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Note:

Dear Ms Emett, Attached please find a submission to the Technical Committee on the TEC for distribution before their discussions on Monday. Thanks, Jakkie Cilliers

SUBMISSION TO THE TECHNICAL COMMITTEE ON THE TEC

POWERS AND DUTIES OF THE SUBCOUNCIL ON DEFENCE

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INTRODUCTION

The submission follows the recent draft Transitional Executive Council Bill, dated 6 August 1993 and relates to par. 14 of that Bill. The recommendations contained in this submission must be considered against the objective as set out by the Technical Committee on Violence 'To establish impartial, accountable, effective and legitimate security forces for a democratic South Africa.' (Report no. 4, par. 5.1)

We broadly welcome and applaud the broad thrust and content of the TEC Bill. There are, however, some areas of concern.

SCOPE

This submission deals with the following issues:

- the workload of the Subcouncil on Defence;
- the requirement to establish an expert advisory body in parallel with the Subcouncil on Defence;
- the role of the Subcouncil on Defence with regard to the proposed National Peacekeeping Force/Service; and
- various specific or technical drafting issues relating to the Bill.

THE WORKLOAD OF THE SUBCOUNCIL ON DEFENCE

It appears from the proposed powers of the Subcouncil on Defence that this will effectively place the various armed forces under separate but co-ordinated multi-party control. This will not only pave the way for the eventual integration of forces but also imply shared political responsibility over the military and their involvement in law and order duties. There is, however, some room for concern about the **ability** of the Subcouncil on Defence to

effectively perform both monitoring, corrective action and longer term planning for the armed forces given its lack of resources, limited membership and the political nature of that membership.

The Subcouncil on Defence is envisaged as a six-member multi-party body. This composition may not even serve to balance political interests, since there are at least seven forces that have to be brought under multi-party control, namely the SADF, MK, each of the TBVC armed forces and possibly APLA. Should this general rule for the composition of the Subcouncil on Defence not be adapted to allow additional representation from the broader civilian community, effective longer term planning becomes impractical. The Subcouncil will inevitably find itself overwhelmed by the tasks of oversight and corrective action.

The establishment of a Joint Armed Forces Council (JAFC) in terms of par 14(1)(j) of the TEC Bill which would be tasked with *'liaising with the structures of all military forces to ensure the promotion of the objects of the Council and to make recommendations to the Subcouncil concerning any military matters relating to its powers and duties'* would not resolve this issue, for the Subcouncil on Defence would be virtually captive of inputs from this body.

We therefore submit that a distinction should be drawn between oversight and corrective action (on the one hand) and investigation, research and planning (on the other hand). Both are the legitimate areas of concern of the Subcouncil, but is unrealistic to expect the Subcouncil to do more than provide policy direction and approval of expert advice and investigation. In other words the Subcouncil would delegate its research and planning functions to another body. This body is discussed below under the heading 'the need to establish an expert advisory body'.

Even if it is only tasked with **effective oversight** of the armed forces, **the Subcouncil should be provided with the means to do so in form of a small, full-time secretariat**. Such a secretariat could best be composed around that of the existing Ministry of Defence, strengthened by a small number of seconded SADF officers and other individuals.

THE NEED TO ESTABLISH AN EXPERT ADVISORY BODY

In contrast to virtually any other sector in the South African transitional context, there is no 'legitimizing forum' when discussing the military comparable to, for example, the NEF, LGNF or even the Police Board.

This Institute has written extensively on the extent of changes that face our armed forces in the near future. These issues are complex and interrelated. Thus the solution will have to be an integrated one which addresses all the issues. If it is to be effective, **the proposed Subcouncil on Defence will need to be supported by an appropriate and politically non-partisan expert advisory body which will last well beyond elections.** The main task of this body would be to translate and reconcile political guidelines with practical constraints and execute the detail staff work on alternative policy proposals for presentation to the Subcouncil on Defence.

