

DOI: <https://doi.org/10.38140/aa.v56i1.8412>

ISSN:0587-2405

e-ISSN: 2415-0479

Acta Academica -
2024 56(1): 157-174

© Creative Commons
With Attribution (CC-BY)



Spectres of reparation in South Africa: an interview with Jaco Barnard-Naudé

Jaco Barnard-Naudé's *Spectres of Reparation in South Africa: Re-encountering the Truth and Reconciliation Commission* was published in Routledge's Contemporary South Africa Series in 2023. In this interview with Pierre de Vos, the author takes stock of the scholarly journey of fifteen years that it took to bring the book to fruition. In the course of the interview, critical questions about the nature of apartheid, the configuration and purpose of the truth commission, and the legacy of unfinished business in its wake, are revisited, while the possibility of an affirmative and emancipatory response in relation to the lack of reparation and the spectres that such a lack raises, are asserted and briefly sketched.

De Vos: The question of whether reparations should be made, either by the beneficiaries of apartheid or by the democratic state, in order to acknowledge and repair the causes and consequences of colonialism and apartheid, has – perhaps surprisingly – not taken centre stage in the political discourse in South Africa. Your timely book, taking the Truth and Reconciliation process as a starting point, now squarely addresses this question. Where does your interest in reparations come from and why did you write the book? Or put differently, why do you believe it is important to talk about the Truth and Reconciliation Commission (TRC) generally and reparations specifically at this juncture of South Africa's history?

Barnard-Naudé: *Well, the book is really a consolidation of fifteen years of work on transitional justice in South Africa from different, variegated perspectives, and such a scholarly exercise obviously doesn't take place without a consideration of the central role that the TRC played in the transition. Many would say – with cause – that the TRC was the crucial counterpart to the transitional negotiations of the nineties that culminated in the 1993 Interim Constitution which explicitly talked about a “need for reparation”. But my own journey in relation to reparation really starts in around 2008, when I was asked to contribute a chapter to an edited collection that was entitled “Justice and Reconciliation in Post-Apartheid South Africa”. Now, you would know that at the time the TRC was known and lauded across the world for its unique model of conditional amnesty which granted such amnesty to individual perpetrators of what was called “gross human rights violations”, committed with a political objective, during the apartheid years. The amnesty was conditional in the sense that the perpetrator was required to make a full disclosure of what happened in relation to the gross human rights violation, in order to be granted amnesty. In other words, the amnesty process was geared at the production of truth about gross human rights violations – perpetrators had to come to the commission to tell the “truth”. And this version of amnesty was what, it is said, distinguished the TRC from other truth commissions that had existed before it, such as those in Latin America where perpetrators were granted a blanket amnesty, meaning that they didn't have to disclose anything about their dark and evil deeds. So this conditional amnesty attached to the production of truth was thought in those years around 2008 to be the primary form of justice that was produced by the TRC: justice as truth. It was also the primary justification that the Constitutional Court relied on in declaring the TRC consistent with the Interim Constitution in the famous Azapo case.*

However, when I started looking at the confrontation between justice and the TRC, it became clear to me that there was another, repressed and less familiar form of justice to which the TRC also attended, but much less prominently. This was the form of justice that pertained to the victims that came to the TRC and told their stories to the Human Rights Violations Committee or sat in amnesty hearings and listened to how they and their loved ones were tortured, brutally attacked and cruelly violated in so many ways. What kind of justice – in addition to and complementary to “truth” as justice – did the TRC hold out for these victims who are, by virtue of the very nature of apartheid, not just the victims who were recognized as such by the TRC but in fact constitute the majority of the country.

I then discovered that the form of justice that was promised to these victims as the counterweight to amnesty for the perpetrators, was reparation. Now at the time, very little work had been done in relation to the question of reparation as justice for victims. The discourse that dominated South African transitional justice, focused on the two committees of the TRC that were most prominent in the media and academic commentary: the Amnesty Committee and the so-called Human Rights Violations Committee, which listened to the stories of victims. But there was a third, less visible, less prominent committee of the TRC and this was the committee that was tasked with Reparations and Rehabilitation. This committee did important work in thinking through what it called a "right to reparation" for apartheid's victims.

But it should also be noted that this committee was hamstrung from the start in the sense that whereas the Amnesty Committee had the power to immediately and directly grant amnesty to perpetrators, the Reparation and Rehabilitation Committee didn't have the power to grant reparations to victims that had come forward and had been identified, no, the Reparations and Rehabilitation Committee could only "make recommendations" to the government in respect of what adequate reparations would amount to. So, from the start, we have a deficit in relation to this form of justice as a counterbalance to amnesty: amnesty can be granted by the TRC, but not reparations, victims had to wait and see what recommendations from the Reparations and Rehabilitation Committee would be implemented by government.

What we now know, of course, is that very little materialised as a result of these recommendations for reparation. Government implemented a miniscule amount of reparation grants to individual victims and there has, almost thirty years later, been no movement on the committee's recommendations in relation to, for instance, community reparation and rehabilitation. And this despite the fact that there is a fund in the Department of Justice called the President's Fund which has had unspent budget of over a billion rand for many years just sitting there, not being used to fund these reparations which are long overdue.

