

Report of the Working Group Established under Paragraph 1 of the Groote Schuur Minute

1. On 2, 3 and 4 May 1990, at Groote Schuur in Cape Town, a delegation of the African National Congress met the State President accompanied by Ministers and officials. At the conclusion of the meeting a document, called the Groote Schuur Minute, was adopted. A copy thereof is attached. Paragraph 1 provided for the establishment of a working group. The ANC nominated as its representatives on the working group, Messrs Zuma, Maduna, Nhlanhla, Pahad, Phosa and Ndlovu (its members on the Steering Committee). The Government nominated as its representatives Minister Coetsee, Deputy Minister Meyer and Messrs Van der Merwe, Swanepoel, Louw and Viall, Major General Knipe and Brigadier Kok.

2. The Working Group was charged with:

- making recommendations on a definition of political offences in the South African situation;
- discussing, in this regard, time scales; and
- advising on norms and mechanisms for dealing with the release of political prisoners and the granting of immunity of political offences to those inside and outside South Africa.

3. It is recognised that in terms of the Groote Schuur Minute, the category of persons involved only in offences set out hereunder have already been catered for, for immediate attention:

3.1 The leaving of the country without a valid travel document;

3.2 Any offences related merely to organisations which were previously prohibited (including membership of Umkhonto we Sizwe).

4. Persons in the above category are entitled to be dealt with in terms of the provisions set out in paragraphs 6.2 and 6.3 hereof, as the case may be.

5. The Working Group met on a number of occasions and reports as follows:

Defining Political Offences in the South African Situation:

6. 1 The following classes of persons, whether inside or outside South Africa, must be taken into account with regard to pardon or indemnity for political offences:

1. Persons already sentenced, including persons serving a sentence, persons subject to any suspended sentence, persons awaiting execution of a sentence or where the case is on appeal or review.

2. Persons who may be liable to prosecution, or who are awaiting or undergoing trial.
3. Persons in detention.

6.2 The power to pardon is vested in the State President by virtue of section 6 of the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983), and section 69 of the Prisons Act, 1959 (Act 8 of 1959) , and will apply to persons already sentenced, i.e. class (a) above.

6.3 Special power to grant indemnity is required in regard to persons referred to in class (b) above. The relevant power is contained in section 2 of the Indemnity Act, 1990. Section 6 of the Criminal Procedure Act, 1977 provides for the stopping of a prosecution and may therefore be applied.

6.4 The recommendations contained in this document relate only to political offences and in no way imply any limitation upon the general exercise of the powers mentioned in paragraphs 6.2 and 6.3.

6.5 In preparing for the making of “recommendations on a definition of political offences in the South African situation”, the following principles and factors were noted (the principles and factors are largely those applied by Prof Norgaard in the Namibian situation after study of the jurisprudence and the representations of the parties concerned and do not purport to be exhaustive):

6.5.1 There is no generally accepted definition of “political offence” or “political prisoner” in international law. What is generally accepted, however, is that principles developed in the field of extradition law are relevant in distinguishing between “political offence” and “common crimes”.

6.5.2 The law and practice of states show that there is now a considerable degree of consensus both as to the types of offence which may in principle be classified as political as well as to the sort of factors which should be taken into account in deciding whether an offence is “political” or not. In particular, the following are aspects of the law and practice of extradition which appear to provide valuable guidance:

- a. Whether or not an offence is political depends on the facts and circumstances of each individual case. The question is thus approached on a case by case basis.
- b. Certain offences are recognized as “purely” political, eg. treason directed solely against the State and not involving a common or “ordinary” crime such as murder or assault or the dissemination of subversive literature.
- c. In certain circumstances a “common” crime, even a serious one such as murder, may be regarded as a political offence. Here the

following are the principal factors which are commonly taken into account by national courts:

- i. The motive of the offender - i.e. was it a political motive (eg. to change the established order) or a personal motive (eg. to settle a private grudge).
- ii. The context in which the offence was committed, especially whether the offence was committed in the course of or as part of a political uprising or disturbance.
- iii. The nature of the political objective (eg. whether to force a change in policy or to overthrow the Government).
- iv. The legal and factual nature of the offence, including its gravity (eg. rape could never be regarded as a political offence).
- v. The object of the offence (eg. whether it was committed against Government property or personnel or directed primarily against private property or individuals).
- vi. The relationship between the offence and the political objective being pursued, eg. the directness or proximity of the relationship, or the proportionality between the offence and the objective pursued.
- vii. The question whether the act was committed in the execution of an order or with the approval of the organisation, institution or body concerned.

6.6.1 The Working Group endorses the principles and factors set out in paragraph 6.5.2 and accepts that these will form the basis of guidelines to meet the South African situation when considering the grant of pardon or indemnity in respect of political offences.

6.6.2 As stated in the Groote Schuur Minute, it 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, grouping or institutions, governmental or otherwise, who committed offences on the assumption that a particular cause was being served or opposed.

TIME SCALES

7.1 Having defined political offences, the norms and the guidelines a cut-off date will have to be fixed. Pardon and indemnity will only be considered in respect of political offences committed on or before that date.

7.2 Bearing in mind the preamble to the Groote Schuur Minute, the Working Group accepts that the process should proceed as expeditiously as possible. It is understood that diverse periods for pardon, indemnity and release will apply to diverse persons,

categories of persons and categories of offences. A mechanism to provide advice to Government in this regard is necessary.

7.3 It is understood that the Government may, without waiting for the implementation of the process contemplated in this document, proceed to exercise the powers referred to in paragraph 6.2, in terms of existing policy. This may result in substantial results in the very near future in regard to persons referred to in class a of paragraph 6.1

A MECHANISM

8.1 The granting of pardon or indemnity in respect of a specific offence or a category of offences, is an executive governmental function. 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.

8.2 It is suggested for this purpose that a body or bodies be constituted, consisting of a convener with ad hoc appointments from concerned groups when dealing with particular offences (or categories of offences).

8.3 It is recommended that this Working Group be kept active in respect of ANC interests.