



**Lawyers' Committee for  
Civil Rights Under Law**

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**TESTIMONY  
Prepared for  
  
the  
  
SUBCOMMITTEE ON AFRICA  
of the  
U.S. HOUSE OF REPRESENTATIVES**

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**by**

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**Lawyers' Committee for Civil Rights Under Law**



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### **SOUTH AFRICA: THE TRANSITION**

On Monday, September 7th, negotiating parties finalized the terms for the establishment of the Transitional Executive Council ("TEC" or "Council"), the primary institution that will oversee the transition to a new democratic era in South Africa.

It has been over three years since the release of Nelson Mandela from a South African prison. Yet his sizeable black constituency still cannot vote. The road to democracy in South Africa has been characterized by a slow, stop and start process during which tragedy and disappointment have often come on the heels of signs of hope and raised expectations.

The democratic transition in South Africa officially began in December 1991 when 19 political parties came together to launch the Convention for a Democratic South Africa ("CODESA"), a multi-party negotiating forum. Hindsight has shown the timetable set by that forum for the transition to be overly optimistic. Specifically, an Interim Government Council representing the 19 CODESA parties was to have been established in June 1992. An election for a constituent assembly was to have followed a year later - June 1993.

Negotiations, however, were suspended in May 1992, just before the Interim Government Council was to have been established. The talks were terminated completely in June 1992, amidst accusations by the African National Congress ("ANC") and other opposition parties, that

the National Party-led Government had been assisting, if not orchestrating the forces of political violence that continued to ravage African communities. Thus, instead of preparing for South Africa's first democratic elections, the major political players spent the balance of 1992 trying to put the derailed negotiations back on track.

In April of this year, CODESA was reconstituted into a 26 member "Multi-party Negotiating Forum." Although parties from the far left and the far right have intermittently participated in the forum, the key players, are still regarded to be President de Klerk's National Party ("NP") and the ANC. The delay in the negotiations appears to have worked mainly in favor of the Government. During the hiatus, the ANC made significant concessions on three key issues: power-sharing, regionalism and the nature of the constitution-making process.

## **KEY ISSUES**

### **Power-Sharing**

Throughout the negotiations, a central issue of contention has been the Government's insistence that a traditional constitutional order based on majority-rule would not be sufficient to protect the interest of the white minority. President de Klerk has advocated instead, a government in which at every level of the legislative and executive branches a minority party would have effective power to veto initiatives sought by parties representing the majority of the population.

Initially, the ANC advocated a short transition process that would end in a winner-take-all election. However, the Congress changed its position late in 1992 at the insistence of Joe Slovo, one of the liberation movement's most respected leaders. Slovo contended that such an abrupt

exclusion from power would heighten the likelihood of a backlash from white extremists and embittered moderates who would still have operational control of the Afrikaner dominated civil service and security forces. The ANC leadership accepted Slovo's analysis that a gradual process of transition marked by cooperation between the ANC and those now in power would minimize the threat to stability.

As a result of this policy shift, the ANC reached an agreement with the National Party to share power in a "Government of National Unity and Reconstruction" which would govern the country for at least 5 years after the election of a constituent assembly. All parties that win above 5% of the vote in the April 27th elections will have a proportionate number of seats in the Constituent Assembly/National Assembly and proportional representation in the Cabinet. The President will be chosen from the majority party, but would need the approval of two-thirds of the Cabinet for certain important decisions.

At the conclusion of the five year period of joint rule (1999), there will be an election for a new government based on the post-apartheid constitution, as adopted by the Constituent Assembly ("CA"). The ANC believes that the democratically elected CA will agree on a constitutional order based on traditional principles of majority-rule.

Polls and predictions released at the beginning of 1993 regarding the possible outcome of the first non-racial elections vary. According to one prediction, votes would be cast by the estimated 20 million electorate as follows: ANC - 60%; NP - 17%; Pan Africanist Congress ("PAC") - 8%; Conservative Party ("CP") - 6% and Inkatha Freedom Party ("IFP") - 5%, with the remaining votes distributed among other parties, none of which would reach the 5% threshold.<sup>1</sup> However, the NP fairs much better under a prediction made by two political

scientists, Andrew Reynolds and Bernard Grofman, that the ANC would receive 40.6% of the vote, the NP 30.2%, the IFP 11.4%, and the CP 5.7%, with the PAC and others receiving less than 5%.<sup>2</sup>

Under the first scenario, the combination of ANC and PAC on the left would have sufficient strength, i.e. 68% (more than a two-thirds majority), to dominate a NP/CP/IFP alliance on the right. However, under the second scenario, the NP-led conservative alliance would have substantial power to block the exercise of the executive powers by an ANC President.