So, it seemed to me at the time, that more needs to be said about this occluded part of the TRC which is reparation and so, in 2008 I started with the role of big business and their responsibility in complicity for apartheid as a crime against humanity. The TRC, it turns out, did investigate big business but not in the terms of or treated as a perpetrator of apartheid. And this allowed big business to come away scot-free from the TRC. Over the years, as I conducted more and more research on dimensions of reparation as they relate to the TRC, it became clear that there is a huge deficit in relation to justice in this respect, that there are many other opportunities and forms of reparation that the TRC

ignored or paid very little attention to and so I wrote the book to basically showcase the many ways in which reparation basically constituted the primary form of the unfinished business of the truth commission and this is why the book treats the TRC, overall, as a subject of the lack of reparation.

De Vos: The TRC recommended to the government that reparations should be made to individual victims of human rights abuses identified, but the recommendation was not fully implemented. At first blush, the response of the Mbeki government to the issue of reparations appears to be surprising. Could you say more about the way in which the TRC dealt with reparations, and about the response of the Mbeki government to the recommendations of the TRC regarding reparations. Why do you think the Mbeki government responded in the way it did?

Barnard-Naudé: *So, as I mentioned, we start out with a TRC which has certain powers but not others. The premise of the TRC's moral (and material) economy was plain from the beginning, namely perpetrators who came forward and told the truth about their gross human rights violations would get amnesty – the TRC had the power to grant them amnesty, so what they would “get” out of the TRC was amnesty. Whereas the victims, according to this moral economy would get truth and, at least possibly, reparations. But the rub lies in the fact that the TRC did not actually have the power to order reparations. It could only, as I said, “make recommendations” to government about what to do to secure reparations for victims. The TRC didn't have a reparations budget, so to speak – it had to rely on the will, perhaps the goodwill, of government when it came to the granting of reparation payments. So this created an imbalance in the moral economy that underwrote the TRC, from the start. In the Azapo decision, the Constitutional Court in fact authorized this imbalance in the moral economy when it held that it was best left to government to decide what had to be done in relation to reparation, what policies to implement.*

And as it turned out, the recommendations by the TRC in relation to reparations were almost entirely ignored by the Mbeki government. The TRC, for instance, recommended that when it came to individual reparation grants, an amount of about R30 000 per year for a period of six years would be adequate. The Mbeki government reduced this recommendation to a payment of just above R20 000 once off. And you must remember that this was payment only to the relatively few victims who came to the TRC and were given the official status of victims. In truth there are of course thousands, even millions, more. President Mbeki in his address to Parliament at the tabling of the TRC report in 2003, basically rejected the entire idea of reparation payments for apartheid, instead he said that there was no prize greater than freedom itself and that the struggle was not about money. But the problem I have with this is that it was both constitutionally amiss as well as that it belied that moral economy that

undergirded the TRC in the first place. It was constitutionally amiss, because the 1993 Interim Constitution explicitly reserved in its terms what it called “a need for reparation”. It belied the moral economy that undergirded the TRC, because it removed the critical counterbalance to amnesty in the form of what Ruti Teitel calls “reparatory justice”. So it undermined both the Interim Constitution and the TRC at the same time. In truth, it was a profound betrayal of the people of South Africa and a belittling of their very pressing, material needs that are a direct result of apartheid.

The post-apartheid government was clearly given a chance to address apartheid once and for all through reparation by taking the TRC’s recommendations seriously and implementing them. Instead, it looked the other way and I think the reasons why it looked the other way are not unrelated to what Sampie Terreblanche long ago identified as the secret deal behind the scenes of the truth commission between the new representatives of government and the owners and wielders of capital in South Africa. It is no secret that under Mbeki the country moved from a Reconstruction and Development Programme (RDP) that promised to put people first, to an overtly neoliberal economic policy of GEAR: Growth, Employment and Redistribution which heavily relies on the market to sort out all of South Africa’s post-apartheid social ills. Clearly, there is no room for large scale reparations policy under a neoliberal political economy that is market driven. I also think that the current wielders of power are more than a bit scared to start spending the money that has accumulated over the years in the President’s Fund: the over R1,5 billion which is just sitting there, because I think they are very worried about what would happen if this money is suddenly spent on things like community reparations and then there might be a groundswell of people who also want to claim reparations and because they are the majority this R1,5 billion will quickly run out. But I think that the fear of floodgates opening is not an excuse to do nothing as seems to be the case all the time in South Africa. For instance, the R1,5 billion could be allocated on the basis of who needs it most or it could be limited to those who were identified as victims by the TRC, or some other rational criteria can be arrived at to spend this unallocated money. Surely, it would be better to do something in relation to reparation rather than for it to just let the money accumulate while millions are facing the most desperate need on a daily basis.

