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RENEGOTIATING RESPONSIBILITY AFTER APARTHEID:

LISTENING TO PERPETRATOR TESTIMONY

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On July 14, 1997, the Truth and Reconciliation Commission met for a public hearing in Cape Town, South Africa.¹ The Commission allowed five former African National Congress cadres to question Captain Jeffrey Benzien regarding his application for amnesty for acts of killing and torture. Since the 1980s Captain Benzien had been a member of the Cape Town Security Police and was notorious for his methods of torture. His questioners—Tony Yengeni, Ashley Forbes, Gary Kruser, Peter Jacobs, and Bongani Jonas—had been tortured by him while in police custody. Now they were demanding that Captain Benzien describe, even enact before the Commission, the techniques he applied during interrogation. South Africa and the world watched as Jeffrey Benzien simulated the “wet bag” torture method, where a water-soaked bag is placed over the head of the victim to induce suffocation.

Like a handful of other occasions at which victims faced perpetrators,² the hearing instantly became a Truth Commission touchstone. As in the

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1. See Truth & Reconciliation Commission, *Amnesty Hearing*, July 14, 1997 (interview of Jeffrey Benzien), available at <http://www.doj.gov.za/trc/amntrans/ct3/benzien.htm> [hereinafter *Benzien Hearing*]. The Truth and Reconciliation Commission was established at the end of 1995 to uncover and record gross human rights violations of the apartheid era in South Africa. See Truth and Reconciliation Commission, at <http://www.doj.gov.za/trc/index.html> (last updated Jan. 28, 2002). Its mandate included restoring the civil and human dignity of victims by allowing them to testify to violations done to them, and recommending measures of reparation. The Commission was also empowered to grant amnesty from criminal and civil prosecution to perpetrators in return for full disclosure of violations committed by them, provided the acts in question were connected to, and commensurate with, a political goal.

2. The Saint James Church and Heidelberg Tavern attackers and the killers of Amy Biehl are other examples. See generally Truth & Reconciliation Comm’n, *Amnesty Hearing Transcripts 1997*, available at <http://www.doj.gov.za/trc/amntrans/am1997.htm>.

588 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 10:3

other instances, the quasi-judicial — or from another point of view, “legalistic” — conventions governing the hearings were violated.³ However, in the Benzien case, the commentators were more specific about the nature and significance of the transgression. At last the roles were reversed and “the torturer . . . was confronted by the tortured.”⁴

Other observers regard the events that unfolded at Benzien’s hearing in a less favorable light. For instance, Antjie Krog, who covered the Truth Commission’s hearings for South African Broadcasting Corporation radio, wrote the following about the proceedings:

Initially the body language of the tortured was clear: “No one else counts, not the Amnesty Committee, not the lawyers, not the audience—what counts today is you and me. And we sit opposite each other, just like ten years ago. Except that I am not at your mercy—you are at mine. And I will ask you the questions that have haunted me ever since. “ But it isn’t that easy.”⁵

The voice of Tony Yengeni, a member of Parliament, “has become known for its tone of confidence—sometimes tinged with arrogance,” but now “sounds strangely different—his voice somehow choked.”⁶ Then there are the questions that Captain Benzien asks, which have the effect of turning the tables again and putting the victims at the perpetrator’s mercy. Having made Benzien demonstrate the “wet bag,” Krog observes, “Yengeni has to pay dearly. Back at the table, Benzien quietly turns on him and with one accurate blow, shatters Yengeni’s political profile right across the country. ‘Do you remember, Mr. Yengeni, that within thirty minutes you betrayed Jennifer Schreiner? Do you remember pointing out Bongani Jonas to us on the highway?’”⁷

Benzien then proceeded to testify about the “special relationship” he

3. In a compilation of SABC radio coverage of the Commission released in 2000, the Benzien hearing is presented as follows:

Surviving victims of gross human rights abuses continued to steer the Truth Commission’s Amnesty Committee into uncharted territory in mid-July 1997. Until then, the amnesty script was predominantly couched in legalities, with only judges and lawyers jogging the memories of both perpetrator and victim. But all this changed during the amnesty hearing of former Western Cape security policeman Captain Jeff Benzien.

