite sick. I think we have tried to say that over and over again. To be fair, for the new government to try and to bring about equality, even of opportunity, after 300 and more years of racism and colonialism which jeopardized the life chances of the vast majority of the population of the country is almost an impossible task. The fact that they are actually doing something -- that new houses are being built for the poor, that the electricity is being supplied for some, that clean water is being made available for millions -- and I am not exaggerating -- for the first time in their lives, that the clinics are being built. It is not nearly enough, I could be the biggest critique of the new government because I think there is too much adherence, in my judgment, to this whole globalization process. [Inaud]

'We had to name the beast and make people acknowledge that, not just know it. This was very difficult for the white community in particular, who has to bear the major responsibility. They said "it is not true." When they listened

to the victims, they railed against us, they would switch off the radio, they would turn off the TVs. Then suddenly they started listening to a hearing of the perpetrator who actually corroborated what the victims had said, and I think that kind of a foundation on which to build a new society was very important.'

I don't think we could only simply have the economic justice, I think there needed to be a some kind of recognition, some kind of drama being played out, yes, even to combat the denial, to build a society based on some truth rather than some lie. I think that was very important for the South African context and in many other places where the truth is being contested, just as if it had never happened there before, there were just a few rotten apples, etc. Whereas torture was endemic in South Africa, we did not go to a single place in the country -- and we went to hundreds of places to listen to thousands of people -- where we did not hear a story torture in a tiny little town, small township as in big cities. You cannot build a society on that. We had to name the beast and make people acknowledge that, not just know it. Very difficult for the white community in particular, who has to bear the major responsibility of that. They said "it is not true." When they listened to the victims, they railed against us, they would switch off the radio, they would turn off the TVs. Then suddenly they started listening to a hearing of the perpetrator who actually corroborated what the victims had said, and I think that kind of a foundation on which to build a new society was very important.

KT:

Can I just say very briefly how much I concur in the importance of that kind of work because when I was in South Africa in the beginning of 1996 before the TRC had begun its work I was amazed and somewhat sad by the fact that there was already an organized resistance in the country against any affirmative action on the grounds that was a reverse discrimination, a claim which seems to me one can only make seriously by denying the kind of history which came out in the TRC. So there is some clear relationship, it seems to me, between the very possibility of economic re-distribution and the dialogic justice which

establishes the historical record the TRC was able to create.

Q2:

It seems to me that the major part of the TRC is exactly acknowledging the impossibility of justice. How do you make up for human life, there is no way of redistribution, in other words it seems like rather than trying to restore it, it tries to give a sort of recognition of the trauma of apartheid. And it seems to me that this kind of recognition itself, alongside with very important practical and legal forms of redistribution. It seems to that there is a possibility in this for redistribution because of the new laws, because of dealing with racial issues that seems like a kind of redistribution together with retribution.....

KT:

Very insightful. The problem remains though, that there are many South Africans who feel that the Truth Commission did not offer any form of justice and whose understanding of justice that they would acquire as survivors of people who are dead or as people forced to life of torture under the old regime is retribution. They want to see people who were engaged into human rights abuses suffer. One of the interesting aspects of the documentary which you will not see because they could not get it going was a moment in which one of the people who applied for the amnesty and testified before the commission talked about the shattering of his world that had followed upon the revelation to the people in his life -- his wife, his children, etc. -- that he had put on uniform every morning for many years and then engaged in the most atrocious acts. So there is some suffering as a result of the part that the people tell what they did as a condition of being granted amnesty. But it is not retributive justice in the way we would normally think about it. There will be no people sentenced to death in South Africa, that is, capital punishment as a consequence of executions or torture in which they have participated. And the large question is whether or not, even if there were some possibility under current South African law of capital punishment for persons who were judged to have committed human rights abuses, whether that retribution would cure the problem. I think you are quite right to say that even if there were regime that allowed for capital punishment that would nonetheless still force us to come to terms with the impossibility

of justice in the face of that kind of systemic form.