De Vos: Any discussion of the TRC’s approach to reparations for the victims of human rights abuses raises broader questions about the need for reparations to address the harms done by apartheid to black people more broadly. The TRC process provided for reparations only for a narrow class of people who had suffered specifically defined harms, and did not engage with structural harm. Of course, the harm done by apartheid went far beyond the kinds of “spectacular” violence

such as torture and murder suffered by a relatively small group of people largely targeted by the apartheid security forces, and negatively impacted on every black South African in some way or the other. The system also implicated most white people – not only those who did the state's dirty work – who benefited from apartheid and whose active or passive acquiescence propped up the system. The TRC has therefore been criticized for focusing too much on individual victims and perpetrators. The well known Ugandan academic, Mahmood Mamdani, who has been critical of the TRC process, has argued that this narrow focus had the consequence of narrowing the TRC perspective to a political reconciliation between state agents and political activists – all members of what Mamdani calls “a fractured political elite” – rather than focusing on the “national unity and reconciliation” mandated by the legislation that set it up. What do you make of Mamdani's criticism in this regard.

Barnard-Naudé: *Yes, Mamdani was a real thorn in the side of the TRC and the post-apartheid Mbeki government, because he first identified this justice deficit in the TRC in an article in 2002 in which he suggested that an amnesty without a reparation to the victims of this amnesty would amount to impunity for apartheid. But Mamdani also went further than this when he criticized the TRC for unduly individualizing the category of the gross human rights violation: famously, only individual perpetrators were allowed to come before the TRC and account for their individual deeds against specific individual victims that were identified by the TRC as such. Mamdani said that if you individualise the process in this way, you paint a distorted picture of apartheid which was actually more of a systemic or structural crime than it was an individualized process of brutalization or, it was, at the very least, both at the same time. The individual brutalisations were a direct consequence of the systemic or structural crimes like forced removal, the pass law system, the creation of the so-called homelands and the migrant labour system.*

Mamdani said that if you look at these more systemic features of apartheid then you have to concede that the victims were not just those who suffered individual brutalisations at the hands of, for instance, the army and the security police. If you take the picture of apartheid as a systemic or structural crime, then you have to concede that the majority of people in the country are actually victims, because the structural and systemic policies and programmes of apartheid had vast swathes of the majority population as its target. On this version of things apartheid is a crime perpetrated against the collective and not just against a relatively handful of individuals although the individual brutalization was widespread. Mamdani then thought that linking individual perpetrators to individual victims at best paints an incomplete picture of the

nature of apartheid and colonialism as systemic, structural crimes. So, if this is the case, i.e. if linking individual perpetrators to individual crimes paints a distorted picture, then what kind of relation would paint a more complete and holistic picture of the true nature of apartheid?

Mamdani's answer is the category of the beneficiary. If you start looking at the people who were the beneficiaries of these structural crimes and you start identifying victims in relation to these beneficiaries, you will realise that the vast majority of South Africans are victims. And, unfortunate as it may be, the category of race was central to apartheid, it was a system of white beneficence, so the beneficiaries of apartheid are overwhelmingly the white minority whereas the victims of this scheme of corrupt beneficence are the black majority – white beneficence came at a cost, entailed victims.

Now, the TRC didn't work with the relation between beneficiaries and victims in this way. Instead it focused on the individual perpetrators, the so-called monsters like Prime Evil, who murdered, tortured and brutalized in the most heinous possible way. And Mamdani's argument is that by focusing on these individual perpetrators rather than on apartheid as a system, left most white people walking away from the TRC thinking that they had little to do with apartheid when apartheid in fact had everything to do with them, it was created for them, for their benefit and beneficence at the cost of the black majority. So I think that a great part of the book also tries to build consciousness in relation to the category of the beneficiary, to paint a more comprehensive picture of apartheid as systemic or structural crime which has not been adequately addressed. I think that there are still too many white South Africans who think that they were not beneficiaries of apartheid, that apartheid had nothing to do with them, so the book tries to speak to the beneficiaries to try and assist them in realizing the extent of what Denise Ferreira Da Silva has called the "unpayable debt" that they owe as a result of 300 years of white beneficence.

De Vos: In the book you argue that the TRC's concrete operation as well as its novelty and audacity are most illuminatingly named with reference to colonial precedents on indemnity and commissions of inquiry, and also suggests that Colonial Commissions of Inquiry (also referred to as Tumult Commissions) were a device used by colonial authorities to manage or defer demands by indigenous populations for political self-determination, and perhaps also to safeguard the legitimacy of the specific colonial regime. We know that the apartheid regime often used Commission's of Inquiry – for example, after the Sharpeville massacre – to manage the fall-out of the event politically, but we also know that after 1994 the democratic government has used the same tactic, for example, in the wake of the massacre at Marikana. Your provocative comparison of the TRC to these other

processes seem to suggest you believe the TRC may have been used in a similar way to safeguard the legitimacy of the new state built on compromise with the apartheid system. Is this indeed what you are saying?

