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UPDATE ON THE TRANSITION PROCESS

PAPER III:
THE PRETORIA MINUTE
AND WORKING GROUP REPORT
OF AUGUST 6, 1990

On August 6, 1990, after fifteen hours of negotiations, the African National Congress (ANC) and the South African government issued a joint statement known as the Pretoria Minute. The document expressed the acceptance by both parties of a report prepared by a bipartisan Working Group regarding the release of political prisoners and the granting of an indemnity. The Pretoria Minute also announced the suspension by the ANC of the armed struggle, and a commitment by the government to end the State of Emergency still in force in the province of Natal and to consider repealing certain provisions of the Internal Security Act.

In this paper, the Southern Africa Project of the Lawyers' Committee for Civil Rights under Law presents an analysis of the

Pretoria Minute and the Working Group Report of August 6th, 1990. This paper is the most recent in a series of updates produced by the Southern Africa Project. The Project hopes that this series of papers will provide some insight into each important step of the transition process leading to a new and democratic South Africa.¹

I. Background

ANC Deputy President Nelson Mandela held a series of discussions with South African government officials during the last months of his detention. The first public steps in the current transition process were the changes announced in President de Klerk's speech of February 2nd, 1990. Among those reforms were the unbanning of the ANC, the Pan-Africanist Congress (PAC), the South African Communist Party (SACP), and 33 other organizations. Although the speech was criticized by the Southern Africa Project and other groups and individuals for not going far enough,² President de Klerk did proclaim: the release of those political prisoners convicted solely of membership in the previously banned organizations; the repeal of certain

¹ The two earlier updates are: Southern Africa Project, Statement regarding the Address by State President F.W. de Klerk (Feb. 2, 1990) and The Partial Lifting of the State of Emergency in South Africa (June 8, 1990) (available from the Southern Africa Project).

² Southern Africa Project, Statement regarding the Address by State President F.W. de Klerk, supra note 1.

aspects of the Emergency Regulations (but only those provisions dealing with the media and educational institutions); the lifting of restriction orders; the suspension of the death penalty pending reform of its use; and limits on the duration of Emergency detentions. On February 11th, 1990, Nelson Mandela was released from his 27 year-long imprisonment.

After pre-negotiation "talks about talks" between ANC and South African government delegations, the two sides issued the Groote Schuur Minute on May 4th, 1990. This document outlined a commitment on both sides to work "towards the resolution of the existing climate of violence and intimidation from whatever quarter as well as a commitment to stability and to a peaceful process of negotiations." The Groote Schuur Minute also established a Working Group whose Report on an amnesty for political prisoners and an indemnity for exiled South Africans is the subject of this paper.

In the meantime, the Groote Schuur Minute authorized the consideration with a view to release of the cases of political prisoners convicted either of leaving South Africa without a valid travel document or of membership in a previously prohibited organization. The Groote Schuur Minute granted temporary immunity for the members of the ANC National Executive Committee and others outside the country in order to permit them to return to South Africa for the talks. The South African government also

promised to review security legislation and the then-existing nationwide State of Emergency, although it provided little concrete sense of whether real reform would take place.

In fact, President de Klerk did announce on June 7th, 1990 that the State of Emergency would not be renewed when it expired on June 12th. He included an important exception: emergency regulations would remain in force in Natal due to the continued fighting there. President de Klerk also announced several new security measures such as adding 10,000 new members to the South African Police and allocating R 840 million (approximately US \$ 315 million) to improve police effectiveness. Security legislation such as Section 29 of the Internal Security Act remained in place -- permitting detention without trial.

The Working Group established by the Groote Schuur Minute was expected to issue its Report on May 21st. It was later postponed to July. Many commentators believed that the prolonged delay pointed to fundamental differences between the two sides over the amnesty issue. In the meantime, the negotiation process appeared to be under threat particularly because of actions of the South African security establishment.³

³ In July 1990, the South African Police announced the detention of approximately forty ANC and SACP members as they entered the country. The police also detained several other SACP officials, citing evidence of a communist conspiracy against the country.

The SACP stated that the police were simply trying to undermine the organization of the SACP's first major public rally

These mounting pressures were eased during a private meeting on July 26th between Nelson Mandela and President de Klerk. This permitted the August 6th meeting between the two negotiating teams to proceed as planned. The result is the Pretoria Minute, issued alongside the long-anticipated Working Group Report. In the following sections of this paper, each of the most important aspects of the two documents will be analyzed in turn.

II. Suspension of the ANC's Armed Struggle

The ANC announced that "it was now suspending all armed actions with immediate effect." Pretoria Minute, para. 3. The South African government merely reaffirmed its commitment together with the ANC "to do everything in their power to bring about a peaceful solution as quickly as possible." Id. As for the State of Emergency in Natal, the government promised only to undertake "to consider [its] lifting... as early as possible in the light of positive consequences that should result from this accord." Para. 6.

since the unbanning of the Party. The rally was scheduled for July 29th, the Sunday after the police actions. One of those detained was Mac Maharaj, a key ANC and SACP organizer.