SOUTH AFRICA’S HUMAN SPIRIT vol. 3, disc 1, track 8 (South African Broadcasting Corp. 2000), available at <http://www.sabctruth.co.za/worlds.htm> (last visited Apr. 21, 2001); see also ALEX BORAINÉ, *A COUNTRY UNMASKED* 252-53 (2000) (noting that, among the Commissioners, there was sometimes a discomfort with departures from “judicial” procedure).

4. See *Truth Commission Special Report* (SABC television broadcast, July 20, 1997) (quoting Max du Preez’s summation in his weekly television wrap-up).

5. ANTJIE KROG, *COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA* 93 (2nd ed. 1999).

6. *Id.*

7. *Id.* at 93-94.

claimed he shared with Ashley Forbes: “You, I can remember especially because I think that the two of us . . . really became quite close . . . I may be mistaken, but I would say relatively good friends in a way . . . Do you remember the time when you saw snow for the first time?”⁸ As Krog observes, “[a] torturer’s success depends on his intimate knowledge of the human psyche. Benzien is a connoisseur. Within the first few minutes, he manages to manipulate most of his victims back into the roles of their previous relationship—where he has the power and they the fragility.”⁹

Yazir Henry, another Western Cape cadre tortured by the Security Police, echoes Krog’s observations. Henry writes that the decision to grant Jeffrey Benzien amnesty “will remain unpopular and continue to be contested and widely regarded as illegitimate.”¹⁰ Henry states further that not only does “the community” perceive that “[Benzien] did not make full disclosure and [that] his actions were disproportionate to his political motivation,” thus disqualifying him from amnesty under the Promotion of National Unity and Reconciliation Act,¹¹ but that:

He also showed very little remorse and in some ways, because of his attitude, continued to torture Yengeni and Forbes in his appearance before the Commission. He asked Yengeni to remember how he gave up not only his arms but also his comrade Bongani Jonas without the security police having to lay a finger on him. He asked Forbes to tell the audience that he (Benzien) had not only brought him ice cream and books but also broke bread with him and played with him in the snow during his detention.

I remember asking myself how a process that was supposed to be holding him accountable for his brutal and systematic torture of people could go so horribly wrong. I struggled with my anger and resolved not to participate in any further amnesty proceedings—even though I knew that the people responsible for torturing and nearly killing me would apply for amnesty. I realised that the amnesty process was hampering my own efforts to deal with the trauma of capture, detention and the obligation to watch a comrade and friend die in front of me as a result of the police opening fire with guns and hand grenades.¹²

Common to Antjie Krog’s and Yazir Henry’s accounts of what happened at the Benzien hearing is the perception that the “process . . . [went]

8. *Benzien Hearing*, *supra* note 1, at 51/184 (No page numbers were found in the text of the hearing, therefore, for citation of the transcript, the author has relied on the pagination generated by his web-browser and printer software, which paginates the document 1-184).

9. KROG, *supra* note 5, at 95.

10. YAZIR HENRY, *Where Healing Begins*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 171 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000).

11. Promotion of National Unity and Reconciliation Act No. 34 of 1995.

12. HENRY, *supra* note 10, at 171.

590 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 10:3]

horribly wrong.”¹³ The intuition guiding each of their versions is that the way in which the proceedings unfolded returned Yengeni, Forbes and the others to the *time* of the offense for which Benzien was applying for amnesty. Krog notes, “[w]ithin the first few minutes he manages to manipulate most of his victims back into the roles of their previous relationship — where he has the power and they the fragility.”¹⁴ As Henry reported, “[h]e . . . in some ways . . . continued to torture Yengeni and Forbes and others in his appearance before the Commission.”¹⁵ For Henry, the exchange with Benzien is not limited to the re-injury of those directly involved. The exchange with Benzien takes him, as a member of the audience, back to when he was detained and tortured, and the complicated events that ensued. There is a sense to be gained from both Krog and Henry, that for the good of the victim, a return to, or a continuation of, the offense ought not to take place. Or, at the very least, not *with the perpetrator*.