Barnard-Naudé: *Yes and No. Yes, because the TRC took much of its inspiration as an institution from the legal form of indemnity as it was practiced by the apartheid government (the government routinely relied on indemnity legislation to absolve its own agents from wrongdoing when there was an uprising or riot or other kind of confrontation between state forces and the civilian population). So the idea of amnesty is a direct outgrowth of this idea of indemnity, the legalization of something that was in fact actually illegal. The other colonial legal figure from which the TRC took its cue, so to speak, was the Commission of Inquiry – there is a long history of Commissions of Inquiry or what Adam Sitze calls “Tumult Commissions” that would form after an uprising in the population, to investigate what the government could do more or better to manage what it called “race relations”.*

So, in short, we have to dispel the myth that the TRC was this wholly new, “miraculous” institution that came out of nowhere and out of nothing at the end of the nineties – the TRC, as Sitze has shown, has significant ancestors or forebears in indemnity and the colonial commission of inquiry. Now, it is also the case that the TRC didn’t simply repeat the form of indemnity in amnesty and the teleology of the colonial-apartheid Commission of Inquiry. The idea of full disclosure for amnesty was clearly a new invention and so too was the work of the Human Rights Violation Committee who listened sympathetically to the stories narrated by victims. But we must not forget that the colonial-apartheid Commission of Inquiry also listened to the stories of victims that came before it. The difference is that the TRC afforded legitimacy and authenticity to the testimonies that it heard from victims whereas the colonial-apartheid Commission of Inquiry basically always listened to these testimonies to apportion some form of blame to those who were blameless. So with Sitze, I think that the TRC did distinguish itself in these respects, but unfortunately, as Sitze also shows, the TRC did not do enough to distinguish itself from its colonial and apartheid ancestors. This is where reparation again becomes part of the picture. So Sitze and I agree that the lack of the power to order reparations represented a significant failure of the TRC model to distinguish itself from its colonial-apartheid ancestors. And this leaves the TRC open to the allegation that it was nothing more than a device which served to help consolidate the sovereignty of the new nation state. The TRC’s pronounced emphasis on “forgiveness” and “reconciliation” because of such forgiveness, was clearly a measure aimed at the pacification of the population in the aftermath of a near civil war and an imperfect compromise with apartheid as you say. So I think

that there is a lot to be said for the fact that the TRC was only given the powers and remit that suited its role as a device through which the newly elected government could secure and shore up its sovereignty.

De Vos: Apology and reparation, or apology as a form of reparation – what is the relationship between them? Amnesty did not require remorse nor apology (and you criticize the TRC for the manner in which it conceived of amnesty) – what to make of that?

Barnard-Naudé: *This is an area of the TRC's discourse about which so little has been written and so little has been said that one would be forgiven for thinking that it did not play a major role in the proceedings. Famously, the TRC did not require a perpetrator to apologise to victims for the gross human rights violation to which they pleaded guilty by way of their amnesty application. Now this does not mean that many perpetrators did not in fact apologise – the TRC's records are littered with references to apology that did come from the individual perpetrators. But the truth of the matter is that the TRC did not require an apology as part of an amnesty application. Rather, the perpetrator had to make a full disclosure of what they did in relation to the gross human rights violation. Now, the liberal consensus in relation to the relationship between apology and reparation in the literature is that an apology can be reparative, it can go a long way in terms of making good for the violation that the victim suffered. I, on the other hand, contest this liberal version in that I think that if you look at the record of apologies that were offered by perpetrators at the TRC it is clear that these apologies are basically formulaic and empty. They, for instance, include little to no references in terms of what the perpetrator is prepared to do in order to make good for the violation. I think that an apology without at the same time concretely and practically indicating what one is prepared to do or is going to do in order to make good for the harm suffered, is basically a useless apology. And this is where I am critical of the TRC, for we see so many instances in the record where the TRC either confirms that an apology is not necessary, or solicits an apology simply for the sake of it, that is, without requiring from the perpetrator a reparatory discourse in terms of which they clearly state what they are prepared to do in addition to simply apologizing. In the book I look at Clive Derby-Lewis's testimony before the TRC in his amnesty application in which he absolutely refuses to apologise for the murder of Chris Hani in such terms that we can speak of his testimony as a retraumatisation of the Hani family and all the victims of Chris Hani's assassination. In the testimony, you get a resigned TRC basically saying through the chairman that Mr Derby-Lewis is not required to apologise, thus giving him fuel for his fire. I also look at Winnie Madikizela's testimony before the Human Rights Violation Committee in which the Archbishop exhorts her to say sorry and, after all the*

pleading, she comes up with a famous apology that rings especially hollow. So the matter of hollow apologies and how the TRC insisted that apologies were not necessary is uppermost in my mind in this chapter and then, of course the question of what is necessary for there to be reparation in relation to apology which is where the question of shame comes in.

De Vos: I find the discussion in the book on the role that apology played at the TRC and specifically in the amnesty process – its presence, but also its absence so to speak – particularly powerful and insightful. It raises complex questions about the value of “forced” apology, as well as the preconditions that would make any apology by the perpetrators or beneficiaries of apartheid meaningful. You make the important point that apology without what you call “reintegrative shame” would have little value, would, perhaps be meaningless. I wonder if requiring an apology to grant amnesty would have addressed the problem – being forced to apologise could be shameful, but would this be the kind of reintegrative shame you seem to support, or not?