Such a body is a key element. It is the expert forum which should recommend the detail composition and creation of any other structures and processes including those related to 'Integration'. Some of those structures presently under discussion in various circles include the office of a Military Ombudsman who would oversee the ad hoc, of all armed forces, to an extended Military Code of Conduct during the interim period and the creation of some sort of Advisory Committee on Race Relations and Civic Education.

We therefore propose that the establishment of such an advisory and expert body be the first task of the Subcouncil on Defence.

The crucial role that such an advisory body could play is evident from the immediate challenges relating to the military which will require substantial investigation and advice. Among these are the following:

- the definition of roles and tasks including the delineation of functions between the SADF, a paramilitary peacekeeping force and the SA Police (an important factor in the militarization of everyday law and order), defence posture, broad force requirements, guidelines relating to civilian and political control of the armed forces.
- investigating and reporting on the establishment of various interim and parliamentary control structures including a civilianised Ministry of Defence, a Military Ombudsman, etc.
- revising, updating and extending the draft code of conduct for the military.
- the re-training and/or -orientation of all members of a future defence force regardless of their background, according to equal opportunities theory and practice, the constitutional framework and the principles of military leadership and ethics emerging from it.
- military manpower procurement policies (i.e. to replace white, male conscription), integration of forces, demobilisation of forces, the revision of the existing Defence Act (Act no. 44 of 1957).

- the future structure and role of military intelligence and what are commonly regarded as special forces.
- the role of international involvement and assistance with all of the above.

The advisory body should be empowered to commission research and call for representations from the public regarding any investigation conducted by it. - As far as possible these sessions and hearings should be open to the public. The composition of the advisory body should provide it with the expertise to commission and evaluate research, hear evidence and investigate and advise with regard to civil-military relations, defence policy, organisational and training problems. It should have both military and a majority of civilian members, thereby institutionalizing civilian control of the military.

FUNCTIONS REGARDING THE NATIONAL PEACEKEEPING FORCE

Our Institute has been at the forefront of those who have warned against unrealistic expectations as regards the proposed National Peacekeeping Force. We are pleased that the revised concept for such a service, as contained in pages 53-61 of the multinational Report to the Commission of Inquiry regarding the Prevention of Public Violence and Intimidation as well as par. 14(12) to 14(16) in the **TEC Bill** addresses most of the concerns in this regard. We would strongly recommend that these proposals be reconciled and form the basis around which such a service be constructed.

However, whilst the SADF will be providing the Peacekeeping Force with *'the necessary and agreed upon uniforms, transport, accommodation, equipment, and other logistical support'* (par 14(15)), **it is inappropriate and illogical that the Peacekeeping Force also be the responsibility of the Subcouncil on Defence.** Two considerations are relevant in this regard. Firstly the task at hand is police- rather than military-oriented. Secondly, the Subcouncil on Defence will not have the means to deal with this issue over and above all the other that it is expected to deal with. **We therefore propose either the establishment of a completely separate Subcouncil under the TEC for the Peacekeeping Force/Service, or transferring this responsibility to the Subcouncil on Stability, Security, Law and Order.**

SPECIFIC ISSUES

The Bill is confused and inconsistent in the use of the terms 'military force', 'defence force' and 'armed force'. Insert the following first sentence in par. 14:

In this section a military force is defined to include both governmental defence forces (which refers to the SADF and the armed forces of the TBVC

states) and non-governmental military forces (which refers to Umkhonto we Sizwe, the Azanian People's Liberation Army and any other force that the Subcouncil on Defence may from time to time determine). This definition excludes policing agencies as well as any Peacekeeping Force or Service. The term defence force and governmental defence force have the same meaning.

