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V454.

## **CONSTITUTIONAL ASSEMBLY**

**Theme Committee 6.4**

## **SECURITY APPARATUS**

**5 June, 1995 (23rd meeting)  
09:00**

**Room V454**

## **DOCUMENTATION**

**CONSTITUTIONAL ASSEMBLY  
23rd MEETING  
THEME COMMITTEE 6.4  
SECURITY APPARATUS  
MONDAY, 5 June 1995**

Please note that a meeting of the above Committee will be held as indicated below:

**Date:** 5 June 1995

**Time:** 09:00 - 16:00

**Venue:** Room V454, old assembly wing

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*This meeting will take place in three parts as follows:*

**09:00 - 10:00**                      **Agenda items 1 - 5**

**10:00 - 13:00**                      **Intelligence workshop**

Panel discussion : Prof Fink Haysom, Mr Moe Shaik  
(NICOC), Mr Mark Shaw

**14:00 - 16:00**                      **Agenda items 6 - 8**

**AGENDA**

- 1. Opening and welcome**
- 2. Minutes of the previous meeting**
  - 2.1 Minutes of the twenty second meeting, 29 May 1995 (pg 1-5)
- 3. Matters arising**
- 4. Outstanding items from Defence report (pg 6-12)**
  - 4.1 Role of the parliamentary committee in the appointment of the Chief of the Defence Force and the Secretary of Defence
  - 4.2 Military Service Commission

- 4.3 Relationship between the defence force and police when deployed under a state of emergency or national defence/war
- 5 Submissions volumes 13 and 14
- 6 Draft constitutional text on provisions dealing with police (pg 13-18)
- 7. Any other business
- 8. Closure

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**H EBRAHIM  
EXECUTIVE DIRECTOR**

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Enquiries: Katharine McKenzie (Tel 24 5031 or 403-2174)

**CONSTITUTIONAL ASSEMBLY**

**MINUTES OF THE TWENTY SECOND MEETING OF SUBTHEME COMMITTEE 4,  
THEME COMMITTEE 6**

**SPECIALISED STRUCTURES OF GOVERNMENT  
SECURITY APPARATUS**

**MONDAY, 29 MAY 1995**

**PRESENT**

**Schreiner J (Chairperson)**

Alant TG	Appelgryn MS
Breytenbach WN	Ebrahim EI
Makana S	Phillips IM
Selfe J	Sisulu L
Sosibo J	Yengeni T

Apologies: Mti LM; Mtintso, TE

A Cachalia; K McKenzie and A Seegers were in attendance.

**1 OPENING AND WELCOME**

Ms Schreiner opened the meeting at 14:10 and welcomed the members.

**2 MINUTES OF PREVIOUS MEETINGS**

**2.1 Minutes of the twenty first meeting, 22 May 1995**  
The minutes were adopted.

**3 MATTERS ARISING**

**3.1 Consideration of draft text**

It was agreed that members of the police, defence and intelligence services could send one or two members to participate in the deliberations of the Committee when it considered draft Constitutional text on each of the reports.

It was agreed that their participation would be restricted to making broad comments and would not extend to debating the content of the text.

The draft text on police would be tabled on Monday 5 June 1995, at an extraordinary meeting to be held in the afternoon.

### **3.2 Democratic Party submission**

The following discussion of the DP submission arose out of the minutes of the previous meeting:

#### **3.2.1 Definition of active service**

The DP stated that active service implied the deployment of troops against an identifiable enemy. Active service did not include routine patrols, exercises or the deployment of a military attaché.

#### **3.2.2 Gender equality**

The DP stated that their submission regarding gender equality did not imply that men and women should be treated differently, but rather that it was impractical to lay down within the Constitution that the defence force should reflect the gender composition of the population.

It was agreed that the defence force should 'broadly' represent the composition of South African society and that this was not a point of contention in the Committee.

### **3.3 Intelligence workshop**

It was noted that the panel who would speak at the intelligence workshop was predominantly white and male.