Barnard-Naudé: *No, I think that forced apologies should be steered away from. I don't think that having forced the perpetrators to apologise in addition to the amnesty application would have gone any further in terms of reparation. In fact, as I mentioned with the Derby-Lewis example, this forced apology or attempted forced apology can have the risk of retraumatizing the victims, because you could always have a perpetrator who simply says I'm sorry and no more or one like Derby-Lewis who used the occasion specifically to retraumatize the victims through a steadfast refusal to apologise unless certain others also apologized to him. So with apology there is always this risk of a grandstanding perpetrator that can derail the whole reparative goal of apology. I may be wrong, but I don't really think that a forced apology can be conducive to the reintegrative shame that I advocate. For reintegrative shame to work, the apology must be sincere and most importantly voluntary. The perpetrator must feel themselves compelled to apologise, there must be a moral drive within the body and soul of the perpetrator to offer an apology, it must be as if there is no choice but to offer an apology and, of course, an apology that is conducive to reintegrative shame must be absolutely unconditional, it mustn't say “I apologise but” or “on condition that you” do this or that. And I think there were too many of these kinds of apologies in the TRC. The first requirement of an apology that demonstrates reintegrative shame is that the perpetrator who offers the apology must take on board all of the shame in relation to the violation, which is just a different way of saying that they must assume full responsibility for what they have done. Secondly, of course they must be able to demonstrate real remorse and, thirdly, the apology must be delivered with an authentic sense of sorrow, the perpetrator must be truly devastated by what they have been responsible for.*

My argument in the book is that what I call the TRC's "climate of forgiveness", severely occluded the shame dimension of the reparative apology. So I argue that the TRC actually undermined its very aim to foster reparation through apology, because of its pronounced over-emphasis on forgiveness. Now, this is a difficult argument to make, but in the book I show that the TRC's interest in forgiveness for the perpetrators, to exhort as much forgiveness as possible, created a critical blindspot when it came to the relationship between apology and reparation. In short, I argue that the TRC's over-emphasis on forgiveness as the ultimate outcome of a process that involves apology, severely occluded the space for a demonstration of shame. So, am I saying that the TRC was not interested in the shame of the perpetrators? Yes. I think that the TRC was so overly concerned with the forgiveness of the perpetrators that it foreclosed in a critical sense on the possibilities of demonstrating the shame of the victims. It is well known that the TRC generally steered clear of what Thomas Brudholm calls the "negative emotions" and I argue that the TRC in a pronounced way steered clear of shame as a manifestation of such negative emotion.

De Vos: The sharp focus on the forgiveness of perpetrators at TRC was, of course, the result of the specific Christian paradigm "imposed" by Archbishop Desmond Tutu, the chairperson of the TRC. In the book you are critical about this imposition of a discourse of forgiveness and reconciliation on proceedings, which you argued led to a delegitimization or discrediting of the valid "negative" emotions of victims; emotions like anger, hatred and resentment. What, in your view, was lost in the process?

Barnard-Naudé: *What was lost, primarily, as I see it, was an opportunity to demonstrate real shame on the part of perpetrators – a shame which could then lead to the reintegration of the perpetrator into the community by way of reparation. But let me add that the TRC's discourse of forgiveness also generated its own set of negative emotions in that there were a fair number of victims who did not take kindly to this attempt to shut down the negative emotions. People commented to the media and interviewers about how Tutu's exhortations of forgiveness not only irritated them, but indeed angered them further and perhaps led to the unintended consequence of retraumatisation. So the discourse of forgiveness was also a discourse that in many ways recoiled upon itself and had the directly opposite effect of what was intended. I think this is something positive about the TRC process about which not enough has been said: the way in which it unwittingly allowed the negative, dark emotions to surface, albeit only in exceptional cases, at the margins of the discourse. As a reader of psychoanalysis, I think that one of the major losses that relates to the discourse of forgiveness is that we missed an opportunity to reckon with the unconscious, for these negative dark emotions are mostly also repressed emotions – what we sometimes refer to as, for example, latent anger. These*

lingering, darker emotions and a reckoning with them did not form part of the TRC's self-understanding. Instead it replaced or displaced the negative emotions with so many injunctions to forgive that, as I argue in the book, the TRC can indeed be understood to have operated according to a certain "law" of forgiveness, in other words, an imperative to forgive no matter what happened, no matter what the reasons why one would not like to forgive, no matter, full stop. And I think this was a serious deficit in the TRC – the idea that forgiveness is in all circumstances and at all events reparative. There are, often, very good reasons why a perpetrator should not be forgiven, for instance when they offer an apology without saying what they are prepared to do to make good, but these reasons were often ignored by the TRC in favour of a kind of ridiculous proliferation of mercy even though it was not deserved.