The police alleged that Joe Slovo, General Secretary of the SACP and a member of the Groote Schuur negotiating team, was implicated in the conspiracy. Slovo rebutted with documentation which showed that he was out of the country at the time he was purportedly in South Africa plotting a coup.

The South African government declined to commit itself to curbing the activities of its security forces or its surrogates. At the 1 a.m. press conference at which the Pretoria Minute was publicized, Nelson Mandela criticized the government for the continuing brutality of its police: "Until the Government tames the police we will continue to be dissatisfied."

In recent months, police officers have killed large numbers of people in attacks on township residents. The Human Rights Commission, an independent South African monitoring group, issued a report on June 6th, 1990, which stated that 176 people had been killed and 1,563 injured in attacks by South African and "home-land" police on peaceful demonstrations since February 2nd, 1990. The Commission added that actual figures were probably higher since other incidents have presumably gone undocumented. Allegations continue of the pivotal role the South African Police and the Kwa Zulu Police play in exacerbating the violence in Natal. And, armed vigilantes continue to foment terror in townships all over the country.

Violent deaths of leading anti-apartheid activists also point to the continued operation of the government's death squads. While the South African military issued a statement on July 31st, 1990 that its death squad, the Civil Cooperation Bureau (CCB), had been disbanded, no details have been given regarding the fate of its members, its projects, its materiel, or

its financial resources. There has been no indication that the operations of the alleged police death squad stationed at Vlakplaas farm outside Pretoria have been terminated.

Therefore, opposition activists remain in considerable danger. Nevertheless, the ANC gains a great deal from its unilateral renunciation of violence. It wins the moral high ground in the negotiation process and is strengthened in its diplomatic talks with foreign governments. Also, as Nelson Mandela made clear at the press conference, the ANC can and will continue with strikes and boycotts. He said, "As long as there are no alternative mechanisms through which our people can address their grievances, it can be expected that mass action will be resorted to."

III. The Internal Security Act

The South African government promised to "give immediate consideration to repealing all provisions of the Internal Security Act [No. 74 of 1982] that (a) refer to communism or the furthering thereof; (b) provide for a consolidated list; (c) provide for a prohibition on the publication of statements or writings of certain persons; and (d) provide for an amount to be deposited before a newspaper may be registered." Pretoria Minute, para. 7. The Government added that it "will continue reviewing security legislation and its application in order to ensure free

political activity and with the view to introducing amending legislation at the next session of Parliament." Id.

This section of the Pretoria Minute is most notable for its omissions. The most important and most repressive aspects of the Internal Security Act remain in force. Section 28 permits the detention of a person merely under the suspicion that the person may commit an act which may endanger the maintenance of law and order. Section 29 authorizes indefinite detention for interrogation without charge or trial. Section 31 permits potential state witnesses in political trials to be held incommunicado indefinitely. Section 50 allows a police officer to arrest anyone without a warrant and hold that person incommunicado for 48 hours, if, in the officer's opinion, that person's actions are contributing to "the continuation of a state of public disturbance, disorder, riot or public violence." As of August 8th, 1990, the Human Rights Commission counted 103 then current Section 29 detainees. The Commission reported a total of 143 such detainees since January 1st -- including those who have been charged and are awaiting trial; those who have been released; those who have died in detention; and those who are still in detention.

Aside from these sections authorizing various forms of detention, the Internal Security Act also allows the government to prohibit gatherings. Section 46 empowers magistrates to

prohibit or restrict any gathering that, in the magistrate's opinion, may endanger the public peace. Sections 48 & 49 allow the use of force, even lethal weapons, to disperse prohibited or "riotous" gatherings. Until late last year, the government enforced a total ban on all outdoor public gatherings. The empowering statute for this ban was the Riotous Assemblies Act, No. 17 of 1956 (as amended in 1974).

IV. Definition of Political Offenses

In paragraph 2 of the Pretoria Minute, both negotiating teams accepted the final Report of the Working Group which had been authorized in the Groote Schuur Minute to look into the question of an amnesty for political prisoners and an indemnity for exiles and others who risk future prosecution for their past political activities. The Groote Schuur Minute talked in general terms, saying that "[a]ll persons who may be affected will be considered." Para. 1. The Pretoria Minute stated, however, that the Working Group had as its purpose a plan "for the release of ANC-related prisoners." Para. 2.

In para. 6.6.2 of the Working Group Report, the South African government reserved the right to "consult other political parties and movements... with regard to the grant of pardon or indemnity..." In those discussions, the government is "free to formulate its own guidelines..."