It was agreed that parties should reflect upon this and liaise with the Chairperson or Secretary should they have any additional names to add to the panel.

## **4 DEFENCE REPORT**

The defence report contained in the documentation for the meeting was adopted after the following discussion and changes were made:

### **4.1 Executive powers**

It was agreed that parties would make further written submissions on the role of the parliamentary committee in the appointment of the Chief of the Defence Force and the Secretary of Defence as well as the Commissioner of Police.

In discussion it was agreed that it was the President's prerogative to nominate candidates for these positions. It was agreed that the parliamentary committee should play some role in these appointments but further clarity was required on whether the parliamentary committee would have veto power over Presidential nominations.

The DP stated that the Constitution should not allow a situation in which the President was able to undergo a ritualistic consultation with the parliamentary committee and then appoint whoever they desired to.

A distinction was made between the Secretary of Defence which was a political appointment and the Chief of the Defence Force which was a military one.

It was noted that in the USA senior military appointments would be nominated by the President and subject to the scrutiny and veto of parliamentary committees. This occurred in a specific context as in the USA it was possible that the President may not be a member of the majority party.

#### **4.2 Roles and duties of the national defence force**

It was agreed that to describe the defence force as "defensive in character" was not necessarily accurate and that a better formulation was section 227(2)(f) of the interim Constitution which reads: "the National Defence Force shall be **primarily** defensive in the exercise or performance of its powers and functions".

It was agreed that the primary function of the defence force was to protect the inhabitants of SA, not only its citizens.

#### **4.3 Rights of members of the national defence force**

It was agreed that members of the defence force should not have the right to strike. There was no agreement as to where this should be located within the Constitution. It was agreed that the draft text would contain two options, one in which the right to strike was prohibited in the chapter dealing with the defence force and one in which this was contained in the limitations clause.

#### **4.4 Employment and working conditions**

It was agreed that the Committee should revisit the debate about a separate Military Service Commission, at its next meeting, in the light of the submission made by the SANDF (contained in volume 13 of submissions).

**4.5 Code of conduct**

Following international convention it was agreed that members of the defence force should be obliged to disobey a **manifestly illegal order**.

**4.6 Political neutrality**

It was agreed that point 1 under this heading in the report should be placed under 'roles and duties of members of the defence force'.

**4.7 Parliamentary oversight**

It was agreed that the role of parliamentary oversight committees was to **oversee** the national defence force. It was agreed that section 228 (3) (d) of the interim Constitution should be added to item 1. Section 228 (3) (d) reads: "The Committee shall be competent to investigate and make recommendations regarding the budget, functioning, organisation, armaments, policy, morale and state of preparedness of the National Defence Force and to perform such other functions relating to parliamentary supervision of the Force as may be prescribed by law."

**4.8 Declaration of a State of emergency**

It was agreed that the mechanisms by which a state of emergency was declared did not belong within the brief of Theme Committee 6.4.

It was agreed that parties would formulate positions on the relationship between the defence force and the police when deployed under a state of emergency, as this had posed problems in the past, and whether this should be contained in the Constitution.

**4.9 Declaration of a state of national defence/war.**

No changes were made to the report

**4.10 Action in the national interest**

The ANC stated that this should form part of a preface of the chapter dealing with security apparatus.

**4.11 Civilian control**

The NP stated that it agreed that there should be an Ombud, but it was not clear on whether this should be a military Ombud as there may not be sufficient work for such a position.

The ANC stated that the Ombud should not be narrowly defined as a complaints structure and that emphasis should be placed on its accountability to parliament as opposed to the Ministry or the defence force.

It was agreed that an Ombud should be provided for under the rights of members of the defence force. It was agreed that a footnote should accompany the constitutional text explaining the need for an Ombud in the light of the limitation of some fundamental rights for members of the defence force.

It was agreed that the term Ombud for Defence Matters, rather than Defence Commissioner should be used.