Some analysts view the latter scenario as the more probable one. The ANC claims the bulk of its support in communities that are increasingly violence ridden. The consequence of that violence may be that a large segment of ANC supporters don't vote because of fear for their safety. According to a recent poll commissioned by Matla Trust, a South African based organization which will be holding voter education workshops throughout the period leading up to elections, 38% of the Africans surveyed claimed that the violence is likely to keep them away from the polls on election day. However, another recent poll indicates that the support for Mandela has risen among both blacks and whites. According to Markinor, a South African-based, Gallup-affiliated research service, Black support for Mandela rose from 65% in November 1992 to 74% in May 1993. His support among whites went from 3% to 14%. According to Markinor's chief analyst, the increased support for Mandela suggests that "his performance and display of leadership after Chris Hani's assassination have earned him new respect."<sup>3</sup>

## **Regional Powers**

A second hotly contested issue throughout the negotiations has been the nature of the post-apartheid state. The ANC's original position was that the future state be a unitary one, with a strong central government, as opposed to a decentralized confederation of semi-autonomous jurisdictions, as proposed by the Government. The ANC feared that the entrenchment of substantial powers in regional governments would enable localities (some of which stand a better chance of being under white control than the national government) to block initiatives to redress the social and economic inequalities created by apartheid.

The NP gained allies in its campaign for federalism from repressive homeland governments which saw in federalism a means to maintain the status quo, insulated from internal or international reprisal by their new status as parts of a democratic whole. The Conservative Party and other white right-wing political groupings joined the press for powerful regions as a route to "self-determination for the Afrikaner nation". Under the leadership of the IFP, and calling themselves the Concerned South Africans Group ("COSAG"), these black and white conservative parties have refused to endorse the April 27th election date until their demands on the question of regionalism have been met.

In order to avoid further alienation of the IFP, a frequent detractor during the negotiations, the ANC has departed substantially from its original insistence on a highly centralized, unitary state. Now, according to Secretary General Cyril Ramaphosa, the ANC maintains that "regions are the levels where democracy and good government can be effectively practiced."<sup>4</sup> They have agreed to strong regional governments with a substantially greater devolution of power than originally envisaged.

The Multi-party Negotiating Forum has formulated a set of "constitutional principles," not yet formally adopted, which will be binding on the CA. The principles provide for

democratically elected regional governments with "appropriate and adequate legislative and executive powers" to enable them to function effectively.

Regional governments are given both exclusive powers and certain other powers that are to be exercised concurrently with the national government. The current draft of the constitutional principles sets out a detailed 12 pronged prescription for the allocation of powers to the national and regional governments which includes an admonishment to the national government to refrain from exercising its powers "so as to encroach upon the geographical, functional or institutional integrity of the [regional governments]." Criterion such as the need to maintain uniform standards, security, economic unity or protection of the common market are used to justify exclusive or overriding powers granted to the national government. Criterion 9 directs the CA to grant the regional governments powers which are either exclusive or concurrent with the national government for "planning and development and delivery of services" and "in respect of aspects of government dealing with the specific socio-economic and cultural needs" of the regions' inhabitants. Concurrent authority will exist where mutual cooperation is desirable to guarantee equality or access to government services. The regions are granted veto power over national government initiatives to alter the allocation of power. Regional governments will also have a constitutional right to "an equitable share" of revenue generated nationally and will presumably have their own revenue raising competence.

During the interim government phase, the regions will be administered by an interim regional government that will be elected at the same time as elections for the CA. The powers, functions and structures of those regional governments during the transition period are presently being considered by a committee established by the Multi-party Negotiating Forum, and will be entrenched in an interim constitution. Regional boundaries are being set by a Delimitation Commission. While the interim regional dispensation will not be binding per se on how the CA

gives shape to the final constitutional provisions, it will have substantial impact on it, since half of the representatives to the CA will be elected by regional representatives.

These agreements do not go far enough, however, for the IFP and the CP which are now boycotting the talks. Gatsha Buthelezi, President of the IFP maintains that unless the final agreement reached during the negotiations includes a binding prescription for federalism that will accommodate his interests, he will continue to boycott the talks. The IFP is pushing for a confederal model that would permit regions to have strong fiscal powers, their own militia and almost total autonomy of a variety far greater than the IFP currently enjoys as the party in power in the KwaZulu homeland.

### **The Nature of the Constitution-making Process**

On a number of occasions the multi-party talks have broken-down over disagreement about the process by which the constitution would be drafted. The NP and its allies, have sought to have the broadest possible scope of constitutional issues determined by the multi-party forum, rather than a democratically elected constituent assembly, in which they are likely to be minority parties. The ANC, initially adamant in favor of leaving decisions on all crucial constitutional questions to the elected constituent assembly, has yielded on this point.