Par. 14(1)(a) should read: **'To be kept informed of the activities of all military forces, including but not restricted to, the planning, preparation and execution of any action by such military forces likely to have an adverse impact on the Council's objectives.'**

Par. 14(1)(b) should read: **'To be kept informed by any Government, administration or organization of any proposed legislation (including subordinate legislation), internal directives or regulations regarding the conduct and deployment of any military force.'**

Par. 14(1)(c). Amend to read as follows: **'to refer to, and request the investigation by an independent judicial body into, the conduct of any member or unit of a military force which may be in breach of any applicable code of conduct or disciplinary code should this conduct adversely affect the objects of the Council.'**

Par. 14(1)(d). Amend to read as follows: **'to refer to, and request the institution of appropriate legal proceedings by, the commander of any military force against any member or members of that force. The Subcouncil may order, in consultation with the commander of the military force in whose employ the person(s) is, that member or members be confined to barracks or suspended from duties on full pay pending such proceedings.'**

Par. 14(1)(e). Insert the word **'legally'** after 'made' and before 'binding'.

Par. 14(1)(f). Replace 'unofficial military and para-military organizations' with **'non-governmental military forces'**.

Par. 14(1)(k). Add the following sentence at the end of the par: **'The Subcouncil would be expected to account for the disbursement of such funds in line with normal accounting and auditing practices and provided with the means to effect such control.'**

Add par. 14(1)l). 'In order to effectively discharge its duties in terms of par. 14(1)(e), 14(1)(f) and 14(1)(g) and 14(1)(k) the Subcouncil and its expert advisory body would have right of access to all relevant information from the military forces. In this the members of the Subcouncil would be bound by existing laws and regulations, including the Official Secrets Act. In the case of information relating to the non-governmental military forces the Subcouncil would be guided by the commanders of those forces as regards issues of confidentiality.'

Par. 14(3). Replace 'military force' with '**defence force**' in the second line of that paragraph.

Par. 14(6) Replace 'military forces' with '**a defence force**'.

Par. 14(7). The NOTE does not make sense.

Par. 14(9). Replace 'an armed force' with '**a military force**'.

Delete par. 14(12)(a) and (b).

Par. 14(11). In a previous submission to both the Technical Committees on Violence and the TEC (Integration and Demobilisation of Armed Forces) a system of collection points was proposed, as well as a process of collection, verification and adjudication for the various military forces.

CONCLUSION

There can be little doubt that the SADF, whilst being the legal armed force of South Africa, suffers a severe lack of legitimacy within much of so called 'black' South Africa. Apart from issues relating to past operational activities, one reason for this situation is that the SADF does not adequately reflect the racial and ethnic composition of the broader society at all levels.

The following events will reduce, but not eliminate, some of these racial and ethnic disparities:

- the integration of the various para-military forces into the SADF,
- the integration of the TBVC armed forces into the SADF;

- the phasing out of white conscription and replacement by some other system, possibly by an all-volunteer force (by which white conscripts will probably be replaced by black, coloured, Indian and white volunteers).

Even after the completion of these changes, two particular areas of imbalance will remain which will severely effect the racial/ethnic representativeness of the armed forces:

- white, particularly Afrikaner over-representation within leadership and reserve cadres; and
- Zulu under-representation at all levels.

There is no panacea or short-term solution to these imbalances particularly given the present high levels of violence. This violence requires a careful approach so that the organizational integrity, loyalty to the Government of the day and effectiveness of the SADF is not endangered. As a result South Africans will have to live and accept that legitimacy as a function of racial/ethnic representativeness will remain an elusive goal for some time, probably many years. This being said, the institution of effective multiparty control by the Subcouncil on Defence, as is envisaged by the terms of reference in the TEC Bill will go some way towards enhancing the perceived legitimacy of the SADF. This situation will yet further improve after elections scheduled for April 1994. The legitimacy of both the TEC as well as an elected government will, therefore, inevitably spill over into other sectors of society, including the military.

A systematic and comprehensive approach must be adopted in the restructuring and future functioning of military forces. In this process the early negotiation and appointment of an expert and legitimate advisory body could play an important role in removing the discussion of the role and functions of the armed forces from the party-political sphere. It may also assist in laying the foundation for public confidence, thus restoring the ability of the armed forces to execute their appropriate function in society.

With the necessary commitment, such an institution can act as catalyst in the process of transforming our armed forces into a body that, in the words of the Goldstone Commission '*... has the trust, confidence and co-operation of the South African public.*' (8 August 1992).