Some South African organizations have expressed their reservations about the "ANC-related" language. For example, the Black Lawyers Association commented that, "The statement that only African National Congress political prisoners will be released causes concern to a non-sectarian lawyer organisation like ours."

The general understanding, however, is that, out of deference to other movements, the ANC did not want to limit the scope of negotiations that might occur between the government and other organizations. Nevertheless, it is anticipated that the guidelines in the Pretoria Minute and the Working Group Report will be applied to all political prisoners as minimum standards leaving the potential for other movements to negotiate broader definitions for an amnesty/indemnity applying to their members, if possible.

The Working Group attempted to define the terms "political prisoner" and "political offense." It presented guidelines which deal with those already convicted; those liable for prosecution; those awaiting or in the midst of a trial; and those in detention. Report, para. 6.1. In defining the terms "political offense" and "political prisoner," the Working Group noted that there are no generally accepted definitions according to interna-

tional law. Para. 6.5.1.⁴ The Working Group, however, considered the field of extradition law most fruitful for developing these definitions. Id. The Working Group listed a series of points which it described as guidelines for determining which offenses should be included within the scope of an amnesty and an indemnity. Para. 6.5.2.

Some of these guidelines are certainly widely accepted by courts in other countries. For example, "common" crimes including violent acts may be regarded as political depending on the motive of the alleged perpetrator, the context in which the act was committed, and the relationship between the act and the political objective. Para. 6.5.2(c)(i-ii, vi).

However, some of the other points listed by the Working Group are not as widely accepted. For example, para. 6.5.2(c)(iii) states that "[t]he nature of the political objective (e.g. whether to force a change in policy or to overthrow the Government)" should be considered. The proper interpretation of this guideline is unclear. However, if it means that the definition of political offenses includes a judgement of the merits of the political objective, then the guideline does not follow the precedents accepted by other states. Traditionally, United

⁴ For a discussion of definitions for the terms "political prisoner" and "political offense," see generally Southern Africa Project, The Release of South Africa's Political Prisoners: Definitions and Expectations (March 3, 1990) (available from the Southern Africa Project).

Kingdom and United States courts refrain from judging the contents of beliefs when deciding whether they are political or not.⁵ Although South African courts have not explicitly adopted the cases cited, they generally follow United Kingdom precedent regarding extradition law.⁶

Para. 6.5.2(c)(v) also raises certain issues. Whether an offense is political can, according to the Working Group, depend on "[t]he object of the offence (e.g. whether it was committed against Government property or personnel or directed primarily against private property or individuals)." The language used in the example may be overly narrow by specifying government-owned property. In other contexts, strategic targets in general have been included in defining political activity. For example, Professor C.A. Norgaard, the Independent Jurist appointed to consider the release of certain Namibian prisoners under the political prisoner provisions of the United Nations Security Council Resolution 435, took a broad view in applying this particular standard.

Professor Norgaard advised in favor of the release of a prisoner despite the fact that the object of the act in question

⁵ See, e.g., Schtraks v. Government of Israel (1962) 3 ALL E.R. 529; Quinn v. Robinson 783 F.2d 776, 804-805 (9th Cir., 1986).

⁶ S. v. Devoy, 1971 1 S.A. 359(N); Ex parte Rolff, 109 (26) S C 433, 439.

was privately owned and not government property.⁷ In that case, an attack on a petrol pump was viewed by Professor Norgaard as political, because of the implications on the transport infrastructure inside Namibia. In another case where the target was perhaps only indirectly government-owned, students gathered at a Namibian secondary school to mobilize a boycott. They disrupted examinations and then threw rocks at the school building and police vehicles during clashes with security forces. Professor Norgaard advised in favor of the students, because their actions were calculated to put pressure on the South African government's policies toward Namibia.⁸ The Working Group specifically cited Professor Norgaard's studies of the Namibian cases. Report, para. 6.5.

The best approach would be that in applying the Working Group's guidelines there would be no requirement that all the elements listed be present in every case in order for amnesty to be granted. A case in point is the guideline contained in para. 6.5.2(c)(vii). This states that the political nature of an act can depend on whether it was "committed in the execution of an order or with the approval of the organization, institution or body concerned."

⁷ Professor Norgaard's advice has yet to be released publicly.

⁸ For further discussion of Professor Norgaard's work, see Southern Africa Project, The Release of South Africa's Political Prisoners: Definitions and Expectations, *supra* note 4 at 14-18.

