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## South Africa's Truth and Reconciliation Commission: A Model for the Future

Tama Koss

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Koss, South Africa's Truth and Reconciliation Commission: A Model for  
SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION:  
A MODEL FOR THE FUTURE

*Tama Koss\**

I.	INTRODUCTION .....	517
II.	HISTORICAL BACKGROUND .....	519
	A. <i>A Divided Society</i> .....	519
	B. <i>National Party Government</i> .....	520
	C. <i>The African National Congress</i> .....	521
III.	ANALYSIS .....	521
	A. <i>The First Commission of Inquiry</i> .....	521
	B. <i>The Second Truth Commission</i> .....	522
	C. <i>The Enactment of the Truth and         Reconciliation Commission</i> .....	523
	D. <i>The TRC's Final Report</i> .....	524
	E. <i>Amnesty Concerns</i> .....	525
IV.	CONCLUSION .....	526

I. INTRODUCTION

Truth commissions are bodies established to investigate a particular country's history of human rights violations.<sup>1</sup> These commissions may be sponsored by a governmental body, usually from within the executive branch, or by an international organization, such as the United Nations.<sup>2</sup> Truth commissions "play a critical role in [countries] struggling to come to terms with [and move beyond,] a history of massive human rights [violations]."<sup>3</sup> Consequently, the predominant reasons behind implementing truth commissions are to conduct sanctioned fact-finding

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\* This Comment received the award for Best Comment, Fall 2001.

1. Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994), reprinted in 1 TRANSITIONAL JUSTICE 225 (Neil J. Kritz ed., 1995).

2. *Id.*

3. *Id.*

and to investigate a specific nation's history of human rights violations.<sup>4</sup> Truth commissions focus not on individual historic events, but on the past, "attempt[ing] to paint the overall picture of certain human rights abuses . . . over a period of time."<sup>5</sup> Investigating and recording the past allows a society to learn from it and acknowledge it, in order to prevent similar abuses from reoccurring.<sup>6</sup>

The path to democracy in South Africa was a long struggle for freedom that ultimately endured.<sup>7</sup> The history of apartheid in South Africa left a need to restore that society's moral order.<sup>8</sup> Consequently, after South Africa's establishment of democratic elections in 1994,<sup>9</sup> the Truth and Reconciliation Commission (TRC) was formed.<sup>10</sup> The Promotion of National Unity and Reconciliation Act delineated the TRC's objectives, goals, and parameters.<sup>11</sup> South Africa's TRC is often perceived as a

4. See *id.* at 226-27. Truth commissions are usually set up during or immediately after a political transition in a country — which may be in the form of gradual democratization, such as in South Africa. See *id.* at 226.

5. *Id.* at 225-26.

6. Hayner, *supra* note 1, at 227.

7. See generally U.S. Inst. of Peace, *Special Report No. 73: U.S. Human Rights Policy towards Africa*, Aug. 9, 2001, available at <http://www.usip.org/pubs/specialreports/sr73.html> (released Aug. 9, 2001). The democratic transition in South Africa retained governmental bodies that slowly evolved after the abolition of apartheid. *Id.* Specifically, the judicial system gradually transformed to erase racial discrimination. *Id.* Preserving the old judiciary foundation did not force South Africa to rebuild its democracy from the ground up and allowed for an emphasis on the past. *Id.*

8. The Afrikaans Dictionary of 1950 defined "apartheid" as:

- A political tendency or trend in South Africa, based on the general principles
- a) of a differentiation corresponding to differences of race and/or colour and/or level of civilization, as opposed to assimilation;
  - b) of the maintenance and perpetuation of the individuality (identity) of the different colour groups of which the population is composed. . . .

K.L. ROSKAM, APARTHEID AND DISCRIMINATION 98 (1960) (quoting WOORDEBOEK VAN DIE AFRIKAANSE TALL (P.C. Schoonees et al. eds., 1950)).

9. In 1994, South Africa realized a newly negotiated democratic society, which stood strong against the past's "oppression, exclusivity, and resistance." Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 141-42 (Robert I. Rotberg & Dennis Thompson eds., 2000).

10. The TRC provided a place for the people of South Africa to deal with past crimes as the country transitioned into a new future. See U.S. Inst. of Peace, *Acknowledging Crimes of the Past*, 6 PEACEWATCH No. 4 (June 2000), available at <http://www.usip.org/pubs/archives.html> (last visited Oct. 7, 2002).