The remainder of the report was adopted as it stood.

## **5 MINISTRY OF DEFENCE SUBMISSION**

It was agreed that the Ministry of Defence submission and other submissions which were still to be distributed would be considered at the next meeting of the Committee.

## **6 INVITATION TO IDP WORKSHOP**

It was agreed that Prof Seegers would present the views of the Committee at the IDP workshop.

Parties would consider whether they would like to send a representative to the workshop.

## **7 ANY OTHER BUSINESS**

### **7.1 Next meeting of the Committee**

It was agreed that the next meeting of the Committee would be longer than usual in order to ensure that its work was finished by the end of June.

The agenda would be as follows:

09:00 Consideration of outstanding items from the defence report

10:00-13:00 Workshop on intelligence

14:00 Consideration of draft text on police

## **8 CLOSURE**

The meeting rose at 16:30.



**REPORT ON DEFENCE - THEME COMMITTEE 6.4**  
**SCHEMATIC TABLE: AREAS OF AGREEMENT AND CONTENTION**

Constitutional issue	Agreement	Contention	Further clarity
<p><b>1. Executive powers</b></p>	<p>1. The Constitution shall provide that the President shall be the Commander in Chief of the national defence force</p> <p>2. The Constitution shall provide that the President shall appoint the Chief of the national defence force and the secretary for defence</p> <p>3. The Constitution shall provide that the Chief of the national defence force shall perform his/her functions subject to the Minister responsible for defence, and during a state of war or national defence, the President.</p> <p>4. The Constitution shall provide that the President shall have powers to declare a state of national defence, war or state of emergency subject to parliamentary confirmation.</p>		<p><i>Are appointments by the President made after consultation with the Cabinet and/or confirmation by the parliamentary committee on defence</i></p>

Constitutional issue	Agreement	Contention	Further clarity
<b>2. Roles and duties of the national defence force</b>	<ol style="list-style-type: none"><li>1. The Constitution shall provide for a defence force structured in terms of the law.</li><li>2. The national defence force shall be primarily defensive in the exercise and performance of its powers and functions.</li><li>3. The primary duty of the national defence force shall be to defend the inhabitants and the territorial integrity and sovereignty of South Africa.</li><li>4. The national defence force shall comply with international, constitutional and other laws, treaties and conventions.</li><li>5. The Constitution should provide that members of the security apparatus should be educated to be conversant with the law, Constitution, international law and Conventions on armed conflict and human rights.</li></ol>		

Constitutional issue	Agreement	Contention	Further clarity
<b>3. Rights of members of the national defence force</b>	<p>1. The Constitution should state that provisions for alternate bargaining, dispute resolution, mediation and arbitration procedures shall be defined in law.</p> <p>2. Members of the national defence force shall have their rights as defined in the Bill of Human Rights subject to a limitations clause.</p> <p>3. The defence force should broadly represent the composition of South African society.</p>		
<b>4. Employment and working conditions</b>			<i>Should there be a separate Service Commission for members of the Defence Force?</i>
<b>5. Code of conduct</b>	Members of the defence force shall be obliged to obey a legal order and disobey a manifestly illegal order.		

Constitutional issue	Agreement	Contention	Further clarity
6. Political neutrality	1. The security apparatus constitute non-partisan professional bodies; the security apparatus themselves cannot participate in partisan political activity, and cannot allow partisan political activity within themselves.		
7. Parliamentary oversight	1. The Constitution must enable the legislature to have multi party oversight committees to oversee the national defence force. Such Committees must be empowered to deal with legislation relating to security apparatus and related matters, make recommendations prior to submission of budgets, investigations, hear evidence, subpoena witnesses and convene themselves as a Commission of Inquiry. {and all details contained in s228 (3)(d)} 2. The Constitution shall provide for Parliamentary oversight before, during and after Executive action.		