The agreed process is that the unelected Multi-party Negotiating Forum will adopt an interim constitution that will govern the country during the transition period.\* The forum will

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\*As of the writing of this testimony, several aspects of the interim constitution were still being negotiated. In particular, issues relating to the wording of the chapter on fundamental rights, the electoral system, deadlock-breaking mechanisms in the process of constitution-making, the national executive, the judiciary, and the role and competencies of local governments, are still outstanding. Aspects of the draft interim constitution that have been agreed upon include a basic prohibition against discrimination, and most other universally recognized constitutional principles, including a right to life provision. However, in contrast to the U.S. constitution, there is specific

also adopt constitutional principles that will be binding on the work of the subsequently elected constituent assembly. Special majorities will be required to adopt constitutional provisions in the constituent assembly and a constitutional court will exercise judicial review over the conformity of the final constitutional provisions with the earlier principles. This represents an important victory for the National Party which has secured for itself as part of the constitutional principles, the required participation of minority political parties in the legislative process. According to one political analyst: " The NP's strategy is to lock as many preconditions in as possible so that the ANC will not be in a position to dilute them once it is the majority party. In the end, [the constituent assembly] will basically be left with filling in the detail of a new constitution, while the parameters within which it can maneuver are set by the multi-party forum, which is not an elected body."<sup>5</sup>

### **TIMETABLE**

The assassination of ANC and Communist Party leader Chris Hani in April, the arrest of 77 members, including the entire negotiating team, of the PAC in May, and the June 25th storming of the negotiations hall by armed white right-wing protestors, placed the negotiations perilously close to derailment. The continuation of negotiations in spite of those potentially paralyzing events is testament to the strong resolve, particularly of the ANC, to keep the talks on track. However, deadlines and timetables have rarely been met.

Based on the current status of the talks, the following timetable is being envisioned:

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language in the current draft which grants constitutional protection to affirmative measures aimed at promoting the advancement of previously disadvantaged groups. While the constitutional principles will be the only parameters legally binding on the Constituent Assembly, it is expected that there will be heavy reliance on the interim constitution as the basis for the permanent constitution.

## **LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

- **September 13-30, 1993** - Parliament convenes to enact a series of transitional measures, including the Transitional Executive Council Act, the Independent Electoral Commission Act and the Independent Media Commission Act.\*
- **Late October or Early November 1993** - A Transitional Executive Council (TEC) will be established which will supervise critical aspects of the government to create a "level playing field" and "conditions conducive to a free and fair election." The TEC will include representatives of all major political parties and, through sub-councils, will exercise control over 7 broad areas to be discussed below. In addition to the TEC, two other transitional commissions an Independent Electoral Commission and an Independent Media Commission will be established.
- **October, 1993** - Parliament enacts an interim constitution and an electoral law setting the parameters for elections for a constituent assembly.
- **April 27, 1994** - All South Africans of voting age go to the polls to elect a single 400-member Constituent Assembly ("CA"), half of whom would be elected on the basis of proportional representation using a national party list, and the other half elected from regional lists. All parties receiving votes of 5% or more will be entitled to a proportionate number of seats in the CA. Members of the CA would also serve as the interim National Assembly (NA). Once constituted, the NA elects a president and appoints a cabinet pursuant to the requirement that all parties elected to the NA are represented in the cabinet - The Government of National Unity and Reconstruction (GNUR).
- **1994-1996** - The Constituent Assembly completes the process of drafting a new constitution.
- **1994-1999** - The GNUR continues to govern the country until the first elections under the new constitution are held, five years after the election of the CA.

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\*It is important to point out here that even after the enactment of these measures, none of the agreements contained therein will be implemented until all of the transitional measures, including the interim constitution and the election law, have been promulgated.

## **TRANSITIONAL STRUCTURES**

### **The Transitional Executive Council**

On Thursday, September 23rd, the bill containing the terms for the establishment of the TEC was passed during the current special session of Parliament. The Council is expected to be fully constituted by the end of October.

The goals of the Council as articulated in the Transitional Executive Council Act are:

- to eliminate any impediments to legitimate political activities;
- to eliminate any form of intimidation which has a bearing on the transition;
- to ensure that all political parties are free to canvass support from voters to organize and hold meetings and to have access to all voters for the purposes thereof;
- to ensure the full participation of women in the transitional and electoral structures and processes;
- to ensure that no Government or administration exercises any of its powers in such a way so as to advantage or prejudice any political party; and
- generally to create and promote conditions conducive to the holding of free and fair elections.

Each party currently participating in the Multi-party Negotiating Forum will be entitled to have one representative on the Council. Of the 26 parties that began the negotiation process earlier in the year, only 19 parties voted in favor of the establishment of a TEC. The Inkatha Freedom Party, the KwaZulu Government which is dominated by the IFP and the Conservative Party have boycotted the talks for the past two months. The governments of two nominally independent homelands, Bophuthatswana and the Ciskei specifically voted against the measure and the Pan

Africanist Congress on the left and the conservative Afrikaner Volksunie party on the right, both abstained.

The three homeland governments, the Inkatha Freedom Party and most recently the PAC, have specifically stated that they do not intend to be represented on the TEC. However, the leading negotiators, the Government and the ANC have demonstrated a readiness to proceed on course whether or not some parties are left behind.

