

. . . WRITERS IN THE FIRST PERSON[†]

Remarks of The Honorable Albie Sachs^{††}

Introductory Note by Eric S. Janus^{†††}

William Mitchell College of Law welcomed Justice Albie Sachs of the Constitutional Court of South Africa for his third visit in April 2000, on the occasion of the re-issuance of his book, *The Soft Vengeance of a Freedom Fighter*. We are honored to publish a transcript of his talk below, which begins with an extended excerpt from the book.

Albie Sachs has devoted his life to equality, human rights, and to making law live up to its promise of justice. As an activist member of the African National Congress, he was imprisoned for his legal work in the fight against South African apartheid.¹ He lost his right arm and the sight of one eye, and nearly his life, in a car-bomb assassination attempt by agents of the South African security forces in 1988. In exile for years, he worked tirelessly throughout the world to achieve a non-racial, democratic South Africa. Finally, as a member of the National Executive of the African National Congress, he participated in drafting the new Constitution of the Republic of South Africa, adopted in 1996. Appointed to the highest Constitutional Court by President Nelson Mandela, Justice Sachs's wisdom has and will inform the Court's judgments as it applies a unique vision of unity and diversity, exemplified by these words in the Preamble of the Constitution that so many sacrificed to achieve:

We, the people of South Africa, . . .adopt this Constitution as the supreme law of the Republic so as to [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human

[†] This essay is based on a speech Albie Sachs gave at William Mitchell College of Law in April 2000.

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1. See ALBIE SACHS, *THE JAIL DIARY OF ALBIE SACHS* (1966).

rights.²

In his visits to William Mitchell, Justice Sachs has spoken broadly about his—and his nation’s—fateful journey to democracy. In April 1999, he lectured on the evolution of the legal doctrine of equality. During his weeklong visit as Distinguished Jurist in Residence in October 1999, he spoke movingly about the South African Truth and Reconciliation Commission,³ about art and politics, about architecture, and about healing.

The Soft Vengeance of a Freedom Fighter is Justice Sachs’s highly personal account of his recovery from the 1988 assassination attempt. As he explains in his remarks below, the “vengeance” he seeks for this attack is the creation of “a country with a bill of rights and the rule of law . . . a free democratic South Africa.”

The new South Africa has chosen healing over revenge. But, as Justice Sachs has reminded us, healing requires telling the truth about the past and creating a just and inclusive society.

Our country has its own journey to equality. We can learn much from Albie Sachs and the South African experience he has helped shape.

Remarks of Albie Sachs

I don’t know if you have ever played that game, *Famous Opening Lines*,⁴ where you identify a piece of literature from its first sentence. Mine’s going to be an easy one to identify, as you will see. Just let me explain the problem I had when starting the book: how do you describe unconsciousness, the absence of sensation and emotion? How do you convey the feeling of having no feeling? That’s what I tried to do with these opening pages.

Oh shit, everything has abruptly gone dark. I’m feeling strange and cannot see anything. The beach, I’m going to the beach. I packed a frosty beer for after my run and something is wrong. Oh shit, I must have banged my head like I used to do in climbing Table Mountain in Cape Town dreaming of the struggle, and cracking my cranium against an overhang. It will go away. I must just be calm and wait. Water the tropical potted plants, stare at the ten heads on the giant African sculpture in my beautiful

2. S. AFR. CONST. (Act 108 of 1996) pmb1.

3. For a version of these remarks on the Truth and Reconciliation Commission, see Albert L. Sachs, *Honoring The Truth In Post-Apartheid South Africa*, 26 N.C. J. INT’L L. & COM. REG. 799 (2001).

apartment. Oh shit, how can I be so careless? The darkness isn't clearing, this is something serious. A terrible thing is happening to me. I'm swirling. I cannot steady myself as I wait for consciousness and light to return. I feel a shuddering punch against the back of my neck and then what seems like another one. The sense of threat gets stronger and stronger. I'm being dominated and overwhelmed. I have to fight, I have to resist. I can feel arms coming from behind me, pulling at me under my shoulders. I'm being kidnapped. They have come from Pretoria to drag me over the border and interrogate me and lock me up. This is the moment we have all been waiting for, the few ANC members working in Mozambique, with dread and yet with a weird kind of eagerness.

'Leave me!' I yell out, 'leave me.'

I move my shoulders and thrash my arms as violently as I can. I always wondered how I would react. Whether I would fight physically, risking death, or whether I would go quietly and rely on my brain and what moral character I had to see me through.

'Leave me alone! Leave me alone!' I demand violently, aware that I am shouting in both English and Portuguese, the official language of this newly independent state where I have been living for a decade. I'm screaming for my life, yet with some contrast, some politeness, since after all I am a middle-aged lawyer in a public place.

'I would rather die here. Leave me. I'd rather die here!'

I feel a sudden surge of elation and strength as I struggle making an immense muscular effort to pull myself free. I might be an intellectual but at this critical moment, without time to plan or think, I'm fighting bravely with the courage of the youth of Soweto. Even though the only physical violence I've personally known in my life was as a school boy being tackled carrying a rugby ball. I hear voices coming from behind me. Urgent, nervous voices, not talking but issuing and accepting commands and they are referring to me.

The darkness is total but still I hear tense, staccato speech.

'Lift him up. Put him there.'

I'm not a him. I'm me. You can't just cart me around like a suitcase. But I'm unable to struggle anymore. I just have to go along and accept what happens. My will is gone.

We are travelling fast, and the way is bumpy. How can they leave me in such discomfort? If they are going to kidnap me at least they could use a vehicle with better springs. I have no volition. I can't decide anything or move any part of me. But I have awareness, I think, therefore I am. The consciousness fades and returns, swirls away and comes back. I am lying down like a bundle. There is a point in my head that is thinking, and then

oblivion, then awareness again. No thought related to action, but passive acknowledgment that my body is being transported somewhere. That I exist even if without self-determination of any sort. I wonder if we have reached the South African border yet? I wonder who my captors are and what their faces look like. Do they have names? This darkness is so confusing.

