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TO : Delegates at World Trade Centre

FROM : National Land Committee

MEMO ON PROPERTY CLAUSE IN THE 7TH PROGRESS REPORT (29 JULY 1993) OF THE TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION

The Property Clause in the 7th Progress Report reads as follows:

Property

23. (1) Every person shall have the right to acquire, hold and dispose of rights in property.

(2) Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.

(3) Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.

FAX TO: WORLD TRADE CENTRE
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Comment

Clause 23(1)

> *Every person shall have the right to acquire, hold and dispose of rights in property.*

We have long argued that to constitutionally entrench existing property rights would be disastrous as it entrenches the racially discriminatory results of colonial conquest and apartheid land laws and policies.

If South Africa had had constitutional protection for property rights during the last century, forced removals and the racial prohibition of rights to own and lease land could never have taken place. Now that these processes have resulted in the dispossession of the majority of South Africans and the white ownership of 80% of South Africa's land, the situation is to be set in stone by a constitutional entrenchment of property rights. It is ironic that this result is justified by the principles of "integrity of title", "free contractual relations" and "security of investment", when these aspects of property rights were systematically denied to black South Africans until 1991.

We have nothing against the above principles as they are universally associated with property rights. Our complaint is the unequal treatment of past (thereby black) and present (thereby white) property rights.

To this end we propose that if clause 23 (1) is to be adopted as the property clause, it must be balanced by the following sentence:

> **Property rights acquired in terms of or under laws which are or were in contravention of universally accepted human rights standards shall not enjoy this protection.**

Clause 23.2

> ***Expropriation of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into account all relevant factors, including the use to which the property is being put, the history of its acquisition, its market value, the value of the owner's investment in it and the interests of those affected.***

This clause seems to derive from a draft which was put forward by the ANC:

> Any law providing for the compulsory acquisition of property by the state shall provide for appropriate compensation which shall take into account the public interest, available public resources, the circumstances of the prior acquisition and use of the property as well as the interests of the party or parties affected by the acquisition.

There are, however, critical differences. The technical committee has added **market value** and the **value of the owners investment** in it. Given the past subsidisation of white farmers and the consequent inflation of rural land prices, the investment criterion may lead to compensation even **above market value**.

Market value compensation would be prohibitively expensive on the scale necessary to address the racial imbalance in land holdings. While there are instances where it may be a fair quantum of compensation these are others where it is absurd, for example where white farmers acquired land from which black people had been forcibly removed at subsidised rates under the Agricultural Credit Act.

Another difference is that the technical committee has dropped taking into account **available public resources**. This has the most serious consequences of all, particularly for any land claims court or restoration process aimed at redressing forced removals. Clauses 23(1) and (2) read together provide that expropriation of land would be constitutional only with market value (or market value plus) compensation. As soon as the budget for compensation was finished no further forced removals claims could be entertained. Black claimants whose land was arbitrarily confiscated

are thereby effectively locked out of the court system and deprived of any possible redress for the abrogation of their property rights. Such unequal treatment of black and white property rights can only undermine the validity of the concept of property which will be perceived as a vehicle for maintaining existing white vested rights at the expense of equal protection for all.

To this end we recommend that "available public resources" must be included in the factors relevant to the determination of compensation. Otherwise there is no balance to "market value" and "owners investment" which should then be deleted.

Clause 23.3

> *Nothing in this section shall preclude measures aimed at restoring rights in land to or compensating persons who have been dispossessed of rights in land as a consequence of any racially discriminatory policy, where such restoration or compensation is feasible.*

The technical committee's rewording of this clause expresses most graphically the unequal treatment of black (past) and white (existing) property rights.

If restoration and compensation for past confiscation of property is only available "where feasible", then compensation for expropriation under clause 23(2) should also be dependent on feasibility. Alternatively compensation for past dispossession must be according to the same compensation formula as provided for existing expropriations under 23(2).

Furthermore, while a positive right to property is established in clause 23(1) no similarly positive right to restoration is established in clause 23(3), which provides only that possible measures (i.e. not guaranteed) to restore land should not be precluded by the previous sub-clauses.

To this end, we propose that clause 23(3) should be formulated as follows:

> **"Every person who did not receive effective compensation for removal from land when the removal was pursuant to apartheid policies and practices shall be entitled to the restoration of the land in question. Provided that where restoration is not feasible such person will be entitled to compensation as set out in clause 23(2)."**

Alternatively clause 23(2) should be amended as follows:

"Expropriation of property by the state shall be permissible in the public interest and shall be subject to compensation where feasible".