Constitutional issue	Agreement	Contention	Further clarity
<b>8. Declaration of a state of emergency</b>		1. The powers of provinces to deploy police in a provincial state of emergency.(IFP)	2. <i>Deployment of the Defence Force within South Africa and the relationship between Police and Defence Force within this deployment.</i>
<b>9. Declaration of a state of national defence/war</b>	The Constitution should provide for Presidential power to declare a state of national defence/war, subject to Parliamentary confirmation.		1. <i>Time period allowed for the review of such a decision by Parliament.</i> 2. <i>Deployment of the Defence Force within South Africa and relationship between Police and Defence Force within this deployment.</i>

Constitutional issue	Agreement	Contention	Further clarity/Comments
<b>10. Action in the national interest and national security</b>	<p>1. The Constitution should provide that the Defence Force's primary function is to defend the territorial integrity of SA.</p> <p>2. The Constitution should provide that action of the security apparatus should be in line with statutory, constitutional and relevant international conventions and law on armed conflict.</p>	<p>1. The Constitution should define national interest and national security policy in broad non-militarist terms focusing on the quality of life of citizens in economic, political, social and environmental terms. <b>(ANC)</b></p> <p>2. The Constitution should provide for the definition of national interest as the interests of the citizenry and the interests of the state.</p> <p>3. National security should be defined in the Defence Act, not in the Constitution. <b>(DP)</b></p>	<p><i>An overriding preface dealing with all arms of the security apparatus should include the content of agreement 2.</i></p>
<b>11. Civilian control</b>	<p>The Constitution shall provide that the defence force is under civilian control, including a civilian ministry, parliamentary oversight and an Ombud for Defence Matters.</p>		
<b>12. The defence force and the provinces</b>		<p>Allocation of any powers in relation to the defence force to the provincial legislature. <b>(DP, FF, IFP)</b></p>	

Constitutional issue	Agreement	Contention	
13. Monopoly of force	The Constitution should enshrine the individuals right to self defence.	The Constitution should enshrine the right to bear arms. (IFP)	
14. Paramilitary force		The for need for, nature of and location of a paramilitary force. (FF, IFP)	

**FIRST DRAFT - 1 JUNE 1995**

**Status: Prepared by Theme Committee 6.4 Technical Advisors for consideration by the Theme Committee**

**POLICE SERVICE**

**Preface to the section of the Constitution dealing with security apparatus<sup>1</sup>**

**Supremacy of the Constitution<sup>2</sup>**

**General section on all security structures**

1. (1) The security services shall be structured by law and shall at all times act in accordance with and within the confines of the law.<sup>3</sup>

(2) The security services shall consist of the National Defence Force, the Police Service and such intelligence services as may be established by law.<sup>4</sup>

(3) The President, the Executive and Parliament shall be responsible for

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<sup>1</sup> It is suggested that this be drafted after the completion of discussion on police, defence and intelligence. There are four places in which this can be included within the Constitution, namely:

1. Within the provisions on Police
2. In a preface to the Chapter dealing with the security apparatus
3. In the preamble
4. In the directive principles, which are being discussed by Theme Committee 4

<sup>2</sup> This clause has been drafted by Theme Committee 1.

<sup>3</sup> This section is repeated from section 4(1) of the Interim Constitution. It covers the agreement reached by all parties and it is suggested that it be maintained in this form.

Obviously the section is not only applicable to the police, but to other arms of the security apparatus as well and as such should be included in a general section.

<sup>4</sup> Option 2: The security services shall consist of the National Defence Force, the Police Service, the National Intelligence Agency and the Secret Service.



safety and security.

(4) The security services shall at all times act subject to the direction of the competent political authority.