But is such a return not what Max du Preez celebrates in *Truth Commission Special Report*?¹⁶ Is it not what Du Preez, and Krog, although Krog does not *celebrate* it, sense that Yengeni and the others seek from Benzien? By reversing roles and asking Benzien questions, are they, in effect, not continuing the contest begun ten years before, so that they can wrest control of the situation from Benzien, and retrospectively gain the upper hand? If this is their game, it is a hazardous one. Du Preez declares the questioners the winners, but Krog and Henry dissent. The five confronting Benzien are like assault victims of a professional boxer entering the ring one by one to get their own back. Common sense tells us that a subpoena will deprive the boxer of none of his advantage over his victims. To the extent that one can even speak of victory going to either party, if Benzien, the practiced torturer has won the first bout, what reason do we have to think that he should lose the rematch?

Such considerations lie behind the regular conduct of the Truth Commission’s public proceedings, which include a separation of the victim’s human rights violation hearing from the perpetrator’s amnesty hearing. Additionally, cross-examination at amnesty hearings is typically restricted to victims’ lawyers.¹⁷ As a quasi-judicial body linking forensic

13. *Id.*

14. KROG, *supra* note 5, at 95.

15. HENRY, *supra* note 10, at 171.

16. See *Truth Commission Special Report*, *supra* note 4.

17. See DESMOND MPIOLO TUTU, NO FUTURE WITHOUT FORGIVENESS 176-78 (1999) (explaining that the Commission’s precautions against victims having to confront perpetrators at hearings were balanced by its preparedness to arrange voluntary meetings between victims and perpetrators at other venues).

2002] RENEGOTIATING RESPONSIBILITY AFTER APARTHEID 591

truth-seeking and rehabilitative telling,¹⁸ the Truth Commission reveals the extent to which such provisions for mediation and the problems of responsibility they seek to address are a shared concern of law and psychoanalysis.

The hearing displays, in psychoanalytic terms, the phenomenon of “transference.” Transference is a way of staging in the present a past set of experiences, and is an alternative to direct confrontation with figures who are linked to traumatic events.¹⁹ Sigmund Freud describes transferences in the following manner:

Transferences are new editions or facsimiles of the impulses and phantasies which are aroused and made conscious during the progress of the analysis; but they have this peculiarity, which is characteristic for their species, that they replace some earlier person by the person of the physician. To put it another way: a whole series of psychological experiences are revived, not as belonging to the past, but as applying to the person of the physician at the present moment.²⁰

Two aspects of Freud’s account are relevant here: the transposition of figures and the assimilation of temporalities.²¹ The process of repetition, acting out, and working through, the components of the therapeutic cure, depends upon this nexus. In a similar way, the Truth Commission makes use of this process, or a part of it, through human rights violation hearings, which are designed to fulfill a mandate of “restor[ing] the human and civil dignity of the victims.”²² In the absence of perpetrators willing to come forward, the Commission assumes responsibility²³ for the violation(s) of the perpetrator.

The perpetrator does not testify at the human rights violation hearing. Further, amnesty-seekers are typically cross-examined not by the victims themselves but by their legal representatives, and then usually only in cases where the victims are withholding their support for the amnesty application. The process is mediated, as in the therapeutic situation, and the return to the time of the offense is managed by proxy. This is how the

18. See generally Mark Sanders, *Truth, Telling, Questioning: The Truth and Reconciliation Commission, Antjie Krog’s Country of My Skull, and Literature after Apartheid*, 46.1 MODERN FICTION STUDIES 13-41 (Spring 2000), available at http://muse.jhu.edu/journals/modern_fiction_studies/v046/46.1sanders.html.