De Vos: Additionally, you write that "the spectre of reparation demands that the work of mourning must refuse forgiveness until such time and moment as adequate, but not completed, reparation has taken place". You further suggests that while forgiveness can always arrive unexpectedly, it is important for us to refuse the idea that one can transact for forgiveness. This speaks to me to a fundamental problem that continues to haunt contemporary South Africa, namely the instrumentalization of forgiveness by many of the beneficiaries of apartheid. I am thinking here of ongoing attempts by many beneficiaries of apartheid to deny the validity of mourning, to embrace a transactional view of forgiveness or, even, to reject the idea that forgiveness is required or needed to be granted. Could you say more about why you think this is a problem.

Barnard-Naudé: *This is perhaps the biggest question and relates to the most controversial part of the book. Allow me to backtrack a little by way of stating my full argument about the relationship between forgiveness and the work of mourning. Famously, Mark Sanders argued that apartheid could also be understood as a large-scale interdiction on mourning and that the TRC, in turn, could be understood as an attempt to enlist the whole of the country in the work of mourning as political work, or even better, just as work. But I think in this it is important to ask what deserves to be mourned, what is it about apartheid specifically that should, or deserves to be, mourned. As you know, there are many white beneficiaries of apartheid who are mourning the demise of apartheid itself, its formal dismantling, the fact that they are no longer the sole beneficiaries of the state's policies, etc. I don't think that this is the kind of mourning that is conducive to reparation. Rather, this kind of mourning is really a form of what Freud termed melancholia – the inability to let the dead loved one go, the desperate clinging to something that exists no more and the denial of a new reality. I think the kind of work of mourning that the TRC elicited was a mourning for the atrocious consequences of apartheid, a mourning for the victims, whoever they are and whoever they may be, but also a mourning for the survivors and the lives that they have been forced to live as a result of*

the structural crime of apartheid. Now, famously the TRC excoriated the white minority for not participating fully in its proceedings, for being generally absent from this work of mourning.

So I think there is a lot that still needs to be done in terms of involving beneficiaries in the work of mourning. But at the same time, I think that a harder reality must also be made manifest to beneficiaries, namely that no matter what effort is expended in terms of the work of mourning, no matter how much one joins in the collective mourning for apartheid's consequences, it can never be enough, it cannot secure or then transact for forgiveness. Forgiveness comes if it comes, but it should not be a purpose behind participation in the work of mourning so that beneficiaries think that if only we mourn we will be forgiven. It doesn't work like that. The testimony in the book shows that forgiveness, moreover, is a process. It rarely happens once and for all – sometimes a victim or survivor feels that they have not fully mourned the dead to the point where they can forgive. But this is (also) not to say that the work of mourning cannot be conducive to forgiveness, it clearly can, but I resist the idea that one can transact for forgiveness because you have participated in the work of mourning. Obviously there are those too who believe that there is nothing to be forgiven, that there were good things about apartheid and colonialism, but I think that such people are seriously deluded and locked in a kind of melancholia which makes it so difficult for them to move on that they lock themselves in all the time, enclose themselves, have as little to do with the Other as much as possible, basically withdraw into their own world which, for psychoanalysis is the quintessential mark of psychosis, the moment that you foreclose on the Other and diminish into your own unshared or minimally shared version of things.

De Vos: Your chapter on big business is particularly powerful, not least because it speaks to the problem of the TRC presenting an “authoritative” version of the past, one that supposedly “draws a line” under colonialism and apartheid, when that version of the past is inevitably littered with silences and omissions. This, you suggests, allows for a forgetting through remembering (what you call “forgetting ahead of itself”) and a “closing of the book” so to speak. You reference Antjie Krog’s searing remark in *Country of My Skull* on the testimony of business leaders before the TRC who belatedly realized more was needed from them than bare denials and thus decided to say “forgive us for Steve Biko and all the others whose names we cannot remember”, before getting on with business as usual. Krog thus suggests that the business leaders could muster no more than an insincere apology, and only because they came to understand that this was required to allow them to “move on”. One could read this as a critique of the TRC hearing on big business as no more than a show put on by economically powerful elites for the benefit of the cameras. Is this also your reading?

Barnard-Naudé: *The question for me touches on what I would call the performative dimension of the TRC about which not enough work has been done. What I mean with the performative dimension is the dimension in terms of which the TRC and its proceedings, broadcast all over the world, made for good theatre. It is perhaps cynical or even cruel to say this, but at the end of the day there were those who came to the TRC in order to put on a good show. I don't mean all of the proceedings here and not even the majority of the proceedings. Clearly there was a lot of authenticity that was exhibited in the TRC. But when it comes to big business especially, it was all lights, camera and action. Krog, in *Country of my skull*, when she writes about the role of big business, begins by saying that when the first day of the business hearings started, business was all about denial: of course we had nothing to do with apartheid, we only worked here, apartheid was a policy of the state not of business. But, Krog says, when it became clear to the Captains of Industry that persistent pleas of innocence did not wash or look good on the eight o'clock news, business became more lenient and by the third day of the hearings they were prepared to apologise (at least a small minority of them) for their complicity with and within the military industrial complex that was apartheid. Now, why specifically forgiveness for Steve Biko? Well, because Biko was murdered in the Sanlam Building which the security police leased from it. There is no telling whether Sanlam as landlord in fact knew about what went on on their leased premises, but the implication of business providing, procuring or facilitating the space for such brutality is clear, so they apologized for Steve Biko.*