#### **Code of conduct for members of the Security services**

2. (1) Members of the security services shall at times act in accordance with the standards of political neutrality, impartiality and professionalism required of the security services in terms of the Constitution. In particular, members of the security services -

- (a) shall be obliged to comply with all lawful orders;
- (b) shall refuse to comply with a manifestly illegal order which would constitute an offence or would breach international law on armed conflict binding on the Republic;
- (c) shall at all times be obliged to use force that will not exceed the requirements of the circumstances;
- (d) shall not be entitled to hold office in any political party or political organisation;

(e) shall refrain from furthering or prejudicing any party political interest.<sup>5</sup>

## **Structure of the Police Service**

### **Option 1**

3. (A1) The police service shall be structured to function at national, provincial and local levels under the direction of the national and provincial governments, respectively.

(A2) (1) The Police Service shall be structured to function at both national and provincial levels under the direction of the national and provincial governments, respectively.

(2) A local government may establish a police service to function within its area of jurisdiction.

(B) The police service shall be structured to function at national, provincial and local levels under the direction of the national, provincial and local governments respectively.<sup>6</sup>

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<sup>5</sup> A Constitutional prohibition on the furthering or prejudicing of party political interests by members of the security service is required by Constitutional Principle XXXI.

<sup>6</sup> (A) has been drafted along the lines of the Interim Constitution. This allows the Service to be structured at national and provincial levels and to operate under the political direction of the national and provincial governments. Where the service is established at a local level, it will function under the direction of the provincial government. (B) has been drafted on the basis that the service is structured at national, provincial and local level, and therefore operates under the

## **Option 2**

3. 1. There shall be a national police service functioning under the direction of the national government.
2. The provincial government shall be competent to establish and regulate provincial, metropolitan or municipal police services and the public order force.

## **Option 3**

3. 1. There shall be a national police service functioning under the directions of the national government.
2. A provincial and local government shall be competent to establish and regulate provincial and metropolitan or municipal police services: Provided that an Act of Parliament shall lay down uniform norms and standards for policing at all levels.<sup>7</sup>

## **Functions of the Police Service**

4. (1) Functions of the police service shall be:

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directions of the three different levels of government.

<sup>7</sup> The third option was added pursuant to a letter received from the Democratic Party.

- a) the prevention of crime;
- b) the investigation of any offence or alleged offence; and
- c) the protection of the safety and security of the Republic<sup>8</sup> and all people within the Republic<sup>9</sup>

### **Powers**

- 5. No drafting has been done.<sup>10</sup>

### **Executive control**

- 6. The President shall appoint the national Commissioner.<sup>11</sup>

### **Parliamentary oversight**

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<sup>8</sup> It is necessary to insert the word Republic to cover both the maintenance of the safety and security of persons as well as the state itself.

<sup>9</sup> Option two: the protection of the safety and security of the Republic and all its inhabitants.

<sup>10</sup> It is considered inappropriate to draft when there is no agreement on exactly what functions will be dealt with at a national and provincial level. Reference should be had to section 218 and 219 of the interim Constitution which sets out the responsibilities of the national and provincial commissioners respectively. This example will be followed if it is desirable to set out the full list of functions in the Constitution. The appropriate approach is for the functions to be set out in legislation. The advantage of the former approach is that it will put an end to any political controversy after the Constitution is adopted. The advantage of the latter approach is that functions can be included at, say, provincial or local levels where the police service has developed in a way which allows for this. With reference to the agreements on order and public order policing, this will be dealt with under the functions set out under the responsibilities of the National Commissioner.

<sup>11</sup> Presidential powers will be dealt with as a general provision within the Constitution.

7. A (joint)<sup>12</sup> multi-party committee of Parliament all be established and maintained for the purpose of continuous Parliamentary oversight of all matters pertaining to Police.

### **Community policing**

There has been broad agreement that the police service should be guided by the concept of community policing. This is really a matter that should be dealt with in legislation and it would seem inappropriate to mandate this in a Constitution.

### **Discrimination**

It is suggested that the prohibition against discrimination in the security services should be properly covered in an equality provision in the Chapter on Fundamental rights.

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<sup>12</sup> Whether or not there are two Chambers of Parliament remains a matter for debate.