11. Promotion of National Unity and Reconciliation Act, (34) 1995 (SA) [hereinafter Unity & Reconciliation Act]. The Act mandated that the TRC would be led by eleven to seventeen

successful example of a truth commission because South Africa was able to incorporate the essential elements of the truth commission model: full disclosure; amnesty; reparation; and rehabilitation. Thus, South Africa's TRC allowed for an investigation of past abuses in order to prevent their future reoccurrence.

## II. HISTORICAL BACKGROUND

### A. *A Divided Society*

In the early Nineteenth Century, Great Britain assumed control of the Cape Colony in South Africa from the Netherlands.<sup>12</sup> The ruling Afrikaner group which remained, led the Colony through subsequent takeovers and conflicts with the British, the Dutch, and the Africans.<sup>13</sup> The Afrikaners exercised power over the Africans in the Colony,<sup>14</sup> as did the British, consequently developing racial attitudes typical of such domineering relationships.<sup>15</sup> Moreover, differential treatment of non-whites in South Africa had been common in this society since 1652,<sup>16</sup> when the whites first arrived in South Africa.<sup>17</sup> In 1994, the first democratic election in South Africa changed this trend.

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commissioners who would be appointed by the President of South Africa. *Id.* § 7, cl. 2. The Act also provided for three committees: the Committee on Human Rights Violations; the Committee on Amnesty; and the Committee on Reparation and Rehabilitation. *Id.* § 12, cl. 3; § 16, cl. 4; § 23, cl. 5.

12. DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA?* 9 (1991).

13. *Id.* at 9-10.

14. *See id.* at 9. The Afrikaners were hoping to protect their own people from the threat of extinction, but in reality they were acting as the Africans' conquerors and creating racial segregation. *Id.* at 10.

15. *Id.*

16. ROSKAM, *supra* note 8, at 52. Initially, race or skin color did not determine discrimination. *Id.* Discrimination by the European colonists was faith-based and occurred against non-Christians. *Id.* Non-white population groups could, and did, escape this discrimination by accepting and participating in the Christian religion. *See id.* Attitudes of racial superiority became apparent in the question of baptizing slaves. *See id.* at 53. In modern South Africa, acceptance of the Christian faith is not regarded as a guarantee of equal treatment. *Id.*

17. *Id.* at 52. One of the first known encounters between Africans and whites took place in 1702. *See id.* at 31. The first eruption of armed conflict took place in 1779, and it is believed that the whites were the first to use violence. *Id.* at 33. The reason for the violence is considered to be the "absolutely necessary possession of land, grass and water," and not the differences between the civilizations, "as there was a great resemblance between the two groups." *Id.* at 33.

### B. National Party Government

In 1948, the Afrikaner-based National Party (NP)<sup>18</sup> came to power and set up restrictive racial legislation in order to increase support for Afrikaners.<sup>19</sup> The NP introduced apartheid to South African politics by describing a new racial policy fundamentally different from previous policies.<sup>20</sup> Under the NP, the apartheid system was enforced via restrictions placed on African migration into cities.<sup>21</sup> For example, Africans were denied land ownership inside South Africa's borders, forcing them to become citizens of their home provinces, and hence foreign workers in South Africa.<sup>22</sup> Furthermore, the NP gained sole control of the new, all-white electorate, and education was segregated to promote the idea of "separate development."<sup>23</sup> The NP not only enforced a system of domination based on denial of basic political rights, but it also imposed a system of apartheid that affected state policies which influenced every area of life in South Africa.<sup>24</sup>

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18. *Id.* The National Party's principle goal was the supervision, control, and domination by whites. *Id.* at 123. Many NP members saw the object of apartheid as "to do justice to [the non-whites of South Africa,] and not to do them injustice." *Id.* (citations omitted). However, the NP felt that the justice that was due to the non-whites (the Africans) was only minimal. *See id.* This way of thinking was discriminatory because it was based on the assumption of qualitative and physical differences between the ethnic groups. *Id.* at 124.