Q3: [How do you see the political effect of the conditions of the amnesty in the international law?]

AB:

That is why I a sort of used Bosnia as an example, where you have a tribunal appointed by the Security Council. My question is, first of all, the moment you do that, you have to be selective, you cannot prosecute everybody so the question is how come some and not others? And they say we cannot do that and by not doing that they were actually qualifying justice. Same thing in Rwanda or even Ethiopia. We had prosecutions taking place, there were people who were sitting in prison since 1991, awaiting trial. Is that justice? You know, for me, there is no black and white, there are all sorts of shades, gray, and once you start acknowledging that, then I think you are on a better track as to what your end goals are because the goals may be different. You may have justice as one goal, you may have democracy as another goal, you may have peace and stability as another goal, all sorts of things. Even though all of these I think are good intentions.

The International Criminal Court I think can present a major problem. I support it, but if it means that the only response is going to be in terms of prosecution then I think one is denying the inventiveness of other interventions which inevitably have to take place. Then the whole question of national sovereignty, international jurisdiction becomes a huge problem. I know the prosecutor has discretion, I would want to argue there ought to be actual encouragement of countries, states, at accepting the responsibilities of dealing, as best as they are able to, with their own situation. The fact that the United States is not a signatory of the International Criminal Court immediately calls the whole process into some doubt -- because we all know the power of United States. We all know that United States in convening the action of NATO against Serbia, for example, would never have dreamed of doing that for East Timor because of the political consequences and the role that Jakarta plays, and the fact that it is the fourth largest country in the world with huge moderate Muslim community.

And we all know that political choices are made. You will not have Kissinger being arraigned, but you may have Pinochet. Why? We all know that politics plays major role and that the most decisions that are taken have to take into account political realism as well as human rights aspirations. In South Africa you have generals going to Mandela and saying: we have protected the negotiations, we made it possible for these negotiations to take place, we even provided for security. It is a very real situation. If you are going to say to us that at the end of the process we are going to be tried and prosecuted and spend the rest of our lives in jail, we are going to make the process impossible. We are going to make the elections impossible. And Mandela says to me privately, "I knew when they told me that they could do it, and I was angry, but I knew that if they had the power to do that we had to find some way." And I think the genius of the response was not to conform into the general amnesty theme, but to a limited amnesty where you have a shaming process which is a very powerful process.

Q3: [About the negative international aspect of such an amnesty, and details of the ICC statutes]

AB:

Well, I cannot go back now to all the retrospectivities, that would take all day, but my guess is that they would argue that the amnesty could apply to the people in the country but would not be recognized outside of the country and therefore those people would not be able to travel, and you know I think that well may be right. My argument is that International Criminal Court should be amended to introduce a clause which actually encourages a state to accept responsibilities for their situations. Then we may have - if you look at Rwanda, looking at gacaca, the indigenous approach, or the ubuntu concept - it is not something that should be considered as primitive African stuff. I think it can teach us powerful lessons. And what is the meaning of the word -- to conclude on that; that if you a sort of picture it in a traditional setting -- and this goes way back to the Greeks, where the emphasis was on the victim, not on the perpetrator, on how you restore what was stolen, taken from the victim and how you rehabilitate the perpetrator, how you bring that person

back in from the darkness. Because if that person's humanity is diminished, then my humanity is diminished in a sense too, because I am human because of someone else's humanity. I think that restorative justice has been attempted -- you have models in Canada, New Zealand, and in the United States, particularly in juvenile delinquency. What I am arguing is that we really have not examined the role restorative justice can play in war crimes, crimes against humanity, genocide, this whole area. And I am not talking about justice missing and patting people on their back and saying it is ok, we will forgive you - some sort of a cheap reconciliation is not quite justice.

'One unfortunate feature of these truth commissions and the history of these transitions is the fact that the word amnesty conjures up of both the idea of remembering and the idea of forgetting.'

