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## Book Reviews

Boraine, Alex. *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission*. Oxford and New York: Oxford University Press. 2000. Pp. xv, 445. Index. £20. US\$30.

Wilson, Richard. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge: Cambridge University Press. 2001. Pp. xxi, 245. Index. Hardback £45, US\$64.95. Paperback £15.95, US\$22.95.

The question of how best to contend with histories of gross human rights violations in the context of transitions spawned a copious literature at the close of the twentieth century.<sup>1</sup> With the South African model frequently being cited *en passant* as an example of the successful use of a non-prosecutorial alternative, the books under review are of great interest given their in-depth examination of the workings of the Truth and Reconciliation Commission (TRC). Taken together, these books flesh out the parameters of the debate about such projects. A sketch of that controversy follows as a necessary starting point for a consideration of these texts.<sup>2</sup>

Proponents of truth commissions suggest that non-judicial mechanisms of accountability and redress may better serve the interests of societies in transition for a variety of reasons. For example, they may be better equipped to elicit evidence, especially perpetrator testimony, that might not otherwise be forthcoming. This is particularly important in the case of ongoing human rights violations such as 'disappearances', where victims' families continue to search for information about the whereabouts and fate of loved ones. The line of argument in favour of truth processes also suggests that the limited resources of an emerging democracy might better be spent on building the new society rather than on a wild goose chase for perpetrators from the old. This school of thought suggests that international law is ambiguous about the need to bring perpetrators to justice, underscoring that Additional Protocol II to the Geneva Conventions in fact exhorts governments to grant the widest possible amnesties after internal armed conflicts.<sup>3</sup>

Often those promoting such views raise concerns about the possibility of selective prosecutions or the unfairness of any trials, and attendant practices such as prolonged pre-trial detention of defendants, the torture of defendants or witnesses, or the application of

<sup>1</sup> See e.g. D. Tutu, *No Future Without Forgiveness* (1999); N. Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (1995); Symposium on 'State Reconstruction After Civil Conflict', 95 *AJIL* (2001) 1; C. Santiago Nino, *Radical Evil on Trial* (1996); and Special Issue on Accountability for International Crime and Serious Violations of Fundamental Human Rights, 59 *Law and Contemporary Problems* (1996).

<sup>2</sup> For a thorough account, see Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale LJ* (1991) 2537.

<sup>3</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 6(5): 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' Note that some have suggested that this is *not* meant to exempt those who may have committed international crimes.

the death penalty, which are in and of themselves new human rights concerns. Such developments can but further undermine respect for the law in the society undergoing transition. As Lorna McGregor noted in the *American Journal of International Law*, ‘the straddle between authoritarianism and democracy gives rise to practical deficiencies, which occasionally require circumventing the rule of law to reach the end goal of democracy’.<sup>4</sup>

Perhaps most centrally, adherents of this approach are concerned that retributive justice will undermine the transitions themselves and potentially lead back down the road to civil war or further human rights abuses by destabilizing fragile new regimes and crystallizing opposition to them among their old enemies. In addition to concerns about the perils of punishment, views in favour of truth commissions are often accompanied by a religious or ethical discourse suggesting that reconciliation and forgiveness are inherently transcendent human experiences and central to healing at both the personal and the national levels (the latter is itself personified). Alex Boraine’s fascinating book generally exemplifies this point of view.

In stark contrast are those commentators who suggest that the corpus of international human rights law compels all allegations of human rights violation to be impartially investigated with a view to alleged perpetrators being brought to justice in accordance with the law.<sup>5</sup> They argue that impunity, literally the exemption from punishment,

perpetuates human rights violations and undermines any attempts at establishing the rule of law. Such views may be sympathetic to the uses of non-judicial mechanisms as *supplements* to trials. However, advocates of trials worry that, whatever the original intent, ultimately truth mechanisms become alternatives rather than complements. As Reed Brody of Human Rights Watch wrote in a cogent article on the subject in the US magazine *The Nation*:

While the TRC amnesty-for-truth process merits respect as the most honestly designed transitional arrangement short of ‘real’ justice (i.e. prosecution), most of its counterparts around the world are producing or promising a lot more amnesty than truth ... Today [such processes are] increasingly seen by abusive governments as a soft option for avoiding justice.<sup>6</sup>

Furthermore, such institutions, seen as fashionable, may attract donor support away from judicial accountability projects and thereby exacerbate funding problems, making alternative resort to truth bodies more likely and supplementary use less so.