More urgent voices speaking with rapid energy, treating me as an object to be lifted and carried and moved this way and that. I feel the muscles and movements of people all around me, above me, at my side, behind me. Nobody engages me as a person, speaks directly towards me, or communicates with me. I exist as a mass. I have physicality but no personality. I am simply the object of other people's decision. They point their mouths towards each other but never towards my head. I am totally present, the center of all the energetic talking, but never included in the discussion. My way, my existence is being violated. I am banished even while in the group.

All is very still, calm and without movement or voices or muscular activity. I am wrapped in complete darkness and tranquility. If I am dead, I'm not aware of it. If I'm alive, I'm not aware of it. I have no awareness at all, not of myself, not of my surroundings, not of anyone or anything.

'Albie,' through the darkness a voice speaking, not about me, but to me and using my name. And without that terrible urgency of all those other voices. 'Albie, this is Ivo Garrido speaking to you.' The voice is sympathetic and affectionate. I know Ivo. He is an outstanding young surgeon and a friend. 'You are in the Maputo Central Hospital . . . your arm is in lamentable condition . . .' He uses a delicate Portuguese word to describe my arm, how tactful the Mozambican culture is compared to the English one, I must ask him later what that word is . . . We are going to operate and you must face the future with courage.'

A glow of joy of complete satisfaction and peace envelops me. I am in the hands of Frelimo, of the Mozambican Government. I am safe.

'What happened?' I am asking the question into the darkness. My will has been activated in response to hearing Ivo's voice. I have a social existence once more. I'm alive, part of humanity.

A voice answers close to my ears, I think it is a woman's, 'A car bombing.' I drift back, smiling inside to nothingness.

I am elsewhere and other. There is a cool, crisp sheet lying on me. I'm lying on a couch aware that I have a body and I can feel it and think and even laugh to myself. Everything seems light and clean and I have a great sense of happiness and curiosity. This is the time to explore and rediscover myself. What has happened to me? What's left of me? What's the damage? I'm feeling wonderful and thinking easily in word thoughts not just

sensations, but there is an internal distraction. Let me see. A joke comes back to me. A Jewish judge from the days when we Jews still told jokes through all the pain, and oppression, and humiliation. When I was still a young student and my mountain climbing friend had a new joke for me each week. I smile to myself as I tell myself the joke and feel happy and alive because I'm telling myself a joke. The one about Himie Cohen falling off a bus, and as he gets up, he makes what appears to be a large sign of cross over his body.

A friend is watching in astonishment.

'Himie,' he says, 'I didn't know you were a Catholic.'

'What do you mean Catholic?' Himie answers. 'Spectacles . . . testicles . . . wallet and watch.'

I laugh, therefore I am. Within days the words had gone round all the ANC camps in Africa: The first thing comrade Albie did was feel for his balls. I suppose in that macho world it made me legendary for a little while, my fifteen minutes of fame.

The theme—I think, therefore I am, I laugh therefore I am—is one of the themes that emerged as I was writing the book. The first time sitting on a commode, my body functioning as a body with an ordinary, benign activity, that tiny little plop was one of the most wonderful sounds I'd ever heard. I shit, therefore I am.

My heel was shattered. After six weeks a physical therapist comes and says, 'Now you must stand.' 'I can't stand, I'll fall over,' I protest, 'It's going to be sore. I was injured.' The orthopedic surgeon is firm: 'after six weeks you must bear weight on your foot, therefore you must stand.'

I sit at the edge of the bed, my feet dangling . . . down onto the floor. Standing . . . automatically. I had to tell my brain, to tell my body, from which it had become disconnected, to tell the muscles, the bones, the joints, the tendons to be commanded and activated to function again. Something as ordinary and benign as that. I sat there in terror of pain and collapsing and she said, 'Just tuck your bottom in, push up.' I'm sitting there and it's not like a whole person that's deciding what to do. It's a brain up here issuing instructions not to a body, but to parts of a body. Not instinctive bodily actions, but conscious commands to discrete parts of the anatomy on how to function.

Suddenly there's a moment when you've made the decision. Here it was almost like a conscious moment, now I'm making a decision, now my brain is activating my body, it's pressing a button

inside and the body is going to work. I tucked my bottom in and put the pressure on and started slowly moving upwards. In front of me was a mirror, it just happened to be there, and I saw in it this thin, scarred face with a shaven head looking so seriously at me. It was me, looking at me. Slowly emerging into the mirror and going up past the top of mirror, and slowly coming down again. That long, lean, embattled, serious, intense face sliding down again and back onto the bed. I stand, therefore I am. I sit, therefore I am.

It's a whole series of rediscoveries of bodily functions. Of being yourself, of being yourself in the world. Later I battle to walk again. You don't know which foot to start with, where to put the pressure. You are having to learn the whole function again of movement, coordination, of directing your toes, your instep, your knee, what to do. It is slow and painful. Upstairs, what a struggle. I remember the little saying, 'Good foot up to heaven, bad foot down to hell.' I describe it in the book and it is just coming back to me as I talk. When I was out of the hospital afterwards, and the phone would ring—I wasn't used to all the new phones in England, cordless phones, phones on the wall, every country has phones in a different place—the phone would ring, and I'd have my stick and I'd walk and I'd get to the phone and my stick would drop. I'd pick up the phone and say 'Hello' and then somebody would give me a message and I'd say, 'Hold on a minute,' and I'd have to retrieve my stick to walk to get a pencil, a piece of paper and come back again. These tiny activities induced a great sense of frustration. It took so long, people would hang up. But it is learning, learning, learning all the time, to reintroduce yourself into the world, to become more competent and effective, to learn to handle your own impatience, just to slow down.