Both United Kingdom and United States extradition cases have recognized acts as political despite the fact that there was no organizational structure which commanded the commission of the offense. For example, a United States court ruled that: "[I]t is entirely possible to sympathize with, aid, assist, or support a group, [and] help further its objectives... without becoming a member of the organization. Still, one may be acting in furtherance of an uprising." Quinn, supra note 5 at 809. A United Kingdom case specifically cited by the full bench of the Natal Provincial Division in Devoy, supra note 6, ruled in favor of Polish sailors who used force to seize control of a Polish ship in order to seek asylum in the United Kingdom, despite the fact that the sailors were not part of any political movement. R. v. Governor of Brixton ex parte Kolczynski (1955) 1 Q.B. 540. The Kolczynski Court recognized the hostility the sailors felt towards the Polish government and pointed out that under the circumstances prevailing inside that country it was impossible to organize any cohesive opposition movement. Id.

This is an important point in light of the situation in South Africa. For years, the South African government has violently hindered the formation of any organized opposition. If the para. 6.5.2(c)(vii) guideline is interpreted so that every case must have an element of command from an organization, whole categories of prisoners may be deemed non-political because they

did not belong or were not ordered to act by a formal organization. For example, the hundreds of prisoners convicted of acts arising out of township unrest risk remaining in prison despite the fact that their actions were clearly aimed at protesting apartheid.

V. Procedures

The Human Rights Commission currently estimates that 3,000 political prisoners are being held inside South Africa. Of these, approximately 300 have been convicted of security offenses. The rest of the prisoners have been convicted of "unrest-related" offenses. It is estimated that at least 2,000 prisoners should be released under the terms of the Pretoria Minute.

The Pretoria Minute provides some details on the procedure for the release of these prisoners. On September 1st, 1990, the release will commence of those prisoners who can be dealt with administratively. Para. 2. Indemnity to categories of people (both those in exile and inside the country) will be granted as of October 1st, 1990. Id. Case-by-case assessments of prisoner releases and the issuance of indemnities to individuals will hopefully be completed in six months but no later than April 30th, 1991. Id. In connection with the case-by-case assessment of the status of individuals, a "body" will be formed by August 31st, 1990 to review such cases.

The Working Group Report lacks specificity regarding the composition of the organizational structure of the "body." It merely states that "a body or bodies be constituted, consisting of a convenor with ad hoc appointments from concerned groups when dealing with particular offences..." Para. 8.2. No mention is given regarding the determination of the impartiality or expertise of the participants. The body or bodies do not appear to have been given any kind of judicial authority. The amnesty and indemnity remain "executive governmental function[s]." Para. 8.1. The body or bodies will merely act in an advisory capacity: "The purpose of devising a mechanism, is to provide the executive with wise advice and to demonstrate that the interests of all parties are being taken into account in as objective a manner as possible." Id. Thus, the role and procedures of these groups remain unclear.

VI. Indemnity for Pro-Government Forces

Para. 6.6.2 of the Working Group Report enables the South African government to negotiate with other groups about extending the application of the amnesty to their members (see also text supra):

[I]t is understood that the Government may in its discretion consult other political parties and movements, and other relevant bodies with regard to the grant of pardon or indemnity in respect of offences relating to them. For this purpose it shall be free to formulate its own

guidelines which it will apply in dealing with members of such organisations, groupings or institutions, governmental or otherwise, who committed offences on the assumption that a particular cause was being served or opposed.

This provision would enable the government to extend an amnesty to government bodies and pro-apartheid groups such as its own death squads, the vigilantes, and extra-governmental white extremists. The government is free to devise its own terms for pardoning other categories of offenders, including those who may have committed gross violations of human rights that could not be considered good faith efforts to maintain law and order or protect the security of the state.

Conclusions

The Pretoria Minute and the Working Group Report have received mixed blessings from various political and human rights groups active inside South Africa. The Human Rights Commission pointed to the continued existence of the Internal Security Act as an example of the obstacles to a climate of negotiation. The Commission said that, "[T]he ANC has put the Government on its honour to remove [such obstacles]." Lawyers for Human Rights, a South African non-governmental organization of lawyers, applauded the ANC's suspension of armed actions, but continued to worry about the violent tactics of the South African Police. The group stated that, "In our view, it is this which constitutes the gravest threat to the prospects of a peaceful and negotiated

settlement." The Black Lawyers Association declared that, "The statement by the Government to 'look into' some aspects of security legislation is totally unacceptable."

Many aspects of the Pretoria Minute and the Working Group Report should be applauded. The ANC's suspension of the armed struggle is morally and politically astute. The two documents do establish a procedure for an amnesty for political prisoners and an indemnity for exiles and others already inside South Africa.

Unfortunately, the South African government has not taken a reciprocal step towards suspending its own violent activities. The State of Emergency remains in force in Natal, and the most severe aspects of the Internal Security Act remain unaddressed. The amnesty and indemnity will be governed by guidelines which may exclude some individuals who should be included. The procedure involves a body or bodies which appear to have only advisory authority. The South African government retains the right to negotiate an amnesty with other organizations. This raises the risk of a pardon for those who have committed gross human rights violations on behalf of the apartheid system.

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