The extent and scope of the Council's authority have been the subject of much debate. The Government on the one hand, has insisted upon restricting the Council to a consultative role wherein it would consult with the Government solely on issues relating to the election. The ANC on the other hand, pushed for the TEC to have full control, or at least joint control with the Government, over strategic governmental functions such as the security forces and finance. The resulting compromise, which forms the basis for the final law, is that the powers of the TEC will be limited. Its mandate will be to assure free and fair elections solely, not to restructure apartheid institutions. It will not have authority to co-govern. Rather, by a 75% or 80% majority, depending on the subject matter, the TEC will have veto power over certain government initiatives. It will have the power to make inquiries and conduct investigations pertaining to matters that fall within the scope of its mandate and will also have primary control over a special peacekeeping force that it will create.

A Special Electoral Court established under the Independent Electoral Commission will resolve disputes between the Government and the Council where the dispute involves a disagreement over 1) whether "a particular matter falls within the scope of the powers of the Council or Subcouncil;" 2) proposed legislation that is alleged to be in conflict with the

objectives of the Council or 3) a directive of the Council with which the Government is obliged to comply. The findings of the Special Electoral Court will be binding and not subject to further appeal.

Both sides have attempted to frame the agreement as a victory for their respective constituencies. According to chief Government negotiator Roelf Meyer, "we are satisfied that this bill does not provide for a substitute of the Government in any way whatsoever, or joint control of the security forces." In contrast, Joe Slovo of the ANC maintains that the Council "has got enormous powers - the power to poke its nose into everything that has a bearing on a free and fair election. It is not a toothless tiger."<sup>6</sup> While it remains to be seen how the TEC will operate in practice, possible Government resistance to TEC directives which is intimated in Meyer's statement, may threaten the chances for Slovo's vision to become a reality.

The Council will exercise its oversight in 7 broad areas through the establishment of Subcouncils. Where new areas of concern arise, additional Subcouncils may be added. The 7 Subcouncils currently envisioned will oversee transitional activity relating to: 1) Regional and Local Government and Traditional authorities; 2) Law and Order, Stability and Security; 3) Defence 4) Finance; 5) Foreign Affairs; 6) Status of Women; and 7) Intelligence.

### **1. Regional and Local Government and Traditional Authorities**

The Subcouncil on Regional and Local Government and Traditional Authorities will be charged with gathering information and making proposals regarding "regional and local government budgets; powers, duties and functions, and restructuring and rationalization of regional and local government administrations; transitional measures; interim local government structures; and the demarcation of boundaries." It will also monitor the impact of legislative and

executive measures on traditional leaders and political participation in traditional communities.

**2. Law and Order, Stability and Security**

One of the newly created security organizations over which the Subcouncil on Law and Order, Stability and Security will have chief control is a national inspectorate comprised of police officials and other policing experts who will investigate and monitor all policing agencies. International experts will be called upon to assist in this process. Based on the results of its investigations, the Subcouncil will be expected to make recommendations regarding ways to improve the effectiveness of policing agencies. It will also establish a national independent complaints body which will receive and investigate complaints of police misconduct. Most importantly, the Subcouncil will serve as a check on the actions and decisions taken by the Minister of Law and Order who will be required to consult with the Subcouncil prior to any declaration of a state of emergency or unrest area. A committee will be established to mediate any disputes between the Government and the Subcouncil.

**3. Defence**

In addition to being kept abreast of all planned military activities, the Subcouncil on Defence will have the power to investigate any military officer or unit of the military which may be in breach of any code of conduct or disciplinary code. On the basis of such investigations, the Subcouncil will also have the authority to order, in consultation with the appropriate military commander, that specific disciplinary actions be taken against an officer found to be in breach of a code. Any deployment of the defence forces for purposes of crime prevention or peacekeeping must be in strict compliance with regulations specifically promulgated by the Subcouncil. The Subcouncil will also oversee resource allocations for the daily maintenance of

all armed forces, including a National Peacekeeping Force (NPF) whose establishment will be the sole responsibility of the Subcouncil. The NPF is to be comprised of all military forces falling under the authority and control of the participants in the Council who wish to contribute their personnel to the NPF. In establishing the NPF, the Subcouncil will strive to ensure equal representation on the force of all the political parties that contribute to it. The Special Electoral Court will resolve disputes between the Defence Ministry and the Subcouncil.

#### **4. Finance**

The Government will be required to keep the Subcouncil on Finance abreast of all recent economic developments and economic policy objectives. A critical function of the Finance Subcouncil will be to ensure that funds are not applied in a manner favoring one political party over another or in such a way that is wasteful or corrupt. In addition, any measures proposed by the Government which are designed to "rationalize Treasury functions in the process of realignment of government structures" during the transition will be subject to the Subcouncil's approval. The Subcouncil will have the power to request disciplinary investigations into possible mishandling of government funds by public officials. The Subcouncil will also make recommendations regarding the privatization of government functions.

#### **5. Foreign Affairs**

The Subcouncil on Foreign Affairs will monitor the Government's handling of foreign affairs and make recommendations regarding international agreements relating to the transition and on how best to promote international relations that are beneficial to South Africa.