The putative positive consequences of trials (to establish either criminal or civil liability) go beyond merely holding one individual alleged perpetrator to account in this

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authorities, or by any other competent authority provided for by the legal system of the State’ (Article 2(3)(b)) and to ‘ensure that the competent authorities shall enforce such remedies when granted’ (Article 2(3)(c)). The quasi-jurisprudence of the Human Rights Committee (HRC) under the First Optional Protocol fleshes out the meaning of such guarantees. For example, in *Bautista de Arellana v. Colombia*, despite the fact that the family had received monetary compensation and disciplinary sanctions had been taken against the alleged perpetrators, the HRC called on Colombia to ‘expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista’. Communication No. 563/1993, CCPR/C/55/D/563/1993, 13 November.

<sup>4</sup> McGregor, ‘Individual Accountability in South Africa: Cultural Optimum or Political Façade?’, 95 *AJIL* (2001) 35.

<sup>5</sup> For example, the International Covenant on Civil and Political Rights, Article 2, requires states parties to respect and ensure human rights, in particular to ‘ensure that any person whose rights or freedoms ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity’ (Article 2(3)(a)), to ‘ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative

<sup>6</sup> Brody, ‘Justice: The First Casualty of Truth?’, *The Nation*, 30 April 2001, at 27. 1995, at para. 10.

view. They include an affirmation that no one, including members of government or the military, is above the law. Trials can help avoid the resumption of violations by demonstrating that the new government will not tolerate such abuses. In the best-case scenario, they can help victims reclaim their dignity and identity as holders of *legal* rights and contribute to reforming judicial systems marred by years of repression. As Reed Brody further notes, 'trials can also (if conducted fairly) juxtapose the meticulous rules of due process with the conduct of the accused'. This, it is hoped, contributes to the emergence of a culture of rights.<sup>7</sup> Generally, Richard Wilson's book represents a view — and a compelling one — from within this camp, providing a counterpoint to Alex Boraine's volume.

Boraine's *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* offers an insider's view of the TRC. A white South African and former President of the Methodist Church of South Africa, Boraine was a Member of Parliament, representing the liberal Progressive Party along with Helen Suzman, from 1974 to 1986. Serving under Desmond Tutu as the TRC's deputy chairperson, he is clearly a proponent of the TRC's achievements. He details the work that went into constructing the TRC as well as negotiating the difficulties it faced. The colossal scale of the work the TRC undertook in its short lifespan is awe-inspiring. Boraine summarizes the TRC's aims as to give back to victims their human rights, to restore moral order, to record the truth, to grant amnesty to those who qualified, to create a culture of human rights and respect for the rule of law and ultimately, by so doing, to prevent the recurrence of the violations of human rights of the past.<sup>8</sup> The logistical problems alone of

accomplishing such Herculean tasks in so large and diverse a country, facing material limitations and with 34 years of brutality to cover, are awe-inspiring. For example, the TRC received 8,000 amnesty applications and had to hold hearings to respond to all of them.

Boraine also discusses the personal tensions among members and staff of the TRC — between suspicious Afrikaner supporters of the National Party who perceived the body as an ANC whitewash and black ANC and PAC militants who saw racism within the workings and practices of the organization. These difficulties both marked the TRC and offered a microcosm of the problems facing the 'New South Africa'. Boraine staunchly defends the TRC against what he views as unfair accusations of 'artificial even-handedness', in allegedly equating the crimes committed defending the internationally unlawful system of apartheid with those carried out during the just uphill battle against this system. It is striking then that back-to-back chapters recount the TRC's dealings with former State President P.W. Botha and disgraced (in the eyes of some) national heroine Winnie Madikizela-Mandela. Both sets of relations were necessarily shaped by the political realities of South Africa, as much as by basic principles of human rights accountability.

