

**SHOULD FORMER GOVERNMENT LEADERS BE SUBJECT
TO PROSECUTION AFTER THEIR TERM IN OFFICE?
THE CASE OF SOUTH AFRICAN PRESIDENT P. W. BOTHA**

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INTRODUCTION

The way we treat our leaders after their tenure in office says a great deal about how we choose to operate as a society. If we hold them immune to prosecution for alleged crimes committed while in office, we send the message that leaders are in some respect above the law. On the other hand, if we hold them liable for prosecution for actions taken in their official capacity, we send the message that leaders are expected to be subject to the law which may make leaders overly cautious while carrying out their official duties for fear of later prosecution for unpopular acts. The treatment of former leaders becomes even more difficult after a period of civil war or unrest that ends the rule of a former government.

Recently, many countries have struggled with the issue of how to treat their former leaders after civil unrest. Germany had to face the difficulty of dealing with former East German leaders and spies when it reunited in the 1990s.¹ Currently, there is much controversy about the immunity status of former Chilean leader Augusto Pinochet.² It may be useful when contemplating this issue to examine the treatment of former leaders in post-apartheid South Africa, particularly the interaction of apartheid-era leader P. W. Botha with that country's Truth and Reconciliation Commission (TRC). The TRC was assigned the task of dealing with the aftermath of hu-

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1. See discussion *infra* Part VII.
2. See *id.*

man rights abuses committed by both pro- and anti- apartheid factions during the apartheid era.

Former South African President P. W. Botha was recently sentenced to probation and fined for refusing to heed repeated subpoenas to appear before South Africa's TRC to discuss his knowledge of human rights abuses committed during the apartheid era. The prosecution and conviction of P. W. Botha raises questions about the level of deference a former political leader should be given after peace has been negotiated, as well as about the integrity of the TRC's processes. In this article the authors will first briefly discuss the political history of South Africa and the conflict over apartheid. In the following sections, the authors will examine whether P. W. Botha has been treated appropriately, particularly given the unique circumstances of South Africa's negotiated peace settlement.

I. A BRIEF POLITICAL HISTORY OF SOUTH AFRICA AND THE CONFLICT OVER APARTHEID

From 1948 to 1993, South African politics and society were dominated by the National Party (NP) and its system of apartheid, in which Whites were given societal and legal preference over non-whites.³ Blacks were assigned to ethnic tribes and were considered citizens of those tribes, and not of South Africa.⁴ Blacks were for the most part not allowed to live in white urban areas unless they had government permission.⁵ All races had to carry identification passes and obey strict curfews.⁶ The passes allowed policemen to stop anyone to determine whether they were present legally;⁷ this was enforced most often against Blacks.⁸ This policy was an attempt at population control to prevent Blacks from moving to urban areas unless they had government-approved jobs.⁹

In March of 1960, Blacks marched against the Pass System because it kept them in rural areas without any employment prospects.¹⁰ The march led to the shooting of Blacks in Sharpeville, which sparked protests across the country.¹¹ Consequently, the government briefly suspended the pass laws. However, it soon declared a state of emergency, reimposed the pass laws, and outlawed both the African National Congress (ANC) and the Pan-

3. See 2 PETER N. STEARNS ET AL., *WORLD CIVILIZATIONS: THE GLOBAL EXPERIENCE* 987-88 (1992). Apartheid, meaning separation of races, was a system that provided for significant legal and social disparity between Blacks and Whites in South Africa. See *id.*

4. See STEVEN MUFSON, *FIGHTING YEARS: BLACK RESISTANCE AND THE STRUGGLE FOR A NEW SOUTH AFRICA* 20 (1990).

5. See *id.*

6. See *id.*

7. There were over 18 million arrests for pass violations. See *id.*

8. See *id.*

9. See *id.*

10. See *id.* at 21.

11. See *id.*

Africanist Congress (PAC).¹² Before this occurred, Black parties had been legal and had actively participated in political debates in South Africa.¹³

In 1976, Black students marched in Soweto in protest of being forced since 1975 to learn school lessons in Afrikaans, rather than in the English to which they were accustomed.¹⁴ One Black student was shot and killed by police, setting off fights between Black students and White police in which sixty-two Blacks were killed by the police. This resulted in countrywide unrest among Blacks and an increase in international criticism of affairs in South Africa.¹⁵

In 1984, South Africa adopted a new constitution that provided more freedom for Asians and Indians, but not for Blacks.¹⁶ There were major strikes and riots in the Vaal Triangle in protest of the new constitution that lasted for several years because of what Blacks felt was increasingly unfair treatment by the government and businesses.¹⁷ Attacks by Black youths on buildings and cars, which they saw as symbols of White power and privilege, became increasingly common.¹⁸ White police officers responded with increasing violence against all Blacks, including those that were not involved in the protests and violence.¹⁹ This increase in violence between Blacks and Whites drew international attention that led to sanctions against conducting business with South Africa.²⁰

Also, in 1984, P. W. Botha was re-elected President of South Africa.²¹ P. W. Botha, known as "the Great Crocodile" because of his temper,²² had been South Africa's Defense Minister in the 1970s.²³ In 1978, he was elected as South Africa's Prime Minister²⁴ and served in that office until 1984.²⁵ In 1984, as part of his governmental reform, P. W. Botha changed the office of Prime Minister to that of President. As President, P. W. Botha

12. *See id.* The African National Congress (ANC) was formed in 1912 and became the predominant Black political party. *See id.* at 365. The Pan-Africanist Congress (PAC) was another important Black political party. *See id.*

13. *See id.*

14. *See id.* at 13.

15. *See id.* at 16.

16. *See id.* at 7. Asians and Indians were separate population groups under government apartheid laws. *See id.*

17. *See id.* at 79-80. For example, partly in response to a recession that began in 1982, rents for Blacks in the Vaal Triangle increased 400% from 1977 to 1984. *See id.*

18. *See id.* at 85.

19. *See id.* at 86.

20. *See* BASIL DAVIDSON, *AFRICA IN HISTORY: THEMES AND OUTLINES* 348-49 (1991).

21. *See* MUFSON, *supra* note 4, at 7.

22. *See* Scott Kraft, *Botha Yields, Calls Election Signaling End of His Rule*, L.A. TIMES, Apr. 7, 1989, at 11.

23. *See* Gumisai Mutume, *South Africa-Politics: Botha Snubs Truth Commission Again*, INTER PRESS SERV., Apr. 4, 1998, available in 1998 WL 5986689.

24. *See* William Claiborne, *S. African Cabinet Crisis Could Bring Constitutional Reform, Black President*, WASH. POST, Mar. 23, 1989, at A34.

25. *See* MUFSON, *supra* note 4, at 79.

became the leader of both the NP and of South Africa, and thus accountable to no one.²⁶ P. W. Botha remained President until 1989, and “carried through such notable reforms as abolition of the pass laws but is universally remembered as the unyielding boss of apartheid South Africa.”²⁷ In 1983, P. W. Botha lobbied hard for the passage of a referendum that would allow the restructuring of the government to allow Indians and coloreds each to have their own chamber in Parliament, but subject to being overruled by the White-controlled President’s Council.²⁸ Under this referendum, Blacks would still not be able to represent themselves in Parliament.²⁹ P. W. Botha felt that this referendum was a major move forward in race relations in South Africa and promoted it with the slogan of “adapt or die.”³⁰ Although the referendum passed by a large margin, race relations did not improve much.³¹

In 1989, P. W. Botha suffered a stroke that made him appear weak to his fellow NP leaders.³² Shortly thereafter, P. W. Botha resigned from leadership of the NP, though he retained his position as President.³³ However, soon after, he would resign the presidency under pressure from NP members,³⁴ who suggested that he step aside and allow a “new generation” of leaders to take his place.³⁵ At first, P. W. Botha disagreed and refused to step down as President. This prompted NP leaders to pass a resolution within the party stating that party members wished F. W. de Klerk to be President.³⁶ This kind of pressure eventually pushed P. W. Botha to resign as President.³⁷ In April of 1989, P. W. Botha announced that he would dissolve Parliament in May of that year, and call an early general election to be held that summer.³⁸

Despite his initiation of dialogue with Nelson Mandela,³⁹ P. W. Botha was not regarded by his own party as the right person to lead South Africa

26. See Claiborne, *supra* note 24.

27. R.W. Johnson, *Botha’s Defiance of Law Pushes South Africa Towards New Era of Strife*, TIMES (London), Dec. 30, 1997, at 9.