#### **6. Status of Women**

The Subcouncil on the Status of Women will focus on "ensuring the full and equal

participation of women in the preparation for the implementation of and the transition to a free and democratic order in South Africa." Specifically, the Subcouncil will be charged with facilitating the implementation of gender sensitive legislation and ensuring that all participants in the Council, the other Subcouncils, the Independent Electoral Commission, the Independent Media Commission, the Independent Broadcasting Authority and other relevant organizations, promote the free and equal participation of women in the electoral process.

#### **7. Intelligence**

This Subcouncil will be charged with adopting a set of basic principles on intelligence which would serve as the basis for the creation of "a national intelligence capability in a new democratic dispensation." It will also organize and establish a Joint Co-ordinating Intelligence Committee comprised of senior representatives of all intelligence services which will help to ensure that Government intelligence operations are in line with the objectives of the TEC. This Subcouncil will also formulate a code of conduct which will be binding on all members of the services during the period of transition and which will serve as a basis for an official code in a new democratic dispensation. The Special Electoral Court will resolve any disputes between the Subcouncil and the Government.

#### **Independent Electoral Commission**

A separate commission called the Independent Electoral Commission is also expected to be in place before the end of this year. Sitting on the IEC will be seven to eleven people chosen on the basis of their reputations for impartiality and fairness and who specifically do not have high political party profiles. According to the Independent Electoral Commission Act which was

recently passed in Parliament, the role of the IEC will be:

- to administer, organize, supervise and conduct, whether directly or indirectly, free and fair elections for the National Assembly and all other legislatures in terms of the Constitution;
- to promote conditions conducive to free and fair elections;
- to determine and certify the results of elections and to certify to what extent such elections have been free and fair;
- to conduct voter education; and
- to make and enforce regulations for the achievement of such objects.

Members of the international community will be able to participate on the Commission in an advisory capacity. Not more than 5 international experts will be invited to serve as non-voting members of the IEC. There will also be an International Advisory Committee which will advise the Commission on any matter regarding the performance of its functions.

An Electoral Tribunal will also be established. The tribunal will determine the merits of complaints involving charges against a person or political party of failure to comply with the terms of the Electoral Code of Conduct. The tribunal will also have the power to impose penalties prescribed by the Electoral Act. The decisions of the Electoral Tribunals will be reviewed upon appeal to Electoral Appeal Tribunals. The Special Electoral Court will review decisions of the IEC.

#### **The Independent Media Commission**

The Independent Media Commission ("IMC") will be responsible for ensuring the equitable treatment of political parties and candidates by the state-owned media and other

information services. The Independent Media Commission is not to be confused with the Independent Broadcasting Authority ("IBA") which is the only permanent structure being established during the transitional period. The IBA which is patterned substantially after the U.S. Federal Communications Commission, is not expected to be in place until after the elections. Consequently, the IMC will be the sole entity monitoring the media during the transitional period.

### **THE MARGINALIZED PARTIES**

Since the negotiations reconvened in April, there have been 26 parties participating. The ANC and the NP continue to dominate the talks. The "sufficient consensus" required to reach agreement on any issue, has been interpreted generally to be realized with the assent merely of the ANC and the NP.\* At the margins of the negotiating forum are parties with relatively small constituencies on the one hand, but enough power to impact substantially on the course of the proceedings.

#### **Inkatha and the Bantustan Parties**

Chief among those is the predominantly Zulu Inkatha Freedom Party whose support base has been pegged as between 3% to no more than 10% of the national population. Recently, prominent conservative whites have switched their allegiance from the NP to the IFP. In addition to the increasing white support for Inkatha, the fiery rhetoric of Inkatha leader Chief

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\*The KwaZulu government in close association with the Inkatha Freedom Party recently challenged the "sufficient consensus" formula in court in a lawsuit against the Negotiating Council. The KwaZulu Government claimed that the formula did not yield representative decisions. However, its efforts to have the court invalidate the formula were defeated.

Gatsha Buthelezi, which at times has included threats of a civil war, has forced the major players to grant to the IFP disproportionate influence within the negotiating forum.

Instead of elections for a constituent assembly to draft a new constitution, the IFP strongly maintains that the Multi-party Negotiating Forum should have the exclusive mandate to draft a permanent constitution and that non-racial elections should be held only after such a constitution is drafted. It also opposes the installation of a Transitional Executive Council and any form of interim government. The IFP wants to use this opportunity to exert its current influence, which would likely be diluted in the context of a CA, to push for a confederal state where it could enjoy substantially unfettered regional powers.

Similarly, the leaders of two of the four nominally independent homelands, Ciskei and Bophuthatswana, have stated that they will resist efforts to reincorporate their homelands into South Africa. Their failure to participate in the TEC may provide an opportunity for them to denounce the TEC as an unrepresentative body whose decisions are therefore invalid.