Despite the impact of politics on the body, Boraine considers the TRC to have been a successful enterprise, largely due to certain crucial aspects of its practice.

- 1 Rather than providing for blanket amnesty, the TRC offered individual amnesty only in exchange for full disclosure and subject to certain other conditions, such as that the offence in question was 'political'.
- 2 Widespread consultations with representatives of civil society took place in the design of the TRC and in the selection of the Commissioners.
- 3 Its proceedings were open to the public, giving rise to what he calls 'maximum transparency'.<sup>9</sup>

<sup>7</sup> Needless to say, as the Rwanda example indicates, with thousands remaining jailed pending trial at the national level in appalling conditions, that positive outcomes are not always possible.

<sup>8</sup> A. Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (2000) 48.

<sup>9</sup> *Ibid.*, at 270.

- 4 The law which created it gave the TRC widespread legal powers, including search and seizure and subpoena, the latter of which it used most notably, as he recounts in intriguing detail, against former Prime Minister P.W. Botha.
- 5 The broad mandate of the TRC enabled it not only to hear victim and perpetrator testimony, but also to hold institutional hearings which looked at the roles of social and political structures such as business, the judiciary and the media in the perpetuation of apartheid and its attendant human rights abuses.
- 6 Finally, unlike its Chilean and Argentinian counterparts, the TRC named names in public and in its final report, balancing the imperative of exposure of abuses with due process concerns by giving alleged perpetrators notice and the right to respond.

The book concludes with a review of international examples of reconciliation in the face of atrocities. Boraine advocates truth-commission-type scenarios as possible responses to other country situations, though he is careful to note that each offers its own peculiarities.

Wilson, on the other hand, offers the critical voice of an outsider, being a Professor of Anthropology at the University of Sussex. He propounds the thesis that the TRC was rather an exercise in nation-building designed to confirm the legitimacy of the post-transition ruling elite. He critiques the use of 'human rights talk' — which equated human rights with reconciliation and amnesties — to force the unfashionably vengeful to forgive and be silent. This is reminiscent of the words of the Uruguayan writer Eduardo Galeano, who noted in the post-dictatorship Latin American context: 'For the elected governments, justice meant vengeance and memory meant disorder, so they dribbled holy water on the foreheads of the men who had waged state terrorism.'<sup>10</sup> While Wilson's critique is both

principled and necessary, it perhaps does not adequately consider the tremendous difficulties facing the post-transition regime and the political realities of the negotiation process which allowed a transition in the first place. Furthermore, Wilson does not resolve a contradiction suggested by his book. If the TRC was merely an ANC exercise in consolidation, why was the TRC so critical of certain ANC abuses (a fact which he also points out)?

To support his understanding of the TRC, Wilson offers anthropological fieldwork carried out among black township populations. This research provides an illuminating account of how the TRC's work failed to take into account the wishes and worldviews of this important and large sector of the population — heavily overrepresented among the victims of apartheid and underrepresented among those who materially benefited from the transition. This provides an interesting concrete baseline for assessing the effectiveness and accomplishments of the TRC, missing in Boraine's work. Questions of the concrete impact of non-judicial mechanisms of accountability have not yet been adequately considered in the literature.

Wilson's criticism of the TRC is somewhat harsh, yet it offers a vital antithesis to Boraine's positive view. In fact, reading the two books together is a most thought-provoking exercise. One interesting example of the different theoretical views which Wilson and Boraine bring to their respective books is their treatment of the meaning and use of the traditional African concept of *ubuntu*. For Boraine, and also for his former supervisor Tutu, *ubuntu* was a legitimate African cultural underpinning for the TRC's work, offering a worldview based on humanity and harmony, and aiming at restorative rather than retributive justice. Contrary to this view, Wilson sees the use of this term as somewhat cynical.

Creating a polarity between 'African' *ubuntu*/reconciliation on the one hand and 'Western' vengeance/retributive justice on the other closes down the space to discuss fully the middle position — the pursuit of legal retribution as a possible route to reconciliation in itself ... By combining human rights and *ubuntu*, human

<sup>10</sup> E. Galeano, *Upside Down: A Primer for the Looking Glass World* (1998) 204.

rights come to express compromised justice and the state's abrogation of the right to due process.<sup>11</sup>

Furthermore, he disputes the notion that customary African jurisprudence was inherently reconciliatory rather than retributive.