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17 August 1993

Mr Ken Andrew MP
Democratic Party
World Trade Centre
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Dear Ken,

As discussed with Helen Suzman, I am sending you the following documents:

1 A memorandum with a proposed redrafted property clause for the Bill of Rights.

2 A memorandum by the National Land Committee, arguing the issues which are involved.

If I can be of any assistance, please do let me know.

Best wishes,

Yours,

Geoff Budlender.

CONSTITUTIONALISING PROPERTY RIGHTS AND THE RIGHT TO RESTORATION OF PROPERTY

1 There is widespread agreement that there should be a land claims court to deal with claims to restoration. Bodies supporting this include the ANC, SA Agricultural Union, Urban Foundation, and World Bank. Derek Keys recently stated that land restoration is essential - that it is the price the society has to pay in order to move forward on a stable basis.

2 If it is considered necessary to constitutionalise property rights, the bill of rights should deal both with protection of existing vested rights, and with restoration of property rights removed by apartheid. This is so for the following reasons:

2.1 A reason of principle: There is a need to balance black and white claims to property rights. To recognise only existing vested interests amounts, in practice, to recognising only white property rights.

2.2 A practical reason: There is a real risk that any programme of land restoration will be challenged on constitutional grounds unless a land restoration programme has some constitutional protection. For example:

- It could be argued that any programme of restoration is unconstitutional on the grounds that the right to restoration is in direct conflict with the right to property;

- Expropriation for the purposes of restoration could be challenged as not being "in the public interest". It would then be unconstitutional whatever compensation was paid;

- The proponents of a land claims court argue for a specialised court of first instance - for example, it should make provision for non-lawyer participation. We do not yet know what the final form of the "Access

to Court" provision of the Bill of Rights will be. The present form (Seventh Report, clause 22) permits a special court. Earlier drafts would arguably have made a special court unconstitutional. The creation of a specialised body for this specialised function should be constitutionally protected.

3 The critical task is therefore to find a formulation which

3.1 gives constitutional authority for a programme of restoration; and

3.2 creates a fair balance between existing rights and rights removed by apartheid. Here, the task is to give constitutional recognition to a right to restoration, as there is to be a constitutional right to existing property.[1]

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[1] Note that the central issue is <u>restoration for those who lost property</u>. The purpose is <u>not</u> to "punish" those who acquired the property. Thus, any formulation which is based on a notion of "acquisition in bad faith" has the wrong starting-point, and will therefore give the wrong results. The starting-point is the right; questions of bad faith are relevant, if at all, only to the question of compensation.

A constitutional provision which requires the claimants now to prove bad faith on the part of present holders adds insult to the injury of the original dispossession. I would invite any member of the committee to attempt explain to people removed from their land at gunpoint why they should have to prove that the present holders obtained their land "in bad faith".

In defining "bad faith", the draft refers to "knowledge of any manifest injustice by which it [the land] was acquired". What does this mean? Is it limited to knowledge of the forced removal, or does it include knowledge that only white people could buy the land - surely also a manifest injustice?

Whatever the legal meaning of this phrase, a provision of this sort will have no practical meaning. Claimants (or the State) will never be able to prove what was in the minds of the purchasers.

4 The following formulation would meet these needs:[2]

(1) Every person shall have the right to acquire, hold and dispose of rights in property.

(2) Compulsory acquisition of property by the State shall be permissible in the public interest and shall be subject either to agreed compensation or, failing agreement, to compensation to be determined by a court of law as just and equitable, taking into account all relevant factors, including the public interest, the use to which the property is being put, the history of its acquisition, its market value, available public resources, and the interests of those affected.

(3) Persons who were dispossessed of rights in land as a consequence of any racially discriminatory law or policy, and who were not effectively compensated, shall have a right to the restoration of those rights or to equitable compensation or redress. Compulsory acquisition of property for this purpose shall be deemed to be in the public interest. Legislation shall be enacted to define and give effect to this right, and to provide for the creation of a specialised court to receive claims, to make awards, and to determine any questions of compensation which may arise as a result of such awards.[3]

Geoff Budlender
17 August 1993

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2 (1) and (2) are drawn from the version in the Seventh Report, with limited amendments. While I believe that these formulations are subject to criticism, I understand that in substance they have been agreed to by a number of parties, and I have therefore not suggested any fundamental changes to them.

3 There is no hidden agenda here. Compensation should be paid on the basis set out in (2). The purpose is to ensure that the court of first instance deals with the whole matter, rather than having it dealt with in a fragmented manner in different courts. There will be many cases where no compensation is payable, as the land is still owned by the State.