### **The Pan Africanist Congress**

The military wing of the PAC, the Azanian People's Liberation Army ("APLA") has been implicated in several highly publicized fatal attacks on white civilians. The PAC claims that its membership is growing due to the organization's principled stand on armed struggle and its refusal to participate in the CODESA talks on the grounds that they were unrepresentative and should have been convened in a neutral country. The PAC opposes the installment of a Government of National Unity during the 5 year period after the April elections.

The PAC has demonstrated a determination to remain in the current negotiating forum,

in spite of pressure to withdraw created by the Government's arrest of 77 PAC members in a mass police action in May of this year. According to the PAC, arrests of its members are continuing. The Government has stated in the past that the PAC should not be allowed to participate in the forum unless and until it pledges to abandon its military activities. The PAC maintains that its armed attacks are reprisals for continued Government-sponsored violence in African communities.

In its most recent press release in which it announced its intention not to be part of the Transitional Executive Council, the PAC claimed that the South African army and police are the "major actual and potential causes of the violence" and that since the TEC arrangement leaves those two entities within the "exclusive" control of the government, its purpose of creating a stable environment for elections will not be served. The PAC has also charged that some of the attacks for which it has been held responsible were actually Government initiated attacks designed to incite white fears and animosities.

The PAC believes that 90% of the violence in South Africa is being orchestrated by the Government through various mercenary forces deployed in the townships. Rather than inter-party political fighting, in the view of the PAC, the violence is the Government's tool to commit genocide against African people.

### **The Conservative Party**

Since the initiation of a negotiated settlement in South Africa, the rallying cry of the predominantly Afrikaner Conservative Party has been "self determination," which for the CP, ideally, would translate into a self-governing Afrikaner state or *Volkstaat*.

### Other Right-Wing Activity

The recent attacks on white civilians by APLA have stirred the passions of right wing groupings in South Africa which would like to see the progress away from an apartheid state reversed or alternatively, a separate and autonomous Afrikaner homeland established. Shortly after the spate of attacks on white civilians after the Hani killing, a group of former security force generals formed a Committee of Generals ("CoG") to mobilize the right-wing. They have also assumed the leadership of a loose coalition of right-wing organizations called the Afrikaner Volksfront ("AVF").\*

Some observers subscribe to the theory that the Hani assassination and the formation of CoG were linked. According to this theory the assassination of Hani was intended to ignite black backlash which would in turn stir up white fears and insecurities, creating the perfect opportunity for a group such as CoG to inspire Afrikaner nationalism and generate greater support for a separate Afrikaner state. According to one report, it is the view of the members of the CoG that the CP is not doing enough to push the *Volkstaat* agenda. Rather, the generals are anxious to move the right-wing from parliamentary politics to extra-parliamentary resistance. However, there is already evidence of a split among the ranks of the leadership of the AVF between those who still favor a negotiated settlement and those who favor an armed struggle.

The armed struggle threat has a degree of credibility, since many Afrikaners who identify with the right are current or former members of the security forces and have significant access

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\*This week, reports surfaced regarding secret meetings between the ANC and the AVF regarding the Afrikaner homeland demand. While the ANC acknowledges that it has been engaging in discussions with the AVF over the establishment of a semi-autonomous Afrikaner homeland in exchange for Afrikaner cooperation with the transition process, it emphasizes that no final agreement has been reached. Some organizations on the right are not in favor of engaging in bilateral negotiations with the ANC. Neither the Conservative Party nor the Afrikaner Resistance Movement has been participating in the talks.

to firepower. In addition, observers have hinted that the formation of CoG may have heightened the possibility of a mutiny within the ranks of the security forces. According to the head of an Afrikaner dominated trade union, the general membership of his union would rather take instructions from retired General Constand Viljoen, chairman of the Committee of Generals, than from a present SADF general. Although General Viljoen has been under pressure to reject some of the more militant elements of the right wing, such as the group that stormed the negotiations building in late June, he has demonstrated a willingness to accept them as partners in the struggle for Afrikaner self-determination.

While there is wide speculation on the military capabilities of the right-wing, most dismiss these groupings as fringe formations incapable of sophisticated destabilization strategies of the kind that could have a major impact on the democratic process. The Hani assassination, however, was a deeply disturbing reminder of the power of a single act.

### **POLITICAL VIOLENCE AND THE TRANSITION**

What has remained constant throughout the negotiations is the political violence which continues to pose the greatest threat to a successful transition to democracy in South Africa. The decline in the levels of violence that began towards the end of 1992 came to an abrupt halt in April, the month that Chris Hani was killed. In the days following the announcement of the date for the upcoming elections, violence reached a peak exceeded only in the period following the

unbanning of the ANC and other political parties in 1990.\* Researchers and violence monitors who have simultaneously tracked the violence, negotiations and other political developments have concluded that the concurrence of increased violence with significant breakthroughs in the negotiations, points to a strategy to derail the transition through violence.