The walking then becomes running. Slowly, slowly then a little faster, a little faster, and just one length of the gym, then two, then five and then they couldn't stop me. Jogging slowly up and down, up and down, and imagining I'm back in South Africa, though still in exile. Imagining I'm on the beach where I grew up, where all my stories end, on that mythical yet real and wonderful beach. Running, running, running. I'm running with Nelson Mandela who is still in prison, but in my mind and body we are a free people in a free country. And because we are just wearing bathing costumes, there is nowhere to hide any guns. So we are almost naked and completely free, with no arms of war, and we're no longer fighting. That's the vision on which the story ends.

There is one moment that I'd like to share with you now. I am out of the London Hospital. I've been in an artificial atmosphere for months. I want to get out into the sun, to feel the sun on my face, to see growing things. I go with my brother to the rose garden in Queen Mary's Park in London. It's a wonderful rose garden with masses and masses of roses. It was a favorite spot of mine. I'm taken there. I get tired very quickly, so my brother and his companion go for a walk, and leave me sitting on a bench. I'm enjoying being there, it's quiet, it's lovely and it starts getting hot. I think how wonderful it will be to have the sun on my skin, just feel it on my skin. I want to take off my top. Yet I said to myself, 'I can't take off my top, I'm scarred, I'm ugly, I've got a short arm.' People are coming here to look at beauty, to look at roses, it's not fair for me to expose myself in that way and confront them with something that is unpleasant. Then another side answers, 'But you're a person. You're hot, take it off.' Then the first voice answers again, 'But this is a rose garden. People have come here for beauty, the very reason I myself have come there. It's not right. I mustn't be selfish.' Then there is a moment of decision, again it's like a conscious step, not just something that happens and you just do. With my surviving hand I tug at the top, pull it over my head and feel the sun on my skin for the first time in months. I feel good. I look carefully around. Nobody cares. People are walking by as they were before. I realize at that moment that it had all depended on me, that I had a right to be there. If people were affronted, that might be their problem, but I must not assume that people will be shocked by seeing me. I must be as I am in the world as I am. It was one of those unexpected moments of deep discovery for me. I remember feeling, half saying to myself afterwards, that I'm glad that I've taken probably the most important decision in my life surrounded by roses.

I mention that particular episode because it in fact introduced me to so many people in the world. I refer not only to what I call the democracy of the disabled, but to so many people who wish they weren't as they are. They wish they were taller, or shorter, or their noses were bigger or less prominent, or they had more hair or less hair, or fuller breasts or flatter ones. It is as though we are made to feel dissatisfied with ourselves. There's a kind of discontent built into our actual appearance, whatever it is. Even the beautiful ones amongst us wonder if we are loved just for our beauty, and will the beauty last? Then I learned through that

circuitous strange kind of a way that if you accept yourself as you are, you enjoy yourself as you are, you engage with the world as you are, and the world engages with you as you are. If you have discomfort about yourself, the world will pick it up, feel it, respond to it and acknowledge it. It's extraordinary how pervasive those kinds of emotions are, and in that sense the experience for me of living with the freak appearance of an amputee was hard, but liberating.

I write, therefore I am. The first job that I had after getting out of the hospital was to teach at Columbia Law School. I had three and a half months. I was very, very weak. To go and buy food, to carry it, to push through the swing doors, exhausted me. But I was hungry and I knew the exercise was good, as it was to engage with the world. I remember being amused when I went to a nearby delicatessen and there were these guys outside with their plastic cups begging for money. When they saw my arm they stopped begging, bowed, and let me through for nothing.

Just to use my fingers to write, to see the words coming up on the screen, to print it out, to do it again, and again, and again, was part of my recovery. It wasn't cathartic in the sense of some repressed experience pushing its way out into the light and giving me emotional relief, it was a different emotion. It was one of re-organizing something that had been drastic, violent, fragmenting and brutal. How to handle the hatred of people you didn't know, you hadn't seen, who were trying to exterminate you? How to come to terms with that. That there are people on this earth who dislike you so much, that they actually want to blot out your existence and remove you is hard to accept. No matter how much you say to yourself that of course it wasn't personal it was political, your body is responding at a visceral, primitive level to a sense of external hatred, and it's shocking that all your political consciousness doesn't help you come to terms with it.

The image I had while I was writing was of this brute, violent, negative force, like a torrent cascading down wildly, and being captured in intellectual and experiential turbines that produced a current of words, and the words would then flow along and produce electrical illumination and light. So it was a case of taking that cruel energy and transforming it into beauty. That was the challenge. It's what we intellectuals do well or badly at different times of our life. We convert the lived experiences, often painful and sometimes joyous, into forms that can be communicated and

transmitted to others.

It was a wonderful moment when the manuscript was complete. The book was there. My hand could do it! There are great moments afterwards. The agent reads it and likes it; the publisher says, yes we like it very much. And then that special moment when it's in your hand, the very book you have written with your fingers is now a book with a cover, beautifully presented and packaged, passing through your fingers. With the special quality that a book has, it is the difference between a manuscript and a book. A book is out there with all the millions of marvelous, wonderful books and all the trash and everything else, but it's there. You produced it. It's part of that population. It's a real book. You see your own words and energy converted into the rectangle of the page with numbers, with that familiarity that a book has.

In this particular case, with the new American edition, it's a book within a book. There are the extra forty pages I have written, now no longer an exile, but a judge [I judge, therefore I am]. There is the new cover, the preface by Desmond Tutu. And then the brilliant introduction by Nancy Scheper-Hughes who is an anthropologist of the body. I didn't even know there were anthropologists of the body, and yet it is obvious, you live in your country, in your class, in your city, your home, and you live in your body. Bodies, in a way, that is what the book is all about. Living in your body, what does it mean, what does it signify? She says that I have got an iconic body. I wrote to her and said, 'Barbara, I'd rather have a bionic body.'