However, when the business hearings were finished, the show was over, I claim that big business simply got on with business as usual and this is the case because the TRC failed to produce an archive of big business activity during apartheid that once and for all clearly illustrated their complicity. It is true that the TRC places business generally in the category of the beneficiary, but it goes no further than that. There is nothing really by way of an indictment of business as actively complicit in – a critical component of – apartheid. So this left business, like many other beneficiaries, to go away from the TRC process thinking that all was said and done, that the relatively unfortunate episodes of, for instance, miners killed because of fires that started as a result of lax safety on the mines, was thankfully over and done with. Or the calling of armed police to disperse striking workers, was unfortunate but by no means criminal. In the book, I contest these versions of the events. I try to illustrate that business whole heartedly embraced apartheid as a government strategy because it made sense for business to do so. One of the primary reasons for this business sense to apartheid resided in the fact of reduced labour costs through the exploitation of black labour which was such a fundamental feature of apartheid.

So, while there are those who say that apartheid was bad for business, I rather ask the question of the accumulation of benefits, wealth and privilege for business during this period. The TRC, when it came to the question of the relationship between capitalism and apartheid, equivocated markedly on this question and its report is basically a cut and paste from submissions that were on one or the other side of this question. But the report also makes it clear that business does have what the TRC calls “a case to answer”. Unfortunately, in the aftermath of the TRC and perhaps because of the shoddy archiving that generally pervades the report on big business, nothing has come of the TRC’s recommendations of, for instance a wealth tax on big business or the sacrifice of 1% – a mere 1%! – of market capitalization for listed companies on the JSE.

You will know that as a result of the failure of the TRC to hold big business accountable, a victim support group NGO, the Khulumani support group, took big business to court in the United States under the Alien Tort Claims Act. Unfortunately, the group ultimately lost these proceedings because of a jurisdictional issue, but in the course of the litigation an unequivocal picture of big business’s complicity with the apartheid government emerged and is there for all to see.

De Vos: The chapter on big business also grapples with the distinction made throughout the TRC report between perpetrators and beneficiaries, something – as I mentioned earlier – heavily criticized by Mahmood Mamdani. You argue that the TRC failed to pay sufficient attention to the role of big business in the maintenance of the apartheid system, that it failed to grasp just how entangled the apartheid regime and big business had been. You also contend that this failure to grasp the effects of the complicity of big business in the system haunts the report. At its heart this failure seems to stem from the acceptance of a distinction between what the apartheid state did and what private actors did. Is part of the problem not now baked into the terms of the post-apartheid (if there is such a thing) settlement as codified in the Constitution, which, it could be argued, does not emphatically reject this public private distinction and so makes it difficult to secure what could be the most radical and effective form of reparation, namely “a return of the land” and all the other kinds of things that could undo inequality.

Barnard-Naudé: *Of course, I think that you are absolutely right. It feels as if, for all the many ways in which the public / private distinction has broken down, the idea that the private is private and cannot admit of any public scrutiny is still very much with us. Private property is of course the pinnacle of this distinction, its holy grail, which prevents any further inquiry into how property was acquired, when was it acquired, by what means? And I think it is as you say: this absolute sanctity of the private is baked into our constitutional compact to*

the point that the very idea of public reason and public policy and public interest simply function as forms of exception to the general sanctity of the private. And the beneficiaries of apartheid obviously use this idea of a sacred private sphere to deflect and hide their responsibilities for apartheid. I'm not saying that we should have no privacy and privity of property in South Africa, but what I am saying is that we need more of a fluidity when it comes to the public / private distinction so that we can begin to provide remedy where this is needed and begin to pay the unpayable debt. People will ask whether I am in favour of expropriation without compensation and I will say that I am only in favour of it if it means that the victims of apartheid will receive reparation as a result of it. Unfortunately, the loopholes around expropriation without compensation are many and glaring and so it too can be appropriated for the most nefarious of purposes. Trusting the state with the success of such an endeavour is a difficult undertaking in the present atmosphere of widespread corruption and state capture.

De Vos: The TRC report presents the work as a complete picture of the apartheid past which allows for a “closing of the book” of apartheid. But this once and for all closing of the book was only made possible by endorsing a certain degree of amnesia. You suggest that we should pay more attention to what has not been recorded, what has been left out, what remains outside the archive, and it is exactly that which is absent from the dominant narrative of the transition that continues to haunt the country. But some pragmatic supporters of the TRC might argue that this was exactly the point, that the TRC was a pragmatic mechanism to manage a tricky transition, which required a closing of the book in a manner that would not delegitimize the new state that came into being as part of a historic compromise that needed to accommodate the interests of those who might otherwise have used their economic power to sabotage the new state. How would you respond to this view?