28. See MUFSON, *supra* note 4, at 48.

29. See *id.*

30. *Id.* at 49.

31. See *id.*

32. See *Botha Calls Early Elections, Signals Plan to Resign as S. African Leader*, COURIER-J. (Louisville, Ky.), Apr. 7, 1989, at 08A.

33. See Patrick Nagle, *The Legacy: P. W. Botha’s Public Life and Political Career Have Been Shaped by His Strong Dislike for British Colonialism and All Its Trappings*, VANCOUVER SUN, Apr. 8, 1989, at B1.

34. See Gumisai Mutume, *South Africa: Botha Prepares for Showdown with Truth Committee*, INTER PRESS SERV., Nov. 18, 1997, available in 1997 WL 13257697.

35. See *Botha Calls Early Elections*, *supra* note 32.

36. See *id.*

37. See *id.*

38. See *id.* The election was originally scheduled for March of 1990. See *id.*

39. See *id.*

through the changes that would be necessary in the near future.⁴⁰ He was seen as inflexible and resistant to change.⁴¹ In addition, P. W. Botha was known to be hostile to the ANC, as shown by his public statement that the ANC was “a terrorist organization controlled by the Communist Party . . . murdering innocent people, not only White people but Black people.”⁴² Additionally, P. W. Botha refused to meet with ANC officials in 1985 unless they renounced violence, saying, “I don’t think you speak to terrorists.”⁴³ On the other hand, de Klerk was seen by NP members as a better choice than P. W. Botha to lead South Africa in the direction it needed to go.⁴⁴ De Klerk had the reputation of being relatively more willing to listen to other points of view, though he was also a staunch supporter of continued racial segregation.⁴⁵

In 1990, under increasing international pressure, South Africa’s newly elected President, de Klerk, began the process of dismantling the apartheid system. In a highly symbolic move, Nelson Mandela, an ANC leader who had been jailed for over twenty years, was freed along with other long-jailed ANC leaders.⁴⁶ The release of Mandela led to a dialogue with de Klerk that laid the groundwork for the political change that was to take place in South Africa.⁴⁷ For these efforts, Mandela and de Klerk shared the Nobel Peace Prize.⁴⁸ In addition, legal repeal of apartheid laws did much to pave the way for a new societal and governmental system.⁴⁹

In 1993, the government in power and the ANC agreed upon an Interim Constitution.⁵⁰ The most radical change proposed in the new Constitution was the creation of a National Assembly that would be elected by parties with proportional representation.⁵¹ The National Assembly would then elect a president and form a permanent constitution.⁵² That election would be the

40. *See id.*

41. *See* Allister Sparks, *Botha Says He’ll Resign This Year; Leadership Switch Seen Spur to Reform*, WASH. POST, Apr. 7, 1989, at A14.

42. MUFSON, *supra* note 4, at 219.

43. *Id.* at 252.

44. *See* Kraft, *supra* note 22, at 11.

45. *See id.* P. W. Botha wanted Barend du Plessis, who was Finance Minister at the time, to succeed him, but de Klerk was seen as a better choice. *See id.*

46. *See* DAVIDSON, *supra* note 20, at 349-51. Nelson Mandela was jailed in 1964 for acts of sabotage against the government. In 1990, President de Klerk freed Mandela and gave him amnesty. *See id.*

47. *See id.*

48. *See* *The Nobel Prize Internet Archive* (visited Dec. 10, 1999) <<http://nobelprizes.com/nobel/peace/1993a.html>>. Mandela and de Klerk received the Nobel Peace Prize in 1993. *See id.*

49. *See* Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 78 (1997).

50. *See id.* at 75.

51. *See id.*

52. *See* Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT’L L. & POL. 695, 704-05 (1996).

first multi-racial election in South Africa and was made possible by a Whites-only referendum that was proposed by de Klerk and held in 1992.⁵³ The 1992 referendum asked Whites to voice whether or not they approved of the reform process the government had begun, which if continued, would mean the dismantling of apartheid.⁵⁴

In 1994, the first elections in which all citizens of South Africa were free to vote were held.⁵⁵ Not surprisingly, the once illegal ANC won the majority of the elections, and the new National Assembly elected former prisoner Nelson Mandela as President.⁵⁶ The new South African Constitution was adopted in May 1996, and was to be gradually implemented by 1999. In the current Government of National Unity, there are seven parties represented in the Parliament of South Africa. The ANC by far dominates the Parliament, with over sixty percent of the seats.⁵⁷ The NP, the Democratic Party, and the Inkatha Freedom Party are the next highest in representation.⁵⁸

II. THE TRUTH AND RECONCILIATION COMMISSION

The TRC is a product of the negotiated settlement reached in South Africa. The NP being the former dominant political party, was neither defeated militarily nor exiled from the country, and because Whites still held many of the most powerful positions in government, business, and society, the ANC was not in a position to step in and simply issue orders for transfer of power.⁵⁹ Rather, a settlement involving the negotiation of the terms of transfer was more appropriate. Political parties came together to negotiate the transfer of power. The negotiations were dominated by the ANC and the NP.⁶⁰ From these negotiations came the Interim Constitution of 1993.⁶¹ The

53. See Karen Cavanaugh, *Emerging South Africa: Human Rights Responses in the Post-Apartheid Era*, 5 CARDOZO J. INT'L & COMP. L. 291, 293 (1997).

54. See *de Klerk Across the Rubicon*, ECONOMIST, Mar. 21, 1992, at 45. The referendum was held on March 17, 1992; 68.8% of the voters voted for approval of the reform process. See *id.*

55. See Mutua, *supra* note 49, at 79.

56. See Robin M. Fields, *In Search of Democracy: Reconciling Majority Rule, Minority Rights, and Group Rights in South Africa and the United States*, 16 B.C. THIRD WORLD L.J. 65, 82-93 (1996). Nelson Mandela ended his presidency in June of 1999, succeeded by Thabo Mbeki. See *Mandela Welcomes Kadafi as Last Guest*, L.A. TIMES, June 14, 1999, available in 1999 WL 2168126.

57. See Fields, *supra* note 56, at 83.

58. See *The Parliament's Homepage* (visited Dec. 19, 1999) <<http://polity.org.za/govdocs/parliament/natass.html>>. Other parties represented in Parliament are the Freedom Front, the Democratic Party, the Pan-Africanist Congress, and the African Christian Democratic Party. See *id.*

59. See Mutua, *supra* note 49, at 78.

60. See Beth S. Lyons, *Between Nuremburg and Amnesia: The Truth and Reconciliation Commission in South Africa*, MONTHLY REV., Sept. 1, 1997, at 5.