So suddenly the book and the experience it records has its own independent existence. It's me, it's different from me. It becomes the occasion to be here to speak to people like yourselves. The whole theme of *soft vengeance*, the title of book, becomes clearer now. When I was writing, it was a phrase that kept coming to mind. I'm lying in the hospital bed in London and a friend comes to me and says, 'Don't worry comrade Albie, we will avenge you.' I thought, what does he mean? Will he catch somebody and cut off his arm? Is that what he means? I don't want to be avenged. To live in a free democratic South Africa, that's my vengeance. The thought came to me at the time quite strongly as I lay on my hospital bed.

Later, I hear that they have caught one of the persons responsible for the bombing. The thoughts go through my head:

he must be put on trial, the evidence must be presented, and if it is insufficient to convict him beyond reasonable doubt, he must be acquitted. His acquittal will be my soft vengeance. To live in a country where people are only punished as a result of due process of law, that's the greatest triumph, that's the real vengeance. Whether one rascal or another goes to jail, that's puny, that's little, but to live in a country with a bill of rights and the rule of law, and freedom of justice, that is grand and justifies everything.

These words *soft vengeance* flowed into the book, my body still frail, in the twenty-third year of my exile, typing with one finger on my PC high in the sky near Columbia University. A year later in 1990, we can all go back home. Mandela is released. The ANC is unbanned. Just to walk around in my beautiful city, to go down to the beach, to run on it as a free person not subject to restrictions, not followed by the security police, that was soft vengeance.

To help to negotiate a country's constitution . . . I guess there are a couple of lawyers and law students around here, and you will agree that it's not a small thing to write the founding constitution of your country. We are the fathers and mothers, daughters-in-law, cousins and uncles of the constitution! We were all there in the sense that the whole nation was represented. I was struck by the words of Thurgood Marshall when he said: 'Well, if my ancestors were at the Philadelphia Convention they would have been dressed in britches, carrying a tray.' But we didn't have that situation. We were all there—black, white, brown, male, female, old regime, new people, we were all there. That's part of the soft vengeance. Hoping to enshrine the very values that you had been fighting for your whole life. Later, standing in a line and voting for the first time as an equal with everybody else.

I suppose most of you vote. You hope the weather is not too bad, that you can get it over with quickly, and maybe you don't feel there's all that much different between the candidates. For us it was different. Ninety percent of the people eligible voted. We had to wait for three, four, five, sometimes seven, eight, nine hours in a line to vote. You might have seen the picture of that lame old man being carried in a wheelbarrow to vote. There we were standing in these long, snaking lines, black and white, the madams and the maids, to vote. I recalled Albert Luthuli, President of ANC, earnest Christian, who got a Nobel Peace Prize in 1961, and later died in banishment, writing a booklet entitled *The Road to Freedom is Via the Cross*. I felt in a way that the road to freedom had been via the

cross—the cross of sacrifice, of commitment, of dedication, and the cross on the ballot slip that made us all equal. That was my ‘soft vengeance.’

The Constitutional Court is established. It is like your Supreme Court, and I am appointed as one of the judges. It’s a wonderful court to be on. There are eleven of us and it is a continuation of everything that we all in our different ways believed in and fought for, now in the Constitution. Our job is to ensure that no one, not even my closest comrades in arms in the days of struggle, deviates from this Constitution. It was negotiated by the whole nation, and became the compact, the peace treaty, and the guide for South Africa. We have to ensure that its principles are maintained.

You don’t get simple cases of express, overt race discrimination, nor clear cruelty, and so on. Every case that reaches us is borderline and controversial. Capital punishment—we decided it is unconstitutional. It violates the basic values and principles of dignity, respect for life, in our Constitution. We are not popular, but our job isn’t to be popular, it is to maintain those principles.

We have outlawed corporal punishment as a judicial punishment. People are telling us it is quicker and easier than jail, it’s better for the kids, give them a few smacks. In almost every country once under British Colonial control, corporal punishment has been used. In the public schools in England they feel that corporal punishment is good for the kids, the teachers, discipline and character. Yet, what do we do if we feel the deliberate infliction of pain is inconsistent with the values of our constitution?

We have a case where we haven’t given judgment yet, on income tax law—pay now, argue later. I think you have the same principle here. It has been upheld by your Supreme Court. I think it was upheld even in the 1930s when the Supreme Court was by no means pro-government. We have to decide whether, in the circumstances of South Africa, given the penalties imposed, it is constitutional or not.

Powers of search and seizure. Can foreigners adopt? That’s coming up soon. We have a case in a couple of weeks where some independent Christian schools are claiming that legislation prohibiting corporal punishment in all schools interferes with their rights as Christians to beat recalcitrant boys. That’s their claim: does being members of a religious community of parents and

teachers who believe 'spare the rod, spoil the child' as Biblical injunction trump a general prohibition established by law?

We have a case dealing with social economic rights. It may be one of the first in the world because we have such economic rights spelled out in our Constitution in a way that makes them justiciable. But how to make them enforceable through the courts and when? It deals with the right to shelter, the right to housing of homeless people. We have to use our brains. We have to take account of the means available to our society. What are the international norms and standards? What are forward-looking judges throughout the world saying in relation to these questions? How to tell the story, how to write what needs to be said to balance out all the interests and values involved?