19. See J. LAPLANCHE & J.B. PONTALIS, *THE LANGUAGE OF PSYCHO-ANALYSIS* 455-64 (1973).

20. Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria (“Dora”),* in *CASE HISTORIES I* 157-58 (Pelican Freud Library ed., 1977) (1905).

21. See *id.*

22. TRUTH AND RECONCILIATION COMM’N OF S. AFR., 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 112 n.6 (1998).

23. See *id.* at vol. 5, 170-71 (explaining that this method of assuming responsibility is essential to counterbalance amnesty).

law endeavors to contain and limit the inevitable repetition of the offense.

To a certain extent, we, as interdisciplinary scholars of law, want things to go awry, to “go wrong.” When operating boundaries are transgressed and quasi-judicial conventions are renegotiated, other dimensions of responsibility may be broached. Once that takes place, however, one cannot anticipate what will unfold. One would not want to say categorically that a confrontation between the parties themselves is detrimental to the victim or, indeed, to the perpetrator, but the attendant risks are unavoidable. It seems clear that, in the case of Benzien’s amnesty hearing, if we accept Yazir Henry’s account, the process does “go horribly wrong” because there takes place a direct confrontation.²⁴ Returning both parties to the time of the offense renders the victim vulnerable again. This is what Yazir Henry senses, although I would not agree that the process “goes horribly wrong” simply “because of [Benzien’s] attitude.”²⁵ The attitude of his questioners also takes a hand. More is required to manage the situation, so that the trauma is not simply repeated, but is also worked through. Ashley Forbes’s comment, in the same installment of *Truth Commission Special Report*, that he did not seek counseling is perhaps a revealing one. Forbes, along with Yengeni and the others, not only eschews the Commission’s safeguards but rejects another available mechanism for reparative telling and listening. The tortured refuse the paths of mediation offered by both psychoanalysis (albeit in the weak sense represented by psychological counseling), and the law. This is what is at stake when we ask whether the “legalities” of the process ought to be abandoned, or, admit improvised modifications such as Yengeni and the others set in motion, and which some have uncritically celebrated—while Yazir Henry walks away from a hearing which is no longer an amnesty hearing but a human rights violation hearing, except that it is not just tales of the past being told, but new violations that are being committed.

Could the critical picture I am presenting be motivated by an unacknowledged impulse to lay down the law in order to disavow an unavoidable risk? Or, worse still, by a compulsion to keep the victim in the position of victim (one famously analyzed by Freud in “‘A Child is Being Beaten’”)?²⁶ How else, though, might one frame an analysis of the Benzien hearing? As interdisciplinary minds attuned and sympathetic to a crossing of boundaries and a transgression of rules, we have, nevertheless, to ask, once quasi-judicial mediation has been given up, whether any other

24. See HENRY, *supra* note 10, at 171.

25. *Id.*

26. See 17 SIGMUND FREUD, ‘A Child is Being Beaten’ — A Contribution to the Study of the Origin of Sexual Perversions, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 175-204 (James Strachey & Anna Freud trans. & eds., 1974).

dimension of responsibility has in fact been broached. That remains the criterion. Such an event cannot be anticipated, but may perhaps be isolated and analyzed after all is said and done.

Rather than arriving at definite conclusions, I propose that if one combs the transcript of the hearing, it may be possible to find beyond a simple repetition and reversal of roles, an amendment of conduct. The focus of critical commentary has been on the struggle between Benzien and his victims (and whether victory goes to either side), Benzien's attitude, or whether such a contest ought, for the welfare of those involved, to have been staged in the first place. There are elements in Benzien's testimony, however, which not only augment our understanding of the relationship between torturer and tortured and its durability (which I read Krog to have in mind when she writes that "it isn't that easy"), but also suggest something else. Clearly, Yengeni and the others conduct themselves as if they want something from Benzien besides his amnesty application; if not revenge exactly, at least a further set of admissions. Beyond that, they want him to submit to them and their interrogation. If this is so, Benzien responds, as Krog observes, by getting back at Yengeni and the others. Once the game is on, generally speaking he will not allow them to get the upper hand.²⁷