61. See Mutua, *supra* note 49, at 79.

provisions in the Interim Constitution served to facilitate an orderly transfer of power, in part by creating a Constitutional Court. This Constitutional Court had among its responsibilities; the sole “power to certify that the permanent Constitution . . . complied with the thirty-four Constitutional Principles laid down in the Interim Constitution.”⁶² As one observer to the negotiations noted:

While constitutional certification has no precedent, it is not difficult to see why both the ANC and the NP agreed to it. For the ANC, the certifying authority would be the Constitutional Court, which it created and which would be sympathetic to it. For the NP, the certification made sure that an ANC-dominated Constitutional Assembly could not draft the constitution it desired. Consequently, the final constitution would reflect the compromise reached in 1993⁶³

The 1993 Interim Constitution, born out of political and racial compromise, included as one of its main features, a commitment to ensuring the human rights of all South Africans.⁶⁴ In particular, the Interim Constitution provided for acknowledging the human rights of all South Africans by committing to focus on the human rights abuses that occurred under the system of apartheid.⁶⁵ In 1995, in response to this commitment, “Parliament enacted the Promotion of National Unity and Reconciliation Act, No. 34, 1995, which located amnesty within the context of the need to heal the wounds and suffering of victims of gross human rights violations.”⁶⁶

Through the provisions in the Promotion of National Unity and Reconciliation Act, particularly that of the establishment of the TRC, South Africa hoped to deal with past human rights abuses, and to demonstrate that all South Africans are entitled to the same human rights.⁶⁷ Furthermore, by focusing on past human rights abuses, the Act attempts to bring closure to the past and in doing so attempts to move South Africa into the future.⁶⁸ The TRC and its processes are the manifestation of the intent expressed in the Interim Constitution to deal with these issues.

The TRC focuses on crimes committed during a certain period of legalized apartheid: March 1, 1960 to December 5, 1993.⁶⁹ The TRC considers human rights violations committed during this time period and “the antecedents, circumstances, factors and context of such violations, as well as the

62. *Id.* at 80.

63. *Id.* at 81.

64. *See id.* at 80.

65. *See id.* at 81-82.

66. Truth and Reconciliation Commission, *TRC Interim Report, June 1996, Section 2: Origins and Objectives* (visited Sept. 17, 1998) <<http://truth.org.za/rep1-all.htm>> [hereinafter *Interim Report*].

67. *See id.* § 1. Anyone affected, regardless of race or political background, could come forward as a victim and be acknowledged. *See id.*

68. *See id.*

69. *See id.*

perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.⁷⁰ The TRC has the power to grant amnesty to those “persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements [of the Promotion of National Unity and Reconciliation Act].”⁷¹ The TRC also has the power to deny amnesty to those persons whose crimes were not sufficiently politically motivated or to those persons who committed crimes but do not comply with the procedures set forth in the Promotion of National Unity and the Reconciliation Act.⁷²

The TRC’s goals and processes were necessary because of the negotiated settlement reached between the ANC and the NP. However, because everyone in South Africa continued to work and live with each other after the change in government, the process for dealing with human rights violations committed during the apartheid years needed to be one in which accountability was assigned, but not in such a way as to continue to divide the nation, making it impossible for the nation to move forward. As one commentator noted:

Apartheid may have been defeated, but its minions still dominated the police, army, and civil service. Success in the constitutional negotiations depended to a large degree on making a deal with the previous regime, and Nuremberg-type trials were not an option if the country was to reach democratic elections without a coup or chaos.⁷³

In addition to the granting of amnesty, the TRC is supposed to accomplish other less legally oriented goals. One such goal is “[e]stablishing and making known the fate or whereabouts of victims and restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims.”⁷⁴ Another goal of the TRC is to compile a comprehensive report of its findings and “recommendations of measures to prevent the future violations of human rights.”⁷⁵ In support of its goals, the TRC has stated:

We hope that the Commission will contribute to the process of healing a traumatized and wounded people. We open wounds only in order to cleanse them, to deal with the past effectively and so to close the door on that dark and horrendous past forever. Then we will be able to work for a prosperous and reconciled South Africa.⁷⁶

70. *Id.*

71. *Id.*

72. *See id.*

73. Peter Storey, *A Different Kind of Justice: Truth and Reconciliation in South Africa*, CHRISTIAN CENTURY, Sept. 10, 1997, at 788.

74. *Interim Report*, *supra* note 66, § 2.

75. *Id.*

76. *Id.* § 1.

III. HISTORY OF P. W. BOTHA'S INTERACTION WITH THE TRC

The TRC felt it was necessary for P. W. Botha to appear before it to respond to the implication of other apartheid-era officials that he was involved in human rights abuses during the apartheid era. Alex Boraine, deputy chairperson of the TRC, stated that one reason P. W. Botha was asked to appear before the Commission was that "Mr. Botha, as a former Minister of Defence [sic], Prime Minister and State President, has invaluable information concerning the period under the TRC's review and without his input, the Commission's final report will be that much poorer."⁷⁷ Boraine further emphasized the importance of Botha's potential appearance before the TRC stating

[B]ear in mind the long years when he was in charge of apartheid . . . He has information. He has to answer like anyone else . . . I mean Mr. Mbeki came before us, Mr. de Klerk came before us, next week Mrs. Mdikizela-Mandela comes before us. [We are calling Botha n]ot out of revenge but as an attempt to do our job.⁷⁸

The TRC has the power to call persons, even those not seeking amnesty, to testify at the request of either victims or applicants for amnesty.⁷⁹ P. W. Botha had been implicated by apartheid-era officials, including former Law and Order Minister Adriaan Vlok, as having been directly involved in human rights abuses during the apartheid era.⁸⁰ The TRC wished P. W. Botha to appear before it to respond to these implications, and to provide additional information it believed only he possessed that would help the TRC sort through many amnesty applications.⁸¹ Although P. W. Botha was repeatedly subpoenaed to appear before the TRC, he refused to comply. The Promotion of National Unity and Reconciliation Act, which established the TRC, made refusal to comply with a TRC subpoena a criminal offense punishable by fines, imprisonment, or both.⁸² However, the TRC was unable to impose criminal charges against P. W. Botha, due to a legal technicality, even after he ignored the second subpoena from the TRC, which was deliv-

77. *Truth Commission Subpoena Delivered to Former President, Truth and Reconciliation Commission*, AFR. NEWS SERV., Nov. 21, 1997, available in 1997 WL 15137769.

78. *Ex-apartheid Ruler Botha Wanted by South African Truth Body*, AGENCE FR.-PRESSE, Nov. 19, 1997, available in 1997 WL 13437306. Thabo Mbeki is currently Deputy President of South Africa; Frederik de Klerk was the last White minority President of South Africa; Winnie Mdikizela-Mandela is the former wife of former President of South Africa Nelson Mandela. See *id.*

79. See Kurt Shillinger, *Apartheid Chief Runs Afoul of Law*, BOSTON GLOBE, Aug. 22, 1998, at A2.

80. See *Botha Trial Begins*, PERISCOPE-DAILY DEF. NEWS CAPSULES, Apr. 16, 1998, available in 1998 WL 8152001.

81. See *Botha Trial Postponed*, PERISCOPE-DAILY DEF. NEWS CAPSULES, Apr. 17, 1998, available in 1998 WL 8152024.

82. See Patrick Laurence, *Botha Charged After Ignoring TRC Subpoena*, IRISH TIMES, Dec. 20, 1997, at 14.

ered on December 5, 1997.⁸³

On December 20, 1997, P. W. Botha ignored the TRC's third subpoena.⁸⁴ Consequently, in late December of 1997, the TRC imposed criminal charges against him for refusing to comply with its subpoenas.⁸⁵ By leveling criminal charges against P. W. Botha, the TRC gave up control of the situation to South Africa's Attorney General, Frank Kahn, who was to decide how to proceed against P. W. Botha in light of the TRC's charges.⁸⁶ As Archbishop Tutu remarked, "[w]e are laying charges in terms of the law and it is up to the attorney-general to decide whether to prosecute."⁸⁷ P. W. Botha had previously assured Kahn that "he would heed a subpoena to appear in court under the Criminal Procedure Act if a decision was taken to charge him."⁸⁸ Consequently, Kahn gave P. W. Botha until January 2, 1998 "to show cause why he should not be prosecuted."⁸⁹

In response to the charges against him, P. W. Botha's lawyers argued that P. W. Botha had taken sufficient action to cooperate with the TRC's requests for information. Specifically, they claimed that they had made "lengthy written representations" of P. W. Botha's answers to questions posed by the TRC.⁹⁰ This the lawyers argued, should have been sufficient for the TRC's purposes, making the subpoenas for P. W. Botha to appear in person unnecessary.⁹¹ Indeed, P. W. Botha had submitted a 1700 page response to written questions sent to him by the TRC.⁹² P. W. Botha truly seemed to believe that he had been demonstrating good faith in cooperating with the new South African government and the TRC.⁹³ As one source noted, "Mr. Botha has entertained Mr[.] Mandela and Archbishop Desmond Tutu, the commission chairman, to tea at his home at Wilderness, on the Cape coast, and greeted them with great warmth. For Mr. Botha, that was evidence enough of his goodwill."⁹⁴ Moreover, P. W. Botha seemed to feel that the TRC's requests were unreasonable, stating that he would not appear before the TRC and declared "I don't perform in front of the circus."⁹⁵ P. W.