When you write as a judge it should be in a certain conventional framework. When I was asked by the publishers to write another forty to fifty pages to bring this story up to date because this was published ten years ago, ending when I was still in exile, I didn't know if I could do it. I might say that I think the American judicial opinions are possibly the best in the world in terms of literacy and accessibility. You might not think so, but you should see the others. I'm speaking about Supreme Court judgments, in focused, smart, intelligible language, forcefully argued. We judges have a strange way of narrating what we think is important, we stylize and conventionalize. Could I shift from that to writing a book like this again? And so I'm sitting at the computer again with my hand and fingers going. I think it came out nicely. I felt very pleased that becoming a judge wasn't squashing the other side of me, that even as a judge I could be creative with my writing. (My legal critics sometimes think I'm a little bit too creative and they'd prefer a more sedate mode of writing!) But it doesn't mean I can still do this phenomenological writing, this existential thinking about what you've been through. All that is part of what I call my 'soft vengeance.'

Finally, the story almost comes to a conclusion, yet the story never ends. Those of you who heard me last year will remember I spoke about Henry. Were any of you here then? Remember Henry at the beginning coming to my Chambers, and then I meet with him a year later, or nine months later, and he says he has been to the Truth Commission, and he's given his story about how he organized the bomb in my car? Two days ago I got an email from my office saying that the Truth and Reconciliation Commission

wanted an affidavit from me because a certain Mr. Henri van der Westhuizen is formally applying for amnesty. I discovered that he spelled his name Henri. That sounds different in my ear from the Henry I was speaking about all the time, who had a 'Y.' The next thing I'll be making an affidavit. I'm not quite sure: How do you convert this experience into an affidavit, 'I the undersigned.' That's one of the things I'll have to attend to when I get back. Then I'll be able to say: I make an affidavit, therefore I am.

Question #1: Didn't you feel terrible physical pain?

I didn't feel much pain. If there was one emotion I had, it was the joy of surviving. The psychiatrist—I was his first bomb trauma patient, he was my first psychiatrist, we kind of looked at each other—he kept waiting for me to collapse. He said you have these phases: euphoria that you've survived. You feel it is miraculous. Then you go down a lot. Then while you're busy getting better, you have a fixed goal, then the most difficult moment is when you have finished the physical rehabilitation, you're back out in the world, and suddenly you discover that's the way you are, maimed and a freak. He's watching me, maybe he's still watching me. I haven't collapsed.

The pain I remembered vividly when I was writing, was what I described: I wish the car had springs. My interpretation at the time was of bumpiness. But I was more unconscious than conscious and I think that blotted out the memory of pain. Then when I came to after the operation I was still a bit under the anesthetic and my surgeon friend said that it's quite usual for the anesthetic to make you euphoric. After that, it was heavy sedation for quite a long time. I tried to control the painkillers. What I do remember is in the London hospital where I was transferred. I would get painkillers twice a day and I would wake up at about four in the morning, then I would feel it. Not acute, terrible pain, but it would be dark and I would watch the dawn light coming and I would feel very lonely, nothing was happening, there was no activity, and I would feel aches in my body. I remember singing to myself, 'It's me, it's me oh Lord, standing in the need of prayer. It's me, it's me oh Lord, standing in the need of prayer. It's not my brother nor my sister, but it's me oh Lord' In that sense of, 'you're on your own,' just lying there quietly, waiting for the morning to come. I think those were the worst moments. Surprisingly looking

back, acute pain wasn't one of the strong emotions that I recall.

Question #2: Can you tell us about your legal system compared to our own?

Let me make my answer a bit anecdotal, and drop a few names at the same time. I happened to be with Ruth Bader Ginsburg in the Supreme Court the other day. We've become good friends. She's a friend because I wrote a book called *Sexism and the Law* some years back. Incidentally, Steven Breyer has become my friend because he organized the building of a new courtroom in Boston and we are building a new courtroom for our Constitutional Court in Johannesburg, and he has given me lots of very interesting ideas. My third acquaintance, by the way, is Justice Scalia—call me 'Nino.' It so happens that the three of them are great friends, and it so happens that they are the three that I have met. In any event, Justice Ginsburg asked her clerks to hear me give a description of the differences between our Court and hers. Our Court is very similar to your Supreme Court, although we only have constitutional jurisdiction. Yet our Constitution covers everything, including interpretation of statutes and development of the common law in the light of the principles of the Constitution. We have a common law based on the Roman Dutch system, as influenced by the English common law. But it has long been interpreted and developed by the courts, and new textbooks have been written, so it has become South African law. Our law of contract and of delict [tort] differs only in detail from yours, but our land law is very different. It is based on Roman law principles, and I believe it's much more coherent, much easier to understand. Our commercial law would be very similar to yours; these things tend to be pretty global. Our criminal law in many respects is similar.

I would say our Constitution, like yours, has had a very big impact on major aspects of our law. We declared capital punishment to be unconstitutional. Another example: gay and lesbian rights are expressly protected in our constitution, and so we struck down the anti-sodomy law. We also read into our immigration law a provision that gay and lesbian life-partners must be treated on the same basis as persons in heterosexual marriages. I might say it is a very moving thing to be sitting in court and see people from the gay and lesbian community there to vindicate

their fundamental rights. You see the whole of South Africa there. In fact there were quite a few students from Witwatersrand University at the hearing and I couldn't tell who were the students and who were people from the gay and lesbian community, and who, possibly, were both. The sense was: we go to this court to be who we are. When I took off my shirt, it was to be who I am. When I supported our decision on gay and lesbian rights, it was for the right of people to be who they are. The idea is fundamental in a diverse country like ours made up of different language groups; our grandparents came from different countries, we speak different languages, we look different, our hair texture is different. If we can't handle difference on the basis of equal dignity for everybody, we're finished as a nation.