Barnard-Naudé: *I would say that if this was the purpose of the TRC then it clearly succeeded – the new state was consolidated and legitimized partly as a result of the TRC. It did function as a mechanism of state legitimation. But is this really all that we want from a TRC or other transitional mechanism akin to it? How would that be different from the colonial-apartheid commission of inquiry that basically whitewashed massacre, shoring up the apartheid state. I would ask whether the purpose of the TRC wasn't supposed to be something more than this. There is a lot in the literature about the TRC as an institution of what is called “therapeutic jurisprudence”. And I think that the TRC did not do enough work in relation to this therapeutic dimension. Yes, it listened to the stories of victims and yes, it granted amnesty to perpetrators and yes, it recommended reparation. But the TRC was in its very design and discourse not*

an institution that could do the hard work of what Adorno calls a “working through”. It provided, as one of the authors in the book that I quote, I think it is Verné Harris, says, only a ‘sliver of a window’ into South Africa’s dark past. And so, if the TRC’s purpose was only to provide a sliver of a window, manage a tricky transition as you say and close the book on the past, then it was successful at least to a point. But what interests me is, as I say in the beginning of the book, the extent to which the TRC is also an institution of lack and particularly of the lack of reparation. I ask how we can close the book if we do not yet have as complete a picture as possible of the nature and extent of the gross human rights violations? How can we forget if we have not yet remembered properly? So the book is an attempt at remembering more, or more fully with a focus on what I call the unconscious of the TRC, the things which it repressed. Repression is often an unwitting effect, so I don’t wish to simply blame the TRC for its unconscious. I just want to say that there is an unconscious to the TRC and we are well advised to investigate this unconscious if we are interested in overcoming the divides that haunt the nation, the particular manifestation of which I call the spectres of reparation.

De Vos: The book ends on what I read as a hopeful note. I am thinking here of your suggestion in the final chapter that it would be possible to bring forth a political practice of reparation through a revival of our uniquely human poetic status, a suggestion that I find both provocative and moving. I take it this could be read as a partial answer to the question of what is to be done in the wake of the partial failure of the TRC. I was wondering whether you would agree that it could be read this way. Additionally, what exactly do you mean when you talk about the revival of our uniquely human poetic status.? I would also be interested to hear if you have any others suggestion on how to answer the “what now” question?

Barnard-Naudé: *The book proposes what it calls an ethic of reparative citizenship as a possible means of consorting more productively with the spectres of reparation and yes, it is true that I place a lot of emphasis in the constitution of this ethic on what Agamben calls the human’s (lost) “poetic status”. For Agamben the human is constitutionally distinguished from the bare life of the animal by virtue of the fact that they are capable of producing a world that is not yet given and that is not fixated on the maintenance of the purely biological conditions of life. My argument is that reparative interventions in South Africa are premised on relying on this poetic status of ourselves to give ourselves a world that is not yet in being, but that can be in its becoming. For this to happen, I argue that we need to rely on what Martha Nussbaum calls the “literary imagination”, a kind of emotional and social rationality that emancipates us into radical empathy, taking the full measure of the Other’s suffering and existence. So, I’m not so much interested in Lenin’s eternal question of what is*

to be done, but rather in the ethical (and inevitably political) disposition with which we come to this question. The book is interested in making a prior point about the attitude, if you will, with which we come to the question of reparation and I give the example in the conclusion of JM Coetzee's magistrate in *Waiting for the Barbarians* who allows himself to be totally undone by the barbarian girl which he brings into his rooms.

You need to read the book to have a full version of the argument, but let me just say that Coetzee gives us a concrete example of what reparation as an incomplete and finite, always insufficient, moment of reparation or series of reparative actions may look like. And we must not be afraid of raising the question of revolution here, because I do think that consorting more productively with the spectres of reparation requires a kind of revolution, namely a revolution in our general attitude of business as usual. Achille Mbembe recently referred to this in the context of decolonization as "disenclosure". What does disenclosure look like for all of us in a neoliberal space-time of enclosure and shoring up. Can disenclosure be figured as a form of perhaps insurgent resistance? Unfortunate as it may be, reparation in our context relies on the exceptional, the not yet given, the still to be done. In that sense it is poetic and I use the metaphor of poetic justice to indicate what I think of as the "making" of adequate reparative action. Reparative citizenship demands of us to convert the exceptionality of reparation into our everyday practices and decisions, so determined by global neoliberal capitalism as they are. What would South Africa look like if reparation became the law, rather than the exception? What will our world be if we are prepared to disenclose ourselves in relation to the Other's plight and for the Other to disenclose themselves in relation to us? Surely, what is to be done will look very different from what currently is being done under the banner of enclosure, erecting boundaries and enforcing borders, that has become central in our way of life after apartheid.

Jaco Barnard-Naudé is Professor of Jurisprudence, Co-Director of the Centre for Rhetoric Studies (CRHS) and Director of Research in the Faculty of Law, University of Cape Town.

Pierre de Vos is Claude Leon Foundation Chair in Constitutional Governance in the Department of Public Law, Faculty of Law, University of Cape Town.