83. The subpoena failed to list the time of the hearing. *See id.*

84. *See Botha Again Ignores Truth Panel's Subpoena*, N.Y. TIMES ABSTRACTS, Dec. 20, 1997, at 7, available in 1997 WL 8017333.

85. *See Sam Kiley, Truth Commission Charges Botha*, TIMES (London), Dec. 20, 1997, at 14, available in 1997 WL 9251352.

86. *See* Laurence, *supra* note 82.

87. *Id.*

88. *Id.*

89. *Id.*

90. R.W. Johnson, *Botha's Defiance of Law Pushes South Africa Towards New Era of Strife*, TIMES (London), Dec. 30, 1997, at 9, available in 1997 WL 9253710.

91. *See id.*

92. *See* Shillinger, *supra* note 79.

93. *See* Johnson, *supra* note 90.

94. *Id.*

95. Gumisai Mutume, *South Africa: Botha Prepares for Showdown with Truth Committee*, INTER PRESS SERV., Nov. 18, 1997, available in 1997 WL 13257697.

Botha told an Afrikaans newspaper that he would rather be charged than make an appearance at the Commission, and in a later press statement stated that he would "not apologize for the struggle against Marxist revolutionary attacks which led to the mutilation and death of innocent civilians."⁹⁶ On the other hand, the TRC felt that its requests of P. W. Botha to appear before it were reasonable, and believed it had gone out of its way to accommodate P. W. Botha's circumstances.⁹⁷

In January of 1998, the Attorney General decided to prosecute P. W. Botha. P. W. Botha briefly appeared in court in January of 1998, but the hearing was postponed to February 23, 1998. A trial date was also set for April 14, 1998, in case P. W. Botha pled not guilty at the February 23 hearing.⁹⁸ During P. W. Botha's brief January court appearance, he indicated continued refusal to cooperate with the TRC,⁹⁹ stating that "he was not prepared to apologize for his government's 'lawful actions' to curb the 'violent onslaught'."¹⁰⁰ P. W. Botha also stated that "he stood by all those who had executed 'lawful commands' from the former government led by him in its struggle against the 'revolutionary communist onslaught against our country'."¹⁰¹ The trial was suspended in June of 1998 and resumed on August 17, 1998.¹⁰² P. W. Botha did not testify at his trial.¹⁰³ Finally, a ruling was issued on August 22, 1998.¹⁰⁴

IV. SIGNIFICANCE OF BOTHA'S SITUATION

In South Africa, opinion is divided over the prosecution of P. W. Botha. Those individuals who struggled against apartheid typically view P. W. Botha's prosecution as an indication that South Africa is committed to addressing the injustices of the apartheid era.¹⁰⁵ By forcing P. W. Botha to testify or by punishing him for refusing to testify, the TRC hoped to send the message that no one is above submitting to the process chosen to help put closure to the apartheid era, no matter how high their position or how fragile

96. *Id.*

97. *See id.* For example, the TRC was willing to hold the hearing at which P. W. Botha was requested to testify near his retirement home. *See id.*

98. *See Trial of S. African Ex-President Postponed*, XINHUA ENG. NEWSWIRE, Jan. 23, 1998, available in 1998 WL 2785521.

99. *See id.*

100. *Id.*

101. *Id.*

102. *See Suzanne Daley, Disappointing Foes, Botha Will Not Testify at Inquiry Trial*, N.Y. TIMES, June 16, 1998, at A12.

103. *See id.*

104. *See Former S. African President Fined for Ignoring Summons*, L.A. TIMES, Aug. 22, 1998, at A3.

105. *See Paul Harris, Botha Found Guilty of Ignoring Subpoena*, WASH. POST, Aug. 22, 1998, at A16.

their current condition.¹⁰⁶ Though punishing P. W. Botha for refusal to testify will not bring about the information the TRC hopes to obtain, and thus not bring about the answers sought by apartheid's victims, such punishment may at least provide some sense, though slight, of retribution for those victims. However, there are others that feel that stronger action should be taken against P. W. Botha. For many Blacks, "Botha is the symbol of all they most hate and they feel that, given the many atrocities shown by the commission to have taken place under his rule, he is being let off too lightly as it is."¹⁰⁷ P. W. Botha "makes no plea of ignorance, but merely says he did what he had to do to oppose communist-backed terrorism."¹⁰⁸

As discussed previously, the prosecution of P. W. Botha is important for two main reasons. First, it demonstrates how important the TRC feels the testimony of P. W. Botha before the TRC would be. P. W. Botha's testimony could have substantial value with regard to the kind of disclosure of information the TRC feels is vital to the national healing process of South Africa. Second, the prosecution of P. W. Botha demonstrates that the TRC stands firmly behind the idea of putting the good of the country ahead of the status of any one citizen.

Conversely, many Afrikaners believe the prosecution of P. W. Botha is unjust and insulting. For them, "Mr. Botha has become a symbolic figure of pride and resistance. They agree that all the commission wants to do is to humiliate him publicly, an act they see as an insult to the dignity of Afrikaners."¹⁰⁹ According to Renier Schoeman, MP Executive Director of the Federal Council of the National Party:

The National Party regrets the fact that the point has been reached where Mr[.] PW Botha will be prosecuted. The National Party has several times pointed out that the TRC is selectively overzealous to prosecute Mr. Botha. We are of the opinion that the TRC should have worked through Mr. Botha's lengthy submission first, then entered into discussions with him and, if they were still not satisfied, considered legal steps. This is still our view and we recommend it strongly. The proposed legal steps now emanate from over-eagerness and matters are taking a serious turn. In the interests of reconciliation we again appeal urgently to the TRC to make a greater effort to reach a peaceful resolution outside the courts. It is also strange that on the one hand the TRC wants to enforce the TRC act to the letter in the case of Mr[.] PW Botha, and on the other hand it violates its own act by granting illegal blanket amnesty to top ANC leaders and comrades.¹¹⁰

106. See *Botha Trial Begins*, *supra* note 80.

107. Johnson, *supra* note 90.

108. *Id.*

109. *Id.*

110. National Party, *Legal Steps Against Mr PW Botha*, AFR. NEWS SERV., Dec. 23, 1997, available in 1997 WL 17419446. In a step which appeared to be contrary to the TRC's insistence that every amnesty applicant appear before the TRC and the desire of the TRC to avoid granting blanket amnesty to human rights violators (because to do so would deprive the

This polarization of public opinion regarding the prosecution of P. W. Botha could have a disastrous impact on South Africa's attempt to put the apartheid era behind it. As one commentator notes, "[f]or the Government to back down now would involve an unacceptable loss of face and a bitter blow to Black pride, but if Mr. Botha were to die in jail, many Afrikaners would never forgive the ANC, and the era of reconciliation would end in bitter strife."¹¹¹