So these things, I think, are more strongly represented in our jurisprudence possibly than in yours. In terms of equality, we have certainly taken positions very different from your Supreme Court. We look to the context in which the issue is raised and we regard the achievement of equality between people who are subject to structured, systemic disadvantage, as being the essence of the equality principle. So that means looking to substantive, not formal equality. It's following the dictum of Professor Ronald Dworkin of NYU that equality doesn't mean treating everybody in the same way, but treating everybody with equal concern and consideration. To show equal concern to people who are in a disadvantaged position means recognizing their disadvantage and taking steps to overcome it. Affirmative action is clearly authorized by our Constitution, and in certain contexts it is even required. The objective is to achieve equality in a context of massive inequality of a kind that was structured systematically by Apartheid over decades and centuries. There are many other things I could mention, but that gives a flavor.

Question #3: How did the death of Ruth First affect you?

Ruth First was a brilliant journalist, writer and academic. Our lives crisscrossed quite a lot. We were both detained in solitary confinement at the same time in South Africa. She left the country before I did. I wrote a book about my experience and I smuggled the manuscript out and sent it to Ruth. My book was called *168 Days*. She felt very awkward about receiving it because she had written a book called *117 Days!* Her book was made into a most

beautiful TV documentary for the BBC, in which she played herself. It was the last strong visual record of Ruth. My book was made into a play by David Edgar, *The Jail Diary of Albie Sachs*, and later also dramatized for the BBC.

I went to work in Mozambique as a law professor. She went to work there as the director of the Center for African Studies. It was one of the great intellectual centers of our time, when she got outstanding people from all over the world, from Stanford, from Holland, from South Africa working there as a team doing intellectually very advanced theoretical conceptual work, but always related to interviews, concrete engagement with people on the ground. The best of the French intellectual tradition of driving thought to go where it must, and the London School of Economics tradition of empirical observation, came together. Ruth was later blown up by a letter bomb and killed. I was one of those who carried her coffin to her grave. We were all profoundly shocked that she should be a target; it could happen to any of us.

I came to the United States to find out how you can get protection against assassination. I thought in the United States you can buy anything, it's all in the market. But, my good friends here were useless in that area, they didn't know anything about assassinations and protection. The best thing Professor Jack Greenberg of Columbia University could do was put me in touch with someone he knew as the police commissioner for human rights! The human rights commissioner eventually directed to me to the 39th Precinct or something. I remember going in there and I really thought I was in *Kojak*. People shouting at each other, Irish names, cups of steaming coffee, doors swinging, and people moving all the time. Eventually I met the anti-terrorist sergeant there, and we had a most extraordinary conversation. All he knew was that I was a South African and I needed protection against terrorist attacks. He assumed that I was from the South African government. To make it a little bit more unusual, he was black, I was white. He assumed he was protecting someone from the South African government against the ANC. I never got it through to him that I feared the South African government, they were the terrorists who were going to try to kill me.

In any event he gave me some advice about locking the door, locking the windows, which I was doing anyhow, and watching out for someone cutting a hole in the ceiling. That made me feel worse than ever. He said, you just have to keep an eye open all the

time. I replied, you mean I have to be paranoid? He said, yes you have to be paranoid. So I answered that I was that already.

I ended up getting an alarm for my motor car. It was quite sophisticated and there was no one in Mozambique capable of fitting it properly. Eventually I found a Danish technician and he installed it. Then I went away one year and I left my car to a friend and when I came back he had it washed to make it nice and shiny, and the water fused the whole thing, and by now there was nobody else to fix it. Though I suspected my car might be the vulnerable part for an attack on me, I thought, naively, that Pretoria knew that I mixed a lot with diplomats, I was quite a well known figure in Mozambique and their intelligence would tell them that I was there as a law teacher. I was doing legal research, not underground work. I wasn't connected to the military. So I thought I was immune. I was wrong.

There's another little touch in relation to Ruth. I referred in the opening page to the sculpture with ten heads, just to convey the environment I was living in. It's a beautiful piece by a sculptor named Chissano. He in fact delivered that sculpture to me the day after Ruth was killed, and I associate it very much with her death. It is now in the library of the University of Western Cape in Cape Town. I recall the beautiful words about Mama Ruth that Chissano said to me at the time. I remember her with deep affection for many reasons and in many ways, one of them being through that piece of sculpture.

Question #4: The South African anti-apartheid writers . . . what are they writing about now?

J.M. Coetzee. I don't know if you are familiar with him. He wrote a book called, *Disgrace*. He's a wonderful writer. *Waiting for the Barbarians* . . . *The Life and Times of Michael K*. He won the Booker Prize, which is the most prestigious prize in London for books. In fact, he won it twice. He is the only writer to do that. The second time was for the book *Disgrace*. He has moved from total despair to deep gloom, which is quite an advance for him. It's a wonderful book. He doesn't know how to handle transition, but writes brilliantly. Nadine Gordimer's book—she was a Nobel prize winner for literature—*The House Gun* is an outstanding work, also dealing with transition, brilliant in its own way.

So the real top-class writers are still giving us their literary

responses to what is happening. What we are looking for and hoping for are new writers who develop completely new themes. That's part of the freedom we fought for, the freedom to write about things that are not obviously relevant. I gave a paper called 'Preparing Ourselves for Freedom' during the exile period, and it created huge reaction. I said we had to deal with love and contradiction, joy, despair, treachery, all these emotions, not just anger at the oppressors. When I came back to South Africa we had debates all over the country on that question. Somebody at one of the very first meetings I attended in Cape Town said, 'I come from Natal. People there are being killed all the time in a civil war type situation. Youngsters come back from the fighting and they count the dead like at a football match, four of ours killed, six of theirs, how can I write about roses?' My response to him actually—and maybe you triggered the memory—was that when we buried Ruth, a victim of violence, we threw roses and flowers into her grave and sang wonderful songs. There is beauty in death, there's death in beauty. You don't separate those things out. But at that stage so many people couldn't imagine themselves writing about anything except the trauma of South Africa. And if you wrote a book about South Africa, publishers outside the country would say: that is the land of Apartheid, how can you write about something that doesn't deal with Apartheid? It was almost obligatory to do so.