19. HOROWITZ, *supra* note 12, at 10.

20. *See* ROSKAM, *supra* note 8, at 84. The NP government rejected any form of assimilation, stating that it could only lead to the downfall of South Africa. The NP did not want to give complete territorial separation to non-whites, but instead wanted to maintain white supremacy in South Africa. The NP also wanted to control the development of multi-communities and transfer the existing rights of Africans to their own areas, which were under NP leadership. This policy was established to create a society of white domination. *See id.*

21. HOROWITZ, *supra* note 12, at 11. Those allowed to migrate, faced tough restrictions. *Id.* African workers were forced to live far from their families in single-sex hostels, and Indians' movements were limited. *Id.*

22. *Id.*

23. *Id.* Non-whites were only allowed to receive inferior education, and higher education was segregated with the establishment of separate universities for whites and non-whites. *Id.*

24. Boraine, *supra* note 9, at 141. "Apartheid was a system of minority domination of statutorily defined color groups on a territorial, residential, political, social, and economic basis. It was a system that was entrenched for almost fifty years." *Id.*

### C. *The African National Congress*

In the early 1950s, "opposition to the apartheid system had gathered momentum."<sup>25</sup> The Freedom Charter, created in 1955, demanded a "non-racial democratic government" and offered guidelines for a civil campaign of unrest.<sup>26</sup> This Charter became the ideological manifesto of the African National Congress (ANC), which ultimately cleared the way for democracy.<sup>27</sup> In 1962, Nelson Mandela, the ANC leader in the struggle for democracy, was arrested and later sentenced to life imprisonment.<sup>28</sup> At the same time, the ongoing revolt against apartheid led to an undeclared war, and by the early 1980s, many supporters of the NP came to realize that apartheid was a failure.<sup>29</sup> Thus, reform was needed, and a new president, Frederik W. de Klerk, was elected in 1989.<sup>30</sup> In 1990, de Klerk released Mandela from prison, and lifted restrictions on previously banned political movements, starting with the ANC.<sup>31</sup> In 1994, the ANC became the majority party in the legislature, and Mandela was elected to be the new president of South Africa, ending the whites' minority rule.<sup>32</sup>

## III. ANALYSIS

### A. *The First Commission of Inquiry*

In 1991, a group of thirty-two former detainees of the ANC's detention camps formed a committee to confront the ANC on abuses which were inflicted upon them and others who were accused of being members of the South African government.<sup>33</sup> The establishment of the committee was a response to widespread reports of abuses in the ANC's detention camps.<sup>34</sup>

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25. JANE'S INFORMATION GROUP LIMITED, JANE'S SENTINEL SECURITY ASSESSMENT: SOUTHERN AFRICA § 7.7.1 (2001) [hereinafter JANE'S SECURITY ASSESSMENT].

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* An undeclared war developed in 1975 as neighboring former colonies became independent and began assisting anti-apartheid forces. *Id.* A serious revolt broke out in 1976 when thousands of youthful protestors took to the streets in Soweto, South Africa. *Id.* The principal leader of the revolt, Steve Biko, died under police interrogation a year later. *Id.*

30. JANE'S SECURITY ASSESSMENT, *supra* note 25, § 7.7.1.

31. *Id.*

32. *Id.*

33. Hayner, *supra* note 1, at 239.

34. *Id.*

Fortunately, by bringing international attention to the issue of human rights abuses, the committee forced the ANC to investigate.<sup>35</sup> As a result, in March 1992, Mandela, the ANC leader, appointed the first South African Truth Commission, the Commission of Inquiry into Complaints by Former African National Congress Prisoners and Detainees, to examine the events that occurred at ANC detention camps.<sup>36</sup> The Commission's terms of reference were set up by the ANC at the outset, calling for a full and thorough investigation of the former detainees' complaints, and recommendations on actions the ANC might take based on the Commission's findings.<sup>37</sup> Seven months later, the Commission submitted a seventy-four-page report to Mandela, documenting abuses in the ANC's camps and describing them as "staggering brutalit[ies]."<sup>38</sup> The report did not name responsible individuals, but recommended "urgent and immediate attention to be given to identifying and dealing with those responsible for the maltreatment of detainees."<sup>39</sup>

### B. *The Second Truth Commission*

In 1992, after the initial Commission of Inquiry finished its work, Mandela appointed a new Commission of Inquiry to take a second look at alleged abuses in ANC detention camps.<sup>40</sup> In contrast to the proceedings of the first Commission, the process of the second Commission was structured like a court hearing.<sup>41</sup> For instance, the accused were given opportunities to confront and question their accusers, and were allowed their choice of counsel.<sup>42</sup> The second Commission submitted a report in 1993 that named individuals who violated the former detainees' rights and described the events and abuses that took place in the ANC's camps.<sup>43</sup>