Boraine does discuss what he sees as some of the TRC's shortcomings in living up to its mandate. In particular, he questions the excessive reference made to religion in the workings of the TRC. He also expresses dismay over the failure of the ANC government to implement the TRC's modest proposals to make reparations to designated victims, reparation being in his view an essential part of the TRC's mandate. However, Wilson sees the mandate itself as the initial source of the difficulties. He believes that the seeds of the TRC's failure (in his view) to adequately account for South Africa's terrible past were sown in its very construction and methodology. In his view, the TRC was given too wide a mandate and should have focused instead on constructing an accurate historical record of the human impact of apartheid itself, much as the report of the analogous Guatemalan commission attempted to do. Additionally, the failure to come to terms with apartheid itself as the touchstone atrocity in the South African context further distorts its depiction of the experience of three and a half bloody decades.

Wilson also critiques the largely quasi-legal methodology used by the TRC to record victim testimonies, which he views as a limitation on its ability to gather the most historically meaningful accounts. Its truth mission was further undermined, in his view, by the fact that the TRC was the same body which dealt with amnesty claims. The notion that the more the TRC tried to look like a legal body and perform quasi-judicial functions, the more it ran afoul of its goals is an intriguing one. Boraine suggests that these very legal approaches were adopted to protect the TRC

from critics and to enhance its credibility and impartiality. These divergent views suggest a real paradox for alternative mechanisms of accountability, whether they be popular tribunals or truth mechanisms: the more they try to emulate judicial mechanisms (often in a genuine effort to serve as rigorous and credible alternatives to judicial processes) the more unable they may be to perform their other missions, such as the construction of an historical record or offering catharsis for victims. On the other hand, if they lean away from legalism, their supporters face graver difficulties in justifying their existence, particularly when offered up as alternatives.

Taken together, these books capture the contradictory developments at the end of the twentieth century. On the one hand, more than 20 countries made use of non-judicial mechanisms of accountability, largely instead of (rather than alongside) prosecutions. Many other nations had no real accounting for gross abuses at all. As Brody notes, 'into the early 1990s, truth may have been the best the victims could hope for'. However, international criminal law then experienced a heyday with the advent of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda (albeit with limited resources, necessarily selective caseloads and slow progress). The Rome Statute for the future International Criminal Court was adopted, and optimistic commentators predict that it could enter into force by mid-2002. The notion of prosecuting perpetrators of human rights abuses, including former heads of state, was also given a resounding boost by the Pinochet litigation. Furthermore, that case spawned what some commentators have dubbed 'the Pinochet syndrome', giving rise to attempted prosecutions or civil litigation against a variety of individuals allegedly involved in human rights violations, from Ariel Sharon to Hissene Habre of Chad. While these endeavours have met with mixed success, a certain trajectory is undeniable.

Post-11 September, while the US simultaneously mourns its tragically lost victims and creates others through attacks on Afghanistan, one is reminded of a global

<sup>11</sup> R. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (2001) 11.

difficulty woven through these debates. Some victims and survivors are seen to be entitled to justice and even revenge, while others are told they must be realistic and settle only for truth or (worse still) 'obligatory amnesia'.<sup>12</sup> While a need to approach country situations flexibly exists, universal principles cannot be thrown to the wind too rapidly. Reading these two books together helps the reader to comprehend the parameters of the arguments in favour of each counter-trend, for truth commissions or for trials. It also allows the reader to consider their relative merits and to think through what is at stake in the accountability debate. In his conclusion, Boraine cites the US poet Maya Angelou:

History, despite its wrenching pain,  
Cannot be unlived, and if faced  
With courage, need not be lived again.<sup>13</sup>

The question remains as to which approach can best fulfil her prophecy.

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<sup>12</sup> Galeano, *supra* note 10, at 202.

<sup>13</sup> Cited in Boraine, *supra* note 8, at 441.