Part of the freedom we've won now is to write about anything, science fiction, mystery stories, love, whatever. I think people will still overwhelmingly write about our country itself, its landscape, its dilemmas. It's just so damned interesting, so full of emotion, contradiction and surprise. We have been getting marvelous literature in Afrikaans, mainly by women. Vivid, captivating, sharp, sardonic. *Griet Skryf ǎ Sprokie—Griet Writes a Fairy Tale*. Griet is abandoned by her husband who never really connects with her. She decides she is going to end her life, and thinks about how best to do it. She can't use a gun, that's what men do, and then some woman has to clear up the mess afterwards. So she decides to put her head in a gas oven. She opens the oven and is about to put her head in . . . when she sees a cockroach inside. Yuk! She gets out a rag and wipes out the cockroach. By the time she has done that she loses her resolve to die, there is so much cleaning to do . . . It is funny and touching, Afrikaans feminist writing, using the Afrikaans language, connecting up with her sisters and challenging a very Calvinist patriarchal culture in an engaging and moving way.

Jean Goossen, a great favorite of mine, wrote a book called *We're Not all Like That*. Clearly autobiographically based, she describes a young girl growing up with a father who is working-class white, poor, an injured railway worker. So he hangs around the house and is gloomy and stern all the time. Her mother, on the other hand, wants to get out and enjoy life. She makes her big leap forward when she becomes an usherette in a cinema. She sees *Gone With the Wind* nineteen times, that's her liberation. This little girl overhears the adults talk about the 'colored people' living in the neighborhood. Some of the adults are overjoyed when the National Party gets into power in 1948. Good, they say, now we are going to get rid of 'that family.' The girl's mother just keeps quiet, and eventually when the day arrives when the family has to leave, the mother bakes a cake and goes over and says, 'Mrs. so-and-so, when you get to the other side - she doesn't say anything about justice or politics or anything - when you get to your new house, it's going to be empty, and I thought maybe you'd like some cake when you get there.' The woman simply replies, 'No thank you.' She says, 'Please take the cake, we're not all like that.' And the woman says, 'No thank you.' I cry when I think of that moment.

So these are our stories that are coming out. Sometimes they are reminiscent of the past, sometimes completely new stories. I still think we haven't made the real breakthrough. We have to provide facilities for people to publish in African languages, that is absolutely vital. If the stories are translated afterwards, to reach a wider audience, so much the better. But at the moment African intellectuals overwhelmingly write in English, not just because they are writing for other Africans who don't speak their language, but because they are writing for the world.

Question #5: Did writing the book bring closure? Does revisiting the incident affect you?

I find it very difficult to read the book beyond the opening pages. The publishers in Berkeley arranged a reading, so I opened the book at random and almost broke down. I haven't read the book now for a long, long time. It pulls me back to that period, the intensity and emotion of living and writing. I enjoy the last part, however, the epilogue I wrote recently. That was different, that's back home. The first part, the experience of a decade ago, is written in the present tense, the last part, which is contemporary, is

written as remembrance.

The writing brought closure to my repeating the story. I got very tired of doing that. I didn't like trotting out a detail here, a detail there. I felt you have to know the whole story. So it was closure in that sense. The two main books I have written are the *Jail Diary* and *Soft Vengeance*, and the third, that's not so well known, *Stephanie on Trial*, deals with my second detention and experience of sleep deprivation. It seems I need disaster before I write a personal book. One day I will write a book that isn't based upon converting negativity into positivity.

Question #6: What do you feel are the essential resources of the Court, which led it to ban capital punishment?

We had one main judgment which was a very broad-ranging and brilliant judgment by the President of the Court, one of the great judgments of recent years. It was the first judgment he had ever written, because he had previously refused judicial appointment. It's masterfully poised. He surveyed the approach to the death sentence throughout the world; he analyzed our constitutional text, and he wrote on a relatively narrow ground, the prohibition on cruel, inhuman, degrading punishment or treatment. Our Bill of Rights is based on setting out the rights to be protected and then the circumstances that allow for limitations that are contained in a law of general application that is reasonable and justifiable in an open democratic society. So balancing limitations against the rights is part and parcel of our Bill of Rights jurisprudence.

I find that a lot of balancing is done by your Supreme Court, though it is often denied. Yet to acknowledge the concept of proportionality is enormously helpful, much better, in my view, than formal and categorical reasoning.

In any event, to kill someone was clearly inhuman. Could the killing be justified? The argument in favor of justifiability was that it acted as a deterrent. We looked at open and democratic societies, and you'll be pleased to know that we included the United States in that description! Your constitutional text is very different from ours, containing the phrase, 'No one shall be deprived of life, liberty or property without due process of law.' So, the text presupposes you can, with due process of law, deprive someone of life. Then some of your judges said, well you can never

have due process of law of sufficient rigor and fairness when a person's life is at stake; the margin and risk of error that might be acceptable in other matters becomes unacceptable. Some of my colleagues picked up on that, but that wasn't the main reasoning of the Court. The Court relied heavily on the fact that from studies done throughout the world, no proof emerged that the death penalty acted as a significantly better deterrent than catching the killers and locking them up for a long time. The critical deterrent is the knowledge that you will be caught and punished, not that you might be executed.

Then each of us wrote separate opinions. One of my colleagues said that by imposing the death sentence the state doesn't punish the crime, it repeats the crime. It's a very emotional issue, capital punishment, one that reaches deep down inside each one of us, whatever side we might be on. Although I came down very forcefully against capital punishment, I have to acknowledge that there are very sincere, honest, decent, moral people who have the opposite view and feel that it is justifiable. I have to respect their different position and not simply assume that they are bigots, reactionaries, brutal and all the rest. Such polarization gets us nowhere. What is required is honest, sincere argument.