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35. *Id.*

36. *Id.*

37. *Id.*

38. Hayner, *supra* note 1, at 239.

39. *Id.* at 239-40. The report was immediately issued to the public, and international attention forced the ANC to respond to the allegations. Mandela accepted responsibility for the acts that had occurred, but insisted that the individuals involved should not be named or held publicly accountable. *See id.* The Commission recommended that an independent body be appointed to further investigate crimes outside the Commission's terms of reference such as disappearances. *Id.*

40. *Id.* at 244.

41. *Id.* at 244-45. The new Commission hired attorneys to represent the complainants and the defendants. Hearings were held over a five-week period in 1993, and approximately fifty witnesses were heard, including some alleged perpetrators of human rights abuses. *See id.*

42. *Id.*

43. Hayner, *supra* note 1, at 244-45.

Although the second Commission's report was positively received, some criticized its combination of a disciplinary proceeding and a truth inquiry.<sup>44</sup> One concern was that using disciplinary proceedings to arrive at the truth might prohibit full disclosure of events. The ANC responded to the Commission's report by calling for a more widespread truth commission to investigate abuses on both sides of the conflict in South Africa since 1948.<sup>45</sup>

### C. *The Enactment of the Truth and Reconciliation Commission*

Following the 1994 elections, South Africa made progress in establishing its democratic government.<sup>46</sup> The country gradually moved away from political violence and searched for a way to confront past abuses. Therefore, South Africa's TRC was created by an act of the legislature in 1995, "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."<sup>47</sup> Clearly, President Mandela's decision to appoint a small committee of varied individuals who would elect the TRC's members led to an open, transparent, and national commission.<sup>48</sup>

The South African TRC was established by the South African Parliament to hear evidence from both victims and alleged abusers under apartheid, and to consider applications for amnesty from persons who had confessed to committing human rights abuses.<sup>49</sup> A democratically elected group participated in determining the objectives and the content of the legislative act, and once those were laid within the legislation's parameters, the Commission had to obey them.<sup>50</sup> This was different from South Africa's previous commissions, in which the members were appointed by an individual, and the procedures and objectives were created by the Commissions themselves. Established parameters for the Commission kept the TRC focused on its goal, and led to its success. "The TRC provided South Africans, both perpetrators and victims, with an

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44. *Id.*

45. *Id.*

46. JANE'S SECURITY ASSESSMENT, *supra* note 25.

47. *See* Unity & Reconciliation Act, *supra* note 11, cl. 2 & 3.

48. *See id.*

49. JANE'S SECURITY ASSESSMENT, *supra* note 25.

50. Boraine, *supra* note 9, at 145.



opportunity to face the past and its consequences and to start afresh.”<sup>51</sup> During 1997, the TRC heard hundreds of cases involving many members of the former NP regime and several government ministers.<sup>52</sup>

Although the TRC intended to grant amnesties and reveal the crimes of the past, it also proved to be a source of public humiliation rather than reconciliation.<sup>53</sup> For example, the TRC’s findings on former President de Klerk were removed from its final report after the former President obtained a court injunction.<sup>54</sup> The TRC discovered that de Klerk had displayed a lack of candor to the tribunal in his testimony, and later found him accountable for gross violations of human rights.<sup>55</sup> De Klerk was publicly known for having directed South Africa on the road to reconciliation in 1990 by releasing Mandela from prison and by initiating negotiations for a peaceful settlement of South Africa’s struggle against apartheid.<sup>56</sup> Consequently, de Klerk acquired a court injunction to remove the report’s findings on him in an effort to avoid the public rancor for which the TRC was known.

#### D. The TRC’s Final Report

The TRC’s final report was somewhat surprising to many. ANC supporters were shocked to hear that the TRC implicated the ANC in several terrible crimes.<sup>57</sup> The TRC was clear in its intention to blame not only the whites for violence in the past years, but also the ANC for the many atrocities it committed while acting as a militant force.<sup>58</sup> Although many have criticized the TRC for its implication of individuals, the Commission has been an important safety outlet by offering amnesty in

51. *Id.* at 142.