V. COMPARISON OF BOTHA'S PROSECUTION TO THAT OF OTHER FORMER SOUTH AFRICAN LEADERS

A. Government Officials

The interactions between the TRC and other prominent government officials who have appeared, or who were asked to appear before the TRC, will be discussed to better understand the context of P. W. Botha's own relations with the TRC. Adrian Vlok, a member of the NP and former Minister of Law and Order from 1986 to 1994,¹¹² "was the most senior National Party member to testify before the commission."¹¹³ Vlok was "forced to seek amnesty after his former police commander, General Johan van der Merwe . . . publicly accused him of issuing orders" for attacks.¹¹⁴ Vlok's testimony before the TRC was "j'accuse flavoured with a dash of mea culpa," as he hesitatingly took responsibility for a few human rights violations and quickly placed the blame for ordering such violations on P. W. Botha.¹¹⁵

Former South African President Frederik de Klerk has twice testified before the TRC.¹¹⁶ However, there is strong evidence that he was not entirely truthful. Specifically, de Klerk may have been lying when he denied knowledge of government-sanctioned human rights violations while testifying and when making written submissions to the TRC.¹¹⁷ Adrian Vlok and Johan van der Merwe are among others that have testified to the TRC that de Klerk had direct knowledge of such violations.¹¹⁸ If de Klerk is found to have testi-

victims of their opportunity to publicly hold the perpetrators accountable for their acts), the TRC granted blanket amnesty to 37 of the ANC's top officials. This was met with significant public outcry, causing the TRC to rescind the blanket amnesty and work through the TRC's normal processes for the individuals involved. See *S. Africa Court Overturns Amnesties 37 ANC Officials May Have to Testify about Apartheid-Era Activity*, CHI. TRIB., May 9, 1998, at 13.

111. Johnson, *supra* note 90.

112. See David Beresford, 'I Am Really Very Sorry, But . . .', MAIL & GUARDIAN, July 24, 1998.

113. Benita van Eyssen, *TRC Hearings Into Apartheid Human Rights Violations Come to an End*, DEUTSCHE PRESSE-AGENTUR, July 30, 1998.

114. Beresford, *supra* note 112.

115. *Id.*

116. See Joe Mdhlela, *De Klerk Has to Explain Discrepancies*, SOWETAN, July 24, 1998.

117. See *id.*

118. See Christopher Munnion, *New Doubts Over De Klerk Evidence*, DAILY TEL. (Lon-

fied falsely, he could be subject to prosecution.¹¹⁹ However, it seems unlikely that the TRC will insist on the prosecution of the man that made the most significant efforts to dismantle apartheid. This in contrast to the prosecution of P. W. Botha, a former leader known for his opposition to the dismantling of apartheid and associated with some of that system's worst atrocities.

Former Deputy Law and Order Minister Leon Wessels also appeared before the TRC. He claimed that he did "not believe that the political defense of 'I did not know' is available to me, because in many respects I believe I did not want to know."¹²⁰ Another former Deputy Minister of Law and Order, Roelf Meyer, also appeared before the Commission. He also took responsibility for certain actions, saying, "the fact that so many transgressions took place over such a lengthy period is an indication in itself that more vigilance was called for."¹²¹

Pik Botha, former Foreign Minister, appeared before TRC and apologized. He asked for "'God's forgiveness' . . . for failing to do more to prevent atrocities committed under the National Party's rule, which he blamed the security services."¹²² He claimed that cabinet members were suspicious of illegal activities carried out by the police force, which included torture and killings.¹²³ Thus, he reasoned that cabinet members cannot truthfully deny all responsibility.¹²⁴ As Pik Botha explained, "the decisive question is not whether we as a cabinet approved the killing of a specific political opponent . . . [t]he question is whether we should have done more to ensure that it did not happen. I deeply regret this omission. God forgive me."¹²⁵

However, not all prominent apartheid-era leaders have been as cooperative as Pik Botha or Leon Wessels. For example, the former head of the apartheid government's chemical and biological warfare program, Wouter Basson, was ordered to appear before the TRC's Human Rights Violations Committee.¹²⁶ The TRC Commissioners accused Basson of "attempting to sabotage the hearing,"¹²⁷ by repeatedly requesting a postponement of his hearing, claiming he did not have legal representation.¹²⁸ Basson also

don), July 24, 1998, at 17.

119. See Sam Kiley, *Botha Faces Black Judge Today*, TIMES (London), Jan. 23, 1998, at 16.

120. *A Glimpse of Courage*, AFR. NEWS SERV., Oct. 20, 1997, available in 1997 WL 15135165.

121. *Id.*

122. David Beresford, *Botha 'Sorry' for Apartheid Crimes*, GUARDIAN, Oct. 15, 1997, at 12.

123. *See id.*

124. *See id.*

125. *Id.*

126. *See van Eyssen, supra note 113.*

127. Ido Lekota, *TRC Orders Basson to Testify . . . Lawyer or Not*, SOWETAN, July 30, 1998.

128. *See id.*

claimed that he should not be forced to appear before the TRC because by appearing, he could “incriminate [himself] in a pending criminal case.”¹²⁹ However, Basson’s argument was meritless because evidence submitted to the TRC “cannot be used as the basis for prosecution in criminal cases.”¹³⁰ Therefore, the Cape Town High Court disagreed with Basson, and ordered him to appear before the TRC.¹³¹ After granting Basson yet another postponement, the TRC’s commissioners “ordered Basson to . . . go and find lawyers of his choice to represent him,” in order to proceed the next day.¹³²

B. Anti-Apartheid Officials

In addition to having mixed success in its dealings with apartheid-era government officials, the TRC has also been met with mixed success in handling prominent anti-apartheid activists. Initially, ANC members refused to apply for amnesty, arguing that “any acts committed to fight apartheid were justified and should never be equated with the actions of apartheid-era police and others in enforcing the system” of apartheid.¹³³ This reasoning seems extremely one-sided. Whether one side or the other in a conflict is successful or whether one side or the other stands on more acceptable moral ground ought to matter little when evaluating human rights abuses committed by either side. The eventual victory of anti-apartheid leaders does not make crimes such as necklacing¹³⁴ any more acceptable than the former government’s crimes of torture in prison carried out by apartheid supporters. To compare this reasoning, would Hitler’s slaughter of Jews have been made any more acceptable if he had been victorious in World War II? The answer to this question can be found by considering that Mao Tse Tung’s slaughter of masses of Chinese citizens is not viewed as acceptable just because he remained in power. Perhaps, ANC leaders realized that their reasoning was faulty because many ANC leaders, including Mandela’s entire cabinet, did submit applications for amnesty for the criminal acts they had committed in their fight against apartheid.¹³⁵

The TRC has also been faced with the difficulty of dealing with negative public opinion from anti-apartheid leaders. Specifically, the TRC has been accused of being far more lenient and accommodating to Black anti-apartheid leaders than to White government leaders.¹³⁶ For example, in May

129. *Id.*

130. Ido Lekota, *Basson Applies Not to Give Evidence*, SOWETAN, July 8, 1998.

131. *Id.*

132. Lekota, *supra* note 127.

133. *ANC Leaders to Seek Amnesty*, BOSTON GLOBE, May 3, 1997, at A16.

134. Necklacing involved the forcing of a gasoline-doused tire around the upper body and arms of a victim, making it impossible for the victim to get out of the tire. The tire was then ignited and the victim slowly burned and choked on toxic fumes. See MUFSON, *supra* note 4, at 91-92.

135. *See ANC to Avail of Amnesty*, IRISH TIMES, May 3, 1997, at 7.