In my case I recalled research I had done when working on my Ph.D. To my pleasure, I might say, I had come across information that a number of prominent African traditional leaders in the pre-colonial period had been strongly opposed to capital punishment. Capital punishment wasn't used as a means of law enforcement in traditional African society. Though witches, and suspected witches, were killed, that was in a frenzy, not after due process. Similarly, soldiers executed to maintain military discipline lost their lives according to military, not judicial, logic. The logic of settling disputes arising from criminal conduct didn't include killing the perpetrators. It was based much more on some form of restorative justice, restitution by the family, the clan, the group responsible, to those who had been injured. I said it is important that in our jurisprudence we rely not simply on jurisprudence drawn from the English common law or the Roman Dutch common law, but from the values of African history, culture, and dispute resolution. We referred to the word *ubuntu*, which is in the part of the Constitution dealing with truth and reconciliation. Ubuntu is a concept which indicates that we are all members of the human family, that no one is beyond the pale, no one is to be discarded; I

am a person because you are a person; we share a common humanity; the least amongst us belongs to that same family, and you don't exclude anybody from humanity, not even the worst of your kind.

In my own life experience I have found among African people far more concern for the values of the Bill of Rights than amongst the whites, who were far less respectful of the idea of respecting diversity, far more willing to support authoritarian governments and to defend torture and the notion of the end justifying the means.

The survey of international opinion showed a clear move towards abolition, but not one that was so decisive that we could say that there was no democratic country that continued to use capital punishment. India and the USA were the only two countries of those we looked at where capital punishment was still applied. In most of our neighboring African states, capital punishment had either been abolished by the constitution, particularly those who had been through war such as Namibia and Mozambique, or it hadn't been applied in practice for a number of years. So there were a number of different factors. Our decision can be found on the net, by the way.

Question #7: Did the Truth and Reconciliation Commission create soft justice for you and for South Africa?

I didn't use the word soft justice. I said, 'soft vengeance.' It's a deliberate choice. In fact the original title I proposed was *'The Soft Vengeance of a Damaged Freedom Fighter.'* I still think it's a better title. The publishers wanted to heal my arm, so they took the word 'damaged' out.

For me it has been very helpful to know that the TRC has been there, and that I could refer this chap Henri, who told me that he'd helped prepare the bombing of my car, to a constitutionally-mandated institution dealing with his situation. It's been enormously helpful to live in a country where so much truth has come out. I find that very liberating. I've told my story dozens of times, but most people have never been listened to. It has been painful, but wonderful to discover and recover the bodies of people who have disappeared. The families can arrange dignified burials, there can be posthumous medals given to those who fought and died for freedom and democracy.

So, overwhelmingly, I think the TRC has been positive. But many of the victims, and families of victims, have a different position. They feel a lot of anger, that somehow the issues have come out, into the open, but not been fully resolved. I see that as a valuable part of the process, enabling the anger to come out and be recognized. There's been a lot of acknowledgment of what happened, where before there was silence or denial. The Truth Commission is criticized on all sides. It is criticized by President Thabo Mbeki for being unfair to and unduly harsh on ANC guerillas. It has been criticized more broadly by persons who were part of the old regime. It has also been criticized by people who say there hasn't been due process of law in the getting and giving of testimony. I personally think they may be missing the whole purpose of the exercise: witnesses testifying from their hearts, not subject to rigorous cross-examination necessary to decide whether to convict somebody or not, but being able to tell their story uninterrupted in an atmosphere where they are made to feel welcome and recognized. The setting is: the nation wants to hear you, but you aren't getting any rewards, not getting damages, nor is anyone going to prison as a result of what you say. The sole purpose of your testifying is to enable you to tell your story. It is not a court case where due process of law is of the essence.

Amazing stories came out. It is liberating for the country to see the perpetrators testify, even if they are only telling twenty percent of the truth. It is unique in the world that torturers and killers come forward and describe what they did, and doing so not because they were tortured or subject to sleep deprivation, or paid vast sums of money, but simply because the way to get amnesty is to tell the truth. That's been possibly the most striking feature of our process. It is the process that matters, not the report that results from it. It is following the hearing on television, listening to the stories, becoming part of a national dialogue. The Truth Commission didn't just record our history, it became part of our history... the telling, the retelling, the thinking, the debates, the interaction, the layers of interaction that don't end. It still goes on. I think it was a rich and vivid experience. I feel invigorated by that process. I'm very proud that I had some say in establishing it, and in giving encouragement for it. It took on formats that I didn't argue for initially. I was fearful that public hearings would prevent the truth from coming out, when, as it happens, it was the very openness of the proceedings which engaged the nation. The

people who argued against me were right, and I was wrong; it has had a dynamic that I think has been good not only for South Africa, but for the world.

If I can get my visa sorted out, and that's a big if, I'm going to Belgrade on my way back to South Africa to pass on South African experience on Truth Commissions. Dialogue is so important. Punishment is not excluded. You need punishment, and maybe it is the threat of punishment that causes the perpetrators to seek amnesty and to talk. But it is only when the former combatants sit across the table, or find a format where they are speaking to each other as equals, that you can get some sense of peace, of common citizenship in a deeply divided country. There is dignity involved in the dialogue. You're not just seeing a villain, a terrorist, a killer, or a Serb or Hutu, or whatever else, across the table, you're seeing another person. The human voice articulates something, it is a human being speaking, and another human being is listening and hearing. It's establishing a kind of contact. The more unmediated it is, in some ways the better. It's the beginning, not the end, of a long-term and multi-faceted resolution of these intense historic hatreds.

Thank you very much.