52. JANE’S SECURITY ASSESSMENT, *supra* note 25.

53. *Id.*

54. Patrick Laurence, *Lifting the Veil on FW*, FIN. MAIL (South Africa), Sept. 29, 2000, at 37. The TRC’s findings are quoted in full in Alex Boraine’s insider’s account of the TRC (citing ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION (2000)). *Id.*

55. *Id.* In September 1988, twenty-three people were injured when the headquarters of the South African Council of Churches was bombed. The bombing is now known to have been the work of the South African police under instructions from then President, P. W. Botha. *Id.* De Klerk had been told that Botha authorized the bombing, but failed to disclose this information to the TRC when he testified before it in 1996. *Id.* In 1997, de Klerk was found to be responsible for having concealed his role as an accessory when he was obligated to disclose the truth known to him. *Id.*

56. *Id.*

57. JANE’S SECURITY ASSESSMENT, *supra* note 25.

58. *Id.*

return for the public airing of past crimes on both sides of the apartheid struggle.<sup>59</sup> Implicating individuals for human rights violations is cathartic for a country rooted in violence and abuse. This element of the TRC's report, specifying individuals who committed past abuses, was important when amnesty applications were being considered. In October 1998, the TRC provided the government with a five-volume report, only to generate controversy on the issues of amnesty and reparation.<sup>60</sup>

### E. Amnesty Concerns

The TRC's amnesty committee was empowered to grant amnesty in return for full disclosure.<sup>61</sup> In its final report, the TRC warned against a future, general amnesty for institutions and governmental bodies.<sup>62</sup> The TRC believed that all persons who had committed crimes during South Africa's apartheid years should be given an adequate opportunity to seek amnesty today, but should not be allowed to benefit in the future. Unfortunately, Thabo Mbeki, the current President of South Africa, is actively seeking to extend the amnesty process beyond the parameters set by the TRC so as to include a de facto type of amnesty that could result in governmental abuses of the process.<sup>63</sup> General amnesties undermine the need for such a TRC, while simultaneously giving the government exclusive power to grant violators of international law the opportunity to escape justice through a blanket amnesty.

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59. African National Congress (ANC), The PRS Group/Political Risk Services, June 01, 2001, at 1.

60. *Id.*

61. Patrick Laurence, *Wider Net Feared, TRC and Amnesty*, FIN. MAIL (South Africa), June 4, 1999, at 39.

62. *See id.*

63. *See Id.* President Thabo Mbeki, the new president of South Africa, applied for amnesty and was denied along with twenty-six other ANC leaders. The TRC amnesty committee considered the applications together at the request of the ANC leaders, and believed that the applications were asking for a general blanket amnesty for any human rights abuses they may have committed during the apartheid regime. They were in fact seeking amnesty for themselves and their party. *See Id.*

#### IV. CONCLUSION

The South African TRC was designed to record and learn from past violence that stemmed from discrimination.<sup>64</sup> There are clear limitations to truth commissions. Most importantly, they do not have prosecutorial powers, nor can they act as judicial bodies to pronounce individuals guilty of crimes.<sup>65</sup> The focus of a truth commission should not be on judicial determinations, but on full disclosure of past abuses. Hence, when structured like a court, allowing hearings with counsel and questioning those accused, a truth commission will be swayed to punish the accused instead of seeking full disclosure of events. Accordingly, truth commission objectives are best laid out in legislation by a governmental body willing to explore past violence. Disclosing individual human rights violations provides a cleansing of the past and permits the establishment of a democratic foundation for the future.

Another successful objective of the South African TRC was to grant amnesty to persons who fully disclosed all relevant facts relating to violent acts motivated by political objectives.<sup>66</sup> Amnesty considerations can best be achieved only by full disclosure. Truth commissions allow for the healing process of societies to acknowledge past abuses in order to prevent such violence from reoccurring in the future. The South African TRC was successful at building a strong democratic foundation after decades of human rights abuses in South Africa.

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64. "[P]unishment and forgiveness are both ways of seeking stable alternatives to vengeance and of constructing a legitimate moral order." Elizabeth Kiss, *Moral Ambition and Beyond Political Constraints: Reflections on Restorative Justice*, TRUTH V. JUSTICE 68, 83 (Robert I. Rothberg & Dennis Thompson eds., 2000).

65. Hayner, *supra* note 1, at 226.

66. See Unity & Reconciliation Act, *supra* note 11.