But, there are moments of a different quality. There are, first of all, occasions when Benzien apologizes (*Ek vra om verskoning*), or asks for forgiveness for what he did.²⁸ Another set of remarks relate directly to the repetition going on at the hearing. Although Benzien frequently responds to his questioners with questions and statements that render them vulnerable,²⁹ he also, on at least two occasions reflected by the transcript, desists from this pattern, reining himself in when he is about to launch into an interrogation: "As a matter of interest, I think I should stop here, and just answer his [Jonas's] question . . . Mr. Jacobs, I don't know what position you hold in the Security Branch now, but do you—okay you are asking me the questions."³⁰ Benzien's restraint may simply be out of respect for, or deference to, the authority of the court of law. As a police veteran, he has testified many times, and as the Commission observes, much leeway is being granted to the others who must be guided in their

27. There is also the question of the procedures for the amnesty hearing and their basis: if amnesty is a conditional "forgetting," is it just that the perpetrator has to "return" to or "re-enact" a past situation, in which, as Benzien does, he/she might find him/herself committing further violations?

28. See *Benzien Hearing*, *supra* note 1, at 2, 116/184.

29. See, e.g., *id.* at 24, 25, 36ff, 39f, 43, 50, 53f, 56, 63, 66, 67, 85, 88, 109, 119 & 140/184.

30. *Id.* at 121, 139/184.

594 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 10:3]

cross-examination.³¹ These moments may, however, ultimately elude the framework of the law.

When we ask whether there will have been responsibility, we look for a reinvention rather than a mechanical application of rules.³² If the first thing we notice about Benzien's hearing is the unanticipated interrogation of Benzien by his victims, perhaps we can, once new rules governing the time of the offense as it is reenacted have been put in place, in turn observe a reinvention on the part of Benzien. Given that what we are witnessing is indeed, as Krog and Henry suspect, a repetition or continuation of the old situation, for Benzien to have responded by becoming the interrogator all over again may have been the least unexpected outcome. Benzien himself keeps saying, with reference to his shooting of cadre Ashley Kriel, that "the tables could have been turned."³³ To have responded in any other way would have been exceptional. Yet there are times where he appears to act otherwise, and the pattern of compulsive or compelled behavior is, if not broken, significantly interrupted.

Let us assume that Benzien is not simply upholding the rules of conduct governing amnesty hearings, which are progressively relaxed when he is cross-examined. It may then be that in those places where he desists from questioning, Benzien is, as much as his questioners, attempting to work things out with the others *without* the aid of the *Commission* as mediator. As observed, once Yengeni and the others take it upon themselves to question Benzien, they abdicate the Commission's mediation and its preparedness to appear as their proxy. Benzien's response is, in general, to turn the tables on them and to become their interrogator once more. When he appeals to the Commission's rules in order *not* to question his questioners, he is, I propose, no longer simply availing himself of the "transference" offered by the Commission, but may instead be acting as his own proxy for the old Jeffrey Benzien. It is hardly surprising that these fleeting moments elude the memory of the hearing of the ones questioning. Like Ashley Forbes's excursion to the snows of the hinterland, these moments do not detract from the overall experience of past and renewed violation. It remains, nevertheless, to weigh them, if not for what they are, then for what they could have been. If one thing they might indicate is a mending of ways commonly thought to be a condition of forgiveness, and thus a practical asking by Benzien of forgiveness, in this case, I do not

31. *See id.* at 127/184.

32. *See generally* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 967 (1990) (stating that responsibility involves more than simply invoking a rule, and that responsible decision, strictly speaking, entails acting in the absence of any known rule).

33. *Bzien Hearing*, *supra* note 1, at 8/184 (reporting that Benzien testified regarding the shooting of Kriel before being questioned by the five victims).

2002] RENEGOTIATING RESPONSIBILITY AFTER APARTHEID 595

know, and perhaps cannot *ultimately* know, what they are, even as I sense that they, like the questions posed by his victims, are something other, something more, than a “legalistic” ploy or gesture.