136. *See Truth and Reconciliation Commission, Truth Commission Statement on NP*

of 1998 “a Cape Town high court set aside the blanket amnesty granted to 37 senior African National Congress members, including deputy president Thabo Mbeki and defense minister Joe Modise.”¹³⁷ These amnesties were given without public hearings, prompting criticism from opposing political parties. Moreover, the granting of blanket amnesty is “in apparent contravention of the Promotion of National Unity and National Reconciliation Act.”¹³⁸

The granting of individual amnesty, rather than blanket amnesty, is perhaps one of the most beneficial aspects of South Africa’s plan. Granting blanket amnesty often means that perpetrators never have to come forward; thus much mystery remains about who committed the crimes and where bodies may be found. If perpetrators are not ordered to come forward, they will not take responsibility for their acts, and they will not have to face the crimes they have committed. In the TRC’s system, for perpetrators to receive amnesty, they must come forward and provide a full account. These procedures are intended to allow the truth to be known as fully as possible and to encourage perpetrators to face what they have done.¹³⁹

Noting the obvious contradiction between the stated policy of the TRC against blanket amnesty and the strong implication of favoritism in its granting of blanket amnesty to thirty-seven ANC leaders¹⁴⁰ the TRC itself applied to the High Court to have the amnesties reviewed.¹⁴¹ TRC chairman Archbishop Desmond Tutu explained his satisfaction with the decision, stating, “I need to stress that the fault is not with the applicants. The fault lies with the TRC and we will have to take responsibility for this.”¹⁴² In addition to this apparent violation of TRC processes, fifteen members of the Inkatha Freedom Party were allowed to submit applications for amnesty despite protests from their victims’ families that the applications were submitted on February 13, 1998, long after the September 30, 1997 deadline for submissions.¹⁴³

Many people were released from their obligation to testify before the TRC due to time constraints near the end of the TRC’s allotted time for conducting amnesty hearings.¹⁴⁴ The TRC stated the “people responsible for human rights atrocities in African National Congress detention camps will

Court Case, AFR. NEWS SERV., Sept. 5, 1997, available in 1997 WL 14061177.

137. *Amnesty for 37 Senior ANC Members Overturned*, DEUTSCHE PRESSE-AGENTUR, May 8, 1998.

138. *Move to Remove ANC Amnesties*, IRISH TIMES, Mar. 14, 1998, at 15.

139. See *Interim Report*, *supra* note 66, § 2.

140. See *S. Africa Panel Challenges ANC Amnesties*, SAN DIEGO UNION-TRIB., Dec. 9, 1997, at A20. An autonomous division within the TRC granted the blanket amnesties. See *id.*

141. See *Move to Remove ANC Amnesties*, *supra* note 138.

142. *Amnesty for 37 Senior ANC Members Overturned*, *supra* note 137.

143. See Willie Bokala, *Amnesty for Boipatong 15 Still Uncertain*, SOWETAN, July 15, 1998.

144. See Tangeni Amupadhi, *TRC Ducks Quatro*, MAIL & GUARDIAN, June 26, 1998.

not have to testify publicly about their deeds.”¹⁴⁵ TRC Commissioner Dumisa Nzebeza, head of the investigative unit, said “[w]e have more than enough information on the ANC,” and “the fact that the ANC had already testified in public eliminated the need for another hearing.”¹⁴⁶ Furthermore, Nzebeza stated that public hearings on the violations could not fit into the hearing calendar.¹⁴⁷ This treatment appears to be one-sided. It is inconsistent that the ANC was allowed to rely on former public testimony while P. W. Botha was not allowed to rely on written responses, which could have been made public. This disparity in treatment is reinforced by the fact that ANC leaders applying for amnesty were not asked to testify before the TRC, while P. W. Botha, who was not applying for amnesty, was asked to appear.

Nelson Mandela, who was one of the architects of the negotiated settlement that spawned the TRC, has not applied for amnesty.¹⁴⁸ This appears strange, but the ANC explains that “Mandela should not be asked to apply because he spent most of the apartheid era in prison and was not responsible for any human rights abuses.”¹⁴⁹ Again, though Mandela was viewed as not needing to apply to the TRC for amnesty because he had already been given amnesty by the White government,¹⁵⁰ the disparity in treatment between Mandela and P. W. Botha is intriguing. Both Mandela and P. W. Botha were former leaders during the apartheid era, both did not apply for amnesty, and yet only P. W. Botha was subpoenaed to testify before the TRC. Moreover, in his trial for contempt, P. W. Botha was essentially forced to go through the type of inquiry into his actions as state leader during the apartheid era that the TRC had hoped to conduct had P. W. Botha appeared before it.¹⁵¹

Some anti-apartheid leaders remained steadfast in their refusal to cooperate with the TRC despite the commonly held idea that the TRC was likely to be lenient with them. One example is that of Winnie Mdikizela-Mandela. Winnie’s troubles for lack of cooperation with the TRC remained national headlines for months.¹⁵² Despite the heavy allegations made against her, she refused to apply for amnesty, thereby leaving herself open to criminal prosecution for those human rights violations.¹⁵³ In addition, in contravention to standard TRC procedure, Winnie was adamant that her initial hear-

145. *Id.*

146. *Id.*

147. *See id.*

148. *See ANC Leaders to Seek Amnesty, supra* note 133.

149. *Id.*

150. Mandela, along with several other ANC leaders, was indemnified in the Indemnity Act of 1990. *See* M.S. Prabhakara, *ANC Leading Figures Apply for Amnesty*, HINDU, Oct. 41, 1997, available in 1997 WL 14059198.

151. *See Former S. African President Stoic at Trial*, FLA. TODAY, Apr. 16, 1998, at 06A.

152. *See* Mark Ashurst, *Mandela’s Ex-wife Hears Claims*, FIN. TIMES, Nov. 25, 1997, at 8. Winnie Mdikizela-Mandela is the former wife of former South African President Nelson Mandela and is widely accused of masterminding “a string of murders, torture and beatings carried out by her bodyguards during the 1980s.” *Id.*

153. *See id.*

ings be held in public, rather than behind closed doors.¹⁵⁴ In September of 1997, the TRC, at Winnie's insistence, agreed to hold open hearings on the allegations against her, enabling Winnie to defend herself publicly. However, the TRC insisted on confidential hearings first. By law the TRC must give advance warning to people likely to be named in connection with apartheid-era atrocities and closed hearings are intended to help identify them.¹⁵⁵ Winnie appeared before the TRC for nine days, during which she denied all allegations against her.¹⁵⁶

VI. TREATMENT OF FORMER LEADERS IN OTHER COUNTRIES WITH TRUTH COMMISSIONS

Other countries emerging through negotiated settlements from long periods of civil strife have set up entities like South Africa's TRC. Similarly, like the TRC, these commissions have been set up to clarify human rights abuses during the strife. Former leaders worldwide have been met with wide ranging treatment by these investigatory commissions.¹⁵⁷

In Argentina, in the early 1980s, President Alfonsín was elected after the military gave up control of the government.¹⁵⁸ However, despite relinquishing its official control, the military remained powerful.¹⁵⁹ Consequently, while the military was to cooperate with a Congressional Commission set up to function as a truth commission, the Commission was not given the power to subpoena witnesses or to compel testimony.¹⁶⁰ As a result, requests for cooperation from former military leaders were unheeded, and therefore, the truth was left unclear.¹⁶¹

Similarly, in Chile, the Chilean Commission on Truth and Reconciliation did not have the power to subpoena.¹⁶² The Commission was precluded from even identifying the perpetrators of the human rights abuses it uncovered.¹⁶³ Consequently, the military did not cooperate with the Commission. Furthermore, General Pinochet, who served as the Commander in Chief of

154. See *Mandela on Trial*, TIMES (London), Sept. 27, 1997, at 23.

155. See David Beresford, *Truth Commission Questions Mrs. Mandela Behind Closed Doors about Eight Murders*, GUARDIAN (London), Oct. 14, 1997, at 016.

156. See Maurice McLeod, *Winnie's Moment of Truth: Truth Commission Revelations Sink Bid for Deputy Leadership*, VOICE, Dec. 15, 1997, at 16.