KT:

Can I just say a word? One unfortunate feature of these truth commissions and the history of these transitions is the fact that the word amnesty conjures up of both the idea of remembering and the idea of forgetting. In the South African context the people who were most deeply invested in forgiving and forgetting were those who had been part of the apartheid regime or who had been the people who had apologized for that regime. So the standard argument was: there were abuses on all sides, the thing to do now is just to forgive and forget. And to the extent that amnesty suggests the forgetting, it is an unfortunate term. My own view is that what took place in the TRC through this limited amnesty was: a) a recognition that people had engaged in gross human rights violations, this is not a blanket amnesty; but b) a kind of forbearance -- if we wanted to, we could choose the Nuremberg solution, the consequences for the future of South Africa would be damned, but if we wanted to pursue dungeons, we could, but we are going to adopt a posture of forbearance, which is not to say that we are forgiving what you are doing, but we are simply not exercising the right to punish you. So I can imagine a situation in which you have prosecution without punishment, the purpose of which would be to establish a responsibility. And the establishment of responsibility I believe

is absolutely crucial, and that is one of the reasons why I support International Criminal Court which will claim for the international community the authority to adjudicate the responsibility for the acts regardless of the inability or unwillingness of domestic legal systems to deal with histories of those kinds of abuses. It may well be that we want supplementary institutions but what I would urge the International Criminal Court to do is do de-couple the prosecution of individuals from the sentencing/punishment concerns that we ordinarily think of as of a piece when we talk about courts and when we think about a sort of legal response to these things.

'You can have admission without apology, and in the face of that defiance it seems to me very important to find a word that does not communicate the notion that amnesty is about a pardon as opposed to forbearance of punishment.'

The other small point that I wanted to make is to insist again on the impossibility of restoration. In this documentary, one of the things that struck me was that there were people who came seeking amnesty who were nonetheless very defiant, particularly people who had been part of the South Africa security forces, who said: I have nothing to apologize for, I will confess that I did what I did, but I was obeying orders, I thought that what I was doing was to protect South African state and I am not going to apologize for that. So you can have admission without apology, and in the face of that defiance it seems to me very important to find a word, I do not know what that word would be, that does not communicate the notion that amnesty is about a pardon as opposed to forbearance of punishment which the society has every right to impose but has chosen for ethical reasons not to impose.

Q4:

I guess I have more questions but my practical question is to do with the importability. I am thinking of what some people have considered to be a reign of terror in this country, especially with the police. It seems to be an interestingly complex situation where you have the room in which revelations are being made

and perpetrators are confessing, victims are expressing themselves and the listeners can assess the stories So I am thinking of the exportability of this politics and the exclusion of the United States from the list of possible the countries that this could be exported to. I am thinking how important this is to human right abuses in this country.

AB:

That is fascinating because for in last 18 months I have spoken in about 12-15 university campuses in all the parts of the United States. With one exception, every student gathering that I addressed the first question has been: do you think there ought to be some kind of truth commission on the United States? Invariably, the person who asks me that question is an African American. My response to them is: I have told you what I think seems to be right for my country, what do you think? They obviously had their views and I wanted to hear that and the answer in every case, no exception, was: absolutely. I am lucky to have a large number of students that I teach at NYU who have themselves decided when talking about transitional societies that United States is also in transition and have done some superb work on reparations for slavery and racism, which is just superb, I think. I have to say that, and I may be totally wrong, this is just my observation -- There still is a great deal of racism in South Africa, but it's in your face. Nobody argues that it is not there. It is on the table, we have come to terms with it and we are trying to find ways to deal with it. There is sometimes a ferocious debate and argument, but not killing each other. I think this is a very neglected area in the United States. Things are not on the table, they are denied, many people I have talked to in New York and they happened to be white would say: This is ridiculous, we have dealt with that in the 60s, it is over. When I asked the question about monuments in this country, there seemed to be an embarrassing silence. There is a huge division, and I am not exaggerating. And I think there is a long way to go.

KT

I think we should take the observations of our colleague from another country to heart.

Tom Keenan:

Thank you all for coming, and good night.