But, for the angry survivors of massacres and drive-by shootings in South Africa's townships and squatter camps, the violence is constant and the negotiations remote. Where they live, the double evils of political violence and economic deprivation are producing levels of frustration that threaten to alienate large segments of the population from a process whose success ultimately depends on their full participation in it.

The unemployment rate in the formal sector has risen to a high of 46%.<sup>8</sup> A recent survey indicates that only 15% of black South Africans feel that they are better off today than they were a year ago.<sup>9</sup> According to one analyst "blacks are showing an increasing trend of pessimism about the future" and they are continuing "to experience a deterioration in their families' economic situations."<sup>10</sup>

Violence monitors are reporting that in the townships frustration is turning to anger and more people are lashing out against a wider range of targets, including the monitors themselves. Monitors fear that they are increasingly coming to be seen as ineffectual. One reported being told that the only way he could help the community is to supply it with bullets.<sup>11</sup>

More importantly the escalating violence and the fear it instills do not bode well for the upcoming elections. In one recent poll 38% of the blacks surveyed said that fear of violence was

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\*The average number of deaths attributable to political violence for the first three months of 1993 was relatively low - 178, while the toll for April jumped to 259, followed by 302 for May. Human Rights Commission, "Summary Report on Repression for May, 1993. 580 were killed in July. Human Rights Commission, "Summary Report on Repression for July, 1993.

likely to keep them away from the polls on election day.<sup>12</sup> This statistic is born out by the fact that even now, long before the elections, many township residents are discouraged and often prevented from fulfilling ordinary daily obligations. According to a school principal in Daveyton Township in the East Rand, "only two percent of our pupils are attending classes. We have to send children home as early as 11 a.m. in fear of possible attacks."<sup>13</sup> A health official at a clinic in Daveyton reports that fewer and fewer patients are keeping their appointments out of fear that they will be killed on the way. A nurse at the clinic says "we [health professionals] are also in constant fear for our lives, but there's nothing we can do."<sup>14</sup>

The average township resident continues to view members of the police and military with suspicion, animosity and distrust. In a recent statement taken by the Johannesburg-based violence monitoring group, Peace Action, a resident who was accused by police of organizing a self-defence unit, related a horrific tale of his own torture at the hands the police. He states "they had to stop [the torture] when blood started coming out of my ears and nose. . . . I told them that their behavior was frightening me and making me hate them because of their actions."<sup>15</sup>

Efforts to quell the violence have largely failed. The National Peace Accord with its network of monitors and dispute resolution committees, the Goldstone Commission of Inquiry with its quasi-judicial powers, the international violence monitors of the United Nations, the Commonwealth and the Organization of African Unity, along with scores of South African peace activist organizations have produced only marginal impact.

Where concrete steps have been urged to curb the violence, the government's response

has been half-hearted.\* While there is no doubt, for example, that members of the security forces have engaged in acts of terrorism against civilians, adequate measures have yet to be taken to transform the security force culture of repression and intolerance. The bitter adversarial relationship between the African community and the security forces continues, along with the perception among township residents that the security forces cannot be relied upon to protect them. Little has changed since the report produced a year ago by an international team of police experts, which concluded that the South African Police displayed gross incompetence, bias, unresponsiveness to the concerns of township residents and investigation skills that were "woefully inadequate."<sup>16</sup>

Clearly, there is an urgent need, as the elections draw near, to deploy in the townships a competent, unbiased police force that will have sufficient authority and legitimacy to neutralize the forces of destabilization. While some in South Africa have called for the intervention of a United Nations peacekeeping force to maintain law and order during the period leading up to elections, to date, the negotiators have favored a National Peacekeeping Force composed entirely of South Africans drawn from the many military and paramilitary groupings around the country. Specifically, the force would incorporate personnel from organizations as diverse as the ANC's Umkhonto we Sizwe, Government security forces, the PAC's Azanian People's Liberation Army,

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\*See Africa Watch, "South Africa: Half-Hearted Reform - The Official Response to the Rising Tide of Violence", May 1993. According to Africa Watch, its most recent investigation into the responsiveness of the South African government to the violence revealed that "although some minor efforts have been made, the steps taken fall far short of a serious attempt to end the violence. . . . The government has been markedly reluctant to accede to even the most limited demands and recommendations of the ANC, independent human rights groups, violence monitors and independent commissions of inquiry." The observations of Africa Watch are born out by the example that even though residents of male hostels are repeatedly implicated in massacres and random violent attacks, and recommendations for addressing the violence have frequently included transformation or elimination of the hostels, undertakings to upgrade hostels into family units have not been treated with the urgency they deserve. Rather, hostels such as the infamous Nancefield hostel which are well known as flashpoints for violence have not been touched.

homeland government police and the right wing Afrikaner Resistance Movement. The force would number between 5,000 and 10,000 members, it would be placed under the authority of the TEC and trained with a special emphasis on the need for impartiality.\*

### **U.S. POLICY TOWARDS SOUTH AFRICA**

The United States must be at the forefront of the international community's efforts to facilitate the transition to democracy in South Africa. Already it has taken significant affirmative steps to position itself in that role. It has made substantial contributions to programs designed to strengthen the electoral process, including \$10 million for training elections observers, voter education and technical assistance to the various entities expected to play important roles during the transition. Through the Agency for International Development, our government is also making important contributions to the political and economic empowerment of those members of the South African population who were severely disadvantaged by apartheid. We applaud these efforts.