157. See Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 332 (1994).

158. See *id.* at 336-37.

159. See Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1427-28 (1992).

160. See Pasqualucci, *supra* note 157, at 337.

161. See *id.*

162. See *id.* at 338.

163. See *id.*

the Army during the civil struggle, was able to retain his position despite the abuses with which he is reputed to have been involved.¹⁶⁴ Pinochet assumed power in Chile in 1973 as the result of a coup that ousted the highly unpopular Marxist government led by President Salvador Allende.¹⁶⁵ During and following that takeover, Allende's supporters and other known Marxists were murdered.¹⁶⁶ Recently, Pinochet was made a Senator for life, making him immune from prosecution for any violations of human rights he may have committed.¹⁶⁷ Chileans rioted and protested demanding that Pinochet be properly punished for his abuse of human rights.¹⁶⁸ Although Pinochet may be immune from prosecution for human rights abuses in his own country, he is not immune in others. Recently, a British court permitted the arrest and extradition of Pinochet to Spain to face charges of masterminding human rights abuses that resulted in the death of several Spanish citizens in Chile.¹⁶⁹ After several court battles regarding Pinochet's immunity, on October 8, 1999, the High Court of Britain finally ruled that Pinochet could be extradited but limited the period for which he could be held accountable.¹⁷⁰

In 1989, Germany was reunified, and thus faced the problem of dealing with the East Germans who were in charge of the East German spy networks and the shooting of people who tried to escape the country.¹⁷¹ In Germany, Erich Honecker's situation most resembles that of P. W. Botha's in South Africa. Honecker was a former political head of East Germany.¹⁷² Honecker ordered those who attempted to escape East Germany to be shot and masterminded the East German spy network.¹⁷³ Eventually, Honecker was brought to trial, but the judge dismissed the case because of Honecker's age and frail health.¹⁷⁴ Honecker then fled to Chile where he lived and remained until his death.¹⁷⁵

In some countries, blanket amnesty has been given to former leaders who are no longer in power, thereby eliminating the need for those leaders

164. *See id.* at 339.

165. *See* Charles Lane, *Busted*, NEW REPUBLIC, Nov. 9, 1998, at 7. These events caused President Salvador Allende to take his own life. *See* James R. Whelan, *The Americas: Chile's Pinochet Fought Marxist Violence*, WALL ST. J., Oct. 30, 1998, at A19.

166. *See* Lane, *supra* note 165.

167. *See* Jose de Cordoba, *Pinochet Leaves Army, but Legacy Remains*, WALL ST. J., Mar. 11, 1998, at A16.

168. *See id.*

169. *See* Matt Moffett & Craig Torres, *Pinochet's Arrest Reopens Old Wounds in Chile*, WALL ST. J., Oct. 19, 1998, at A20.

170. *See* Warren Hoge, *British Court Allows Pinochet to be Extradited to Spain*, SAN FRAN. CHRON., Oct. 9, 1999, at A1. Whereas charges regarding Pinochet's conduct reached to 1973, the court held that Pinochet could be held accountable only for acts committed after December of 1988. *See id.*

171. *See* Lane, *supra* note 165.

172. *See id.*

173. *See id.*

174. *See id.* Like Botha, Honecker was over 80 years old. *See id.*

175. *See id.*

to appear before any type of investigating commission. One example of such a country is the United States. After the Civil War, the United States extended blanket amnesty to most southerners, with the exception of a few high Confederate officials.¹⁷⁶ Those not granted blanket amnesty had to appear before President Johnson, rather than before a public inquiry board, to obtain amnesty.¹⁷⁷ Blanket amnesty has also been granted in Argentina and Chile, allowing those who violated the human rights of others to escape personal liability and avoid being called before an investigating body.¹⁷⁸

VII. IS FORCED TESTIMONY BY FORMER LEADERS A GOOD IDEA?

The key difference between the situation in South Africa and in most other countries dealing with post-civil-strife truth commissions, is that in South Africa the TRC has been given the power to compel the testimony of former leaders. In contrast, the truth commissions in Argentina and Chile were not given such power, which resulted in a lack of testimony from important former leaders which in turn left key parts of the truth hidden.¹⁷⁹ In Germany, the same result was reached even though a former leader was brought to trial because the case was ultimately dismissed due to the leader's age.¹⁸⁰ With these results in mind, perhaps in order to obtain as complete a picture of the truth as possible, it is necessary for former leaders to be compelled to testify if they refuse to do so voluntarily. However, other issues must be considered with regard to forced testimony by former leaders.

It appears that government positions have not been significantly compromised in countries where former government leaders have been forced to give testimony regarding events that occurred during their term in office. For example, in the United States, both sitting and former Presidents have been compelled to provide testimony regarding conduct that occurred within the executive branch during their term in office.¹⁸¹ In some cases, the compelled testimony was not only about their own conduct while in office, but also about the conduct of those around them.¹⁸² Despite the sometimes intrusive and hostile nature of interrogation of current and former Presidents, "involuntary submission to interrogation by a former President will not necessarily offend the separation of powers doctrine nor do lasting damage to

176. See JOHN H. FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 224 (1994).

177. See MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 426 (1986).

178. See Storey, *supra* note 73.

179. See Pasqualucci, *supra* note 157, at 338-39.

180. See Lane, *supra* note 165.

181. See 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.1 (2d ed. 1998).

182. See *id.*

the Office of the Presidency.”¹⁸³

In addition, the United States Supreme Court has addressed the issue of whether or not the potential for compelled testimony by a government official could compromise the effectiveness of the officer in performing his or her duties.¹⁸⁴ The Court noted that generally a President needs to rely on the confidentiality of executive communications to ensure that such communication is open and unhindered among those involved in the communication.¹⁸⁵ However, the Court made it clear in *United States v. Nixon*, that despite the need for the assurance of confidential communication, there were situations in which disclosure might be required:

[W]hen the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation of other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest of confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.¹⁸⁶

The United States Supreme Court’s emphasis on the protection of confidential material by the courts may be useful in the United States, and yet not translate well to other countries with post-civil-strife truth commissions. For example, one of the primary goals of South Africa’s TRC is to make public the events that took place during apartheid. Therefore, the TRC’s processes do not guarantee that any information disclosed to it will be confidential. Indeed, it does not appear that the TRC offered to keep any part of P. W. Botha’s testimony secret. However, it also does not appear that P. W. Botha referred to a need for confidentiality as a reason for refusing to testify before the TRC. Moreover, this issue apparently was not a problem for former President de Klerk when he testified before the TRC, but perhaps this may be because he was possibly not completely truthful in his testimony.¹⁸⁷

Although compelled testimony might have a chilling effect on the conduct of officials during their term in office, it does seem that such a chilling effect is outweighed by the need for a country to heal and move forward after a period of civil strife. As a former senior presidential advisor in Argentina states, “[w]here authoritarian dictatorships have been frequent . . . it is essential to restore credibility in democratic institutions. To achieve this goal, a transitional government must exhibit the weight of the basic principle that nobody is beyond the reach of the law.”¹⁸⁸ Others see the potential

183. *Id.*

184. *See id.* § 7.2.

185. *See id.*

186. 418 U.S. 683, 706 (1974).

187. *See Mdhlela, supra* note 116.

188. Jaime Malamus-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in STATE CRIMES: PUNISHMENT OR PARDON 74 (The Justice

chilling effect of such a policy as not just less important than the benefits, but as virtually non-existent. "However, fear of suffering punishment is unlikely to be an effective deterrent in cases of human rights violations by military personnel . . . Immediate and certain approval from comrades will override and reason for compliance with legal standards and concern for the consequences[.]"¹⁸⁹ Moreover, a chilling effect may not occur when the actions taken while in office are not seen by the official as illegitimate.

