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**National
Land
Committee**

10 August 1993

Dear Negotiators

**COMMENTS ON THE PROPERTY CLAUSE IN THE 7TH PROGRESS REPORT OF THE
TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION**

The National Land Committee (NLC) is an independent umbrella body consisting of nine organisations which deal with land and development issues. Over the past years we have had close contact with rural and landless communities and have built up an experience of issues facing rural people especially those that were forcibly removed from their land because of Apartheid land laws.

The wording of the property clause, in the 7th Progress Report of the Technical Committee on Fundamental Rights, is of particular concern to us. We believe it will seriously prejudice the chances of removed communities to regain their land. In addition, it will limit the effectiveness of a Land Claims Court and a Land Reform Policy.

Please find enclosed our comments and suggestions. Because this issue will have such important consequences for landless communities we trust that it will be treated with the seriousness it deserves, by all the parties at the negotiating table.

Yours faithfully,



BRENDAN PEARCE
LAND RIGHTS AND ADVOCACY OFFICER
NATIONAL LAND COMMITTEE

The National Land Committee comprises:

Association for Rural Advancement (AFRA, Natal), Border Rural Committee (BRC), Eastern Cape Land Committee (ECLC), Farmworkers' Resource and Research Project (FRRP), Orange Free State Rural Committee (OFSRUC), Southern Cape Land Committee (SCLC), Surplus People Project (SPP, Western Cape), Transvaal Rural Action Committee (TRAC), Transkei Land Service Organisation (TRALSO).

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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.*

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".