Now that we have received a "clear and unambiguous signal" from South Africa's chief negotiating partners that barriers to investment can now be removed, the U.S. government and state and local governments must move swiftly to lift remaining financial and trade sanctions and take steps to encourage and support measures that would contribute stimulus to the South African economy. However, the Code of Conduct for U.S. corporations, currently found in section 208

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\*This proposal has been criticized by a panel of experts as impractical given the severe time constraints. A panel of experts headed by U.S. lawyer Charles Ruff has attempted to fashion a more realistic proposal involving a peacekeeping service which would assume responsibility for policing in only limited circumstances such as marches, rallies and election-related violence. While this unit would have multi-party control, membership would be drawn from parties other than the government on a limited basis only. Instead, the unit would be comprised mostly of existing South African Police staff.

of the Comprehensive Anti-Apartheid Act of 1986, must remain in place to serve as an important symbol of our commitment to see the complete transformation of South African society to one which is totally non-discriminatory, equitable and democratic. That transformation will take time to complete. The Code sets a standard of social responsibility that represents the bare minimum of what we expect of U.S. corporations in the employment of our own citizens both at home and abroad. In the case of South Africa, these special measures, designed to also protect South African employees of U.S. corporations, are not an inappropriate extension of our most fundamental principles about racial discrimination to how U.S. corporations conduct business in a country struggling to escape the legacy of apartheid. The failure of U.S. corporations to operate with due regard to minimum standards of affirmative action and economic empowerment for black South Africans, would be an embarrassment and would undermine our international integrity. We must continue to play a leadership role in this regard.

In addition, while the U.S. government must pledge substantial resources to areas such as housing, education and employment for black South Africans, foreign assistance can, and should play only a limited role in South Africa's economic future. One of the most striking things about South Africa is its dualistic economy, reflecting both developing and developed world conditions, with massive poverty a contrast to great wealth and sophisticated technical resources. Within its borders, South Africa has vast and developed resources that it can and must use to undo the damage that apartheid has wrought. U.S. policy must develop effective and appropriate measures to exert pressure on the South African government, South African business and other members of the public and private sectors to assume primary responsibility for the fundamental restructuring of the South African economy. "Redistribution" and

"reconstruction" must now head the list of newly defined economic priorities for both South Africa and U.S. policy towards South Africa.

The task of redistribution will be extremely complex. The privileged of the South African population will not surrender their privileges easily. The future democratic government will face formidable legal, financial and social blockages as it seeks to redirect the economy and the society as a whole. The U.S. government must identify an effective means of assisting the future South African government to encourage and create incentives to redirect investment from shopping centers in the suburbs to housing in the townships.

Though it is replete with imperfections, the U.S. experience with designing and implementing programs of affirmative action to rectify past injustices has much to offer. Our expertise in this area should be offered to government and private institutions in South Africa who demonstrate a commitment to the social and economic advancement of black South Africans.

While the installation of an interim government in South Africa should trigger the resumption of limited government-to-government foreign assistance, such as the provision of aid to South African government sponsored black universities, we urge the U.S. government not to abandon its program of support for those organs of civil society that have played a crucial role in human rights monitoring and advocacy, community self-help efforts and economic development. Over the years in South Africa, we have had the opportunity to witness what happens when committed community activists working at the grassroots levels replace bureaucrats as the chief conduits through which our resources are channeled.

South Africa is literally blanketed with non-governmental organizations ("NGOs") active in human rights and development work. There are hundreds of community-based NGOs

affiliated with regional and national networks, hundreds of service organizations and scores of funding agencies financed by domestic and international donors. Most of these organizations were born out of the political struggle against apartheid, and have now turned to violence monitoring and development activities. These organs of civil society represent a unique strength in South African society. Their continued vitality is a critical element in reaching the future South Africa for which we all aspire.

But they are fragile structures that can be destroyed quickly by an abrupt withdrawal of funding or a flight of leadership to new non-racial government bureaucracies. We must find ways to positively reinforce this network of NGOs through our assistance. They will be South Africa's most important safeguard against any retreat from the challenges of a non-racial, non-sexist, democratic future.

### **CONCLUSION**

The road to democracy in South Africa is full of landmines. Many formidable problems augur ill for the stability of the transition: the escalating political violence, the declining economic situation, intolerant political attitudes, an increasingly marginalized "lost" generation of teenagers, unrealistic expectations and the vast divide between the "elite" negotiators and their constituent base. At this critical juncture in South Africa's history, its future depends not only on the ability of its leaders to sidestep the existing and yet unforeseen pitfalls, but also on our continued engagement and encouragement.

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**LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

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