In cases of state violation of human rights, potential abusers may not always perceive that their act violates a norm. Often their confusion results from society's mixed messages: National security or the need to restore order, for example, may be invoked to justify what would otherwise be clearly punishable acts such as torture or murder.¹⁹⁰

Perhaps, then, the potential of a chilling effect on the actions of high-ranking government officials regarding certain abuses of human rights is insignificant enough to fully justify the compulsion of testimony by such officials regarding conduct that occurred during their term in office. In P. W. Botha's case, it is unclear whether or not his conduct while in office may have been deterred by the threat of forced testimony about his conduct and the conduct of those around him. Moreover, in the specific case of South Africa, such an issue may be irrelevant. The focus of the TRC is in part to ensure that no human rights abuses by the government ever take place again. Thus, to reach its goal, it may be beneficial for the TRC to place a chilling effect on any inhumane actions by future government officials by demonstrating that they too may someday be compelled to testify about their actions during their terms in office.

Another issue that arises in compelling testimony from former leaders after they leave office is whether they might be inclined to cling to power rather than allow a transition to a new government. This may be the case if they are afraid of being compelled to testify about their actions once they leave office. In South Africa, this apparently was not an issue for de Klerk. Rather, de Klerk was an active participant in the transition process.¹⁹¹ De Klerk's actions indicate that in certain situations, the fear of compelled testimony is not substantial enough to influence leaders to cling to power. Indeed, perhaps the prospect of a relatively orderly transfer of power, as was the case in South Africa, rather than a military coup, works to encourage cooperation from government leaders. The threat of compelled testimony at the hands of a truth commission surely pales compared to the threat of injury or death during a violent coup.

& Society Program of the Aspen Institute ed., 1989).

189. *Id.* at 79.

190. Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 14 (Naomi Roht-Arriaza ed., 1995).

191. See DAVIDSON, *supra* note 20, at 349-51.

In South Africa, perhaps if not in other countries, compelled testimony of former leaders appears to be necessary and appropriate. Seeking complete and public truth, rather than the punishment of individuals, is the focus of the peace process in South Africa. Therefore, it is of utmost importance to the country that testimony from former leaders with important information be made available to the TRC. Compelling former leaders to testify under threat of criminal prosecution to obtain such information does not seem likely to cause much damage to either current or future government officials. Indeed, the current South African government seeks to discourage possible future human rights abuses by government officials, and any deterrent effect the compelled testimony of former leaders might have on current and future leaders is a good way for the government to accomplish its goal.

Finally, compelling former leaders to testify before the TRC does not necessitate any future compulsion of testimony by current or future government leaders because the current investigation is limited to information about activity that occurred during the apartheid era. Surely, the current situation sets a strong precedent for any future investigations to discover the truth, but only if they should become necessary because of further abuses of governmental power. If South Africa's government is truly committed to preventing future abuses of power, then the specter of forced testimony should not loom large enough in the minds of officials as to prevent them from effectively performing their duties. That is, of course, if they perform their duties justly, they need not fear future investigations because they should not be needed.

CONCLUSION

Based on prevalent blanket amnesties and the weak investigatory power usually given to investigatory commissions, it is not surprising that former South African President P. W. Botha was insulted when called to appear before the TRC and then prosecuted for refusing to comply with its subpoenas. However, from the lack of closure experienced in the countries with weaker truth commissions, it appears that it is necessary for a truth commission to be given the power to compel participation in its processes, in order to document the truth as fully as possible. Furthermore, it would have seriously undermined the effectiveness, as well as the credibility, of the TRC had it permitted former high-ranking government officials to be excepted from its processes. An imbalance of power would have continued had the TRC allowed those who once were in power to escape the consequences of their actions and yet hold those who held less power (whether in the former government or in opposition to the government) accountable for their actions. This could have proved to be disastrous to South Africa's efforts to compensate for and redress a long-standing imbalance of power. Consequently, the TRC was supposed to act in an impartial manner, though this has not always appeared to be the way in which it operated.

In some respects, it does not appear that P. W. Botha is being held to a tougher standard than other former apartheid-era leaders. High-ranking leaders from both sides of the apartheid issue have submitted applications for amnesty or have appeared before the TRC when asked to do so. While some have resisted, such as Winnie, eventually they have participated, albeit grudgingly, in the TRC's processes. The TRC has shown some deference to P. W. Botha's position as the former leader of South Africa by attempting to schedule his testimony at times and locations convenient for him.

Certainly, though, to judge by the treatment afforded former leaders in many other countries after the settlement of internal conflict, P. W. Botha has been subject to more demands and a higher level of accountability than other former leaders. However, due to the carefully negotiated settlement in South Africa, which involved the creation of a truth commission with broad powers, and the cooperation of South African citizens from all levels of government and society and all sides of the apartheid-era struggle, it seems only fair that P. W. Botha either cooperate with and abide by the TRC's processes or face the consequences of refusal. After all, a central theme of the struggle against apartheid was that there should not be rules that apply to some and not others.

It is difficult to conclude that P. W. Botha has been treated unfairly and with disfavor by the TRC. Botha was almost certainly responsible in one way or another for many gross violations of human rights during his tenure of leadership in South Africa. Moreover, he is a symbol of a system of racial discrimination and separation that is appalling to many. However, it is also difficult to conclude that former leaders, whether they represent the winners or losers in civil or international struggle, should not be held to similar standards. Perhaps this is a United States-oriented view, that each person should be equal before the law. However, in South Africa, the government committed itself publicly to a system that holds all persons accountable in a like manner when investigating human rights abuses committed during the civil strife in the apartheid era. Whether a leader or a follower, each person was to receive similar treatment from the TRC. It seems only fair, then, that P. W. Botha is held to the same standards of other former apartheid-era leaders, whether they were pro-apartheid or anti-apartheid. He should not be held to either a higher or lower standard. Therefore, P. W. Botha should consider his trial and sentence for contempt seriously, keeping in mind that if he refuses any subsequent request by the TRC to appear before it, his sentence will no longer be suspended.

The sentence handed down to P. W. Botha will no doubt appear too lenient to some and too harsh to others. The sentence does little to punish him, although the trial and the ruling were personal humiliations for him. In addition, the resulting fine was not large and he will serve no time in jail. Rather than punishing P. W. Botha, the main importance of the sentence seems to be that it sends a clear message: all South Africans must cooperate with the TRC, just as all South Africans must participate in the reconciliation process

for that process to be effective in healing the country.

The pursuit of P. W. Botha as an individual may do little to lead to reconciliation. Indeed, it is more likely that the controversy over P. W. Botha's prosecution highlighted and magnified divisions between Whites and Blacks rather than bringing the two groups closer together. However, the prosecution of P. W. Botha does serve to reinforce the legitimacy of the current South African government by publicly and legally demonstrating that the current government's policies are to be taken seriously. It is difficult to believe that a country can move forward with healing without a strong government to lead the country.

Former leaders without doubt retain positions of prominence once they leave office. Some are regarded with high esteem while others are vilified, but few become obscure. Immunity from prosecution seems necessary for many acts committed by former leaders while carrying out their official duties, because otherwise they may be so fearful of prosecution by an opposing party once they are out of office, that they will be unable to effectively act as leaders. However, it seems just that no former leader is held unaccountable for human rights abuses committed or ordered during their term in office, and just that no former leader be held above the law in matters occurring after their official term of leadership has expired. However, the burden does not rest solely on former leaders. The entities in charge of any inquiry or prosecution must take the utmost care to be and appear to be impartial in order for citizens to feel confident in their system of justice. Fairness and impartiality must visibly be practiced by those entities in charge of dealing with former leaders and human rights violations committed during an earlier period of strife. Former leaders need to be treated fairly, not so much because of their former stature as rulers, but because their treatment will no doubt be of great interest in the media and send a strong message to ordinary citizens about the overall fairness and impartiality of their government's systems.

