

THESE MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE NEGOTIATING COUNCIL.

MINUTES OF THE MEETING OF THE NEGOTIATING COUNCIL HELD AT 10H30 ON THURSDAY 1 JULY 1993 AT THE WORLD TRADE CENTRE

PRESENT: See Addendum A

1. Moment of Prayer/Meditation

A moment of prayer/meditation was observed by all members.

2. Welcome and Attendance

2.1 The participants were welcomed.

2.2 Participants were requested to display their identification cards.

3. Ratification of the Agenda

The agenda was ratified with no amendments.

4. Substantive Issues

4.1 Reports from the Technical Committee on Constitutional Issues:

4.1.1 Constitutional Principles:

The Technical Committee members were welcomed. Present were A Chaskalson, D Moseneke, M Oliver, W Olivier, F Venter and M Wiechers. Apologies were noted from GE Devenish and B Ngoepe.

4.1.2 The Third Supplementary Report was presented to the meeting.

4.1.3 It was agreed to proceed as follows:

- * That the non-contentious Constitutional Principles be adopted;

- * That the meeting then deal with the outstanding Constitutional Principles and either refer them back to the Technical Committee or adopt them; and
- * That the additional Constitutional Principles then be dealt with.

4.1.4 The following Constitutional Principles were agreed to:

- 2.3 **There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.**
- 2.4 **The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.**
- 2.5 **There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.**
- 2.6 **Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.**
- 2.7 **Formal legislative procedures shall be adhered to by legislative organs at all levels of government.**
- 2.13 **Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.**
- 2.14 **Amendments to the constitution shall require special procedures involving specified majorities.**
- 2.15 **Government shall be structured at national, SPR and local levels.**
- 2.19 **A framework for local government powers, duties, functions and structures, shall be set out in the Constitution. The comprehensive powers, duties, functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.**
- 2.20 **The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of**

government on an agency or delegation basis.

2.21 National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in paragraph 2.19 shall make provision for appropriate fiscal powers and functions for different categories of local government.

2.24 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

2.24.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the SPR's.

2.24.4 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

National Government

2.24.5 Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other States - powers should be allocated to the national government.

2.24.8 The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

4.1.5 The following Constitutional Principles were debated:

2.1 The Constitution of South Africa shall provide for the establishment of a single sovereign state with [a democratic system of government] a common South African citizenship and committed to achieving equality between men and women and people of all races.

* It was suggested that the word "single" be deleted.

* It was noted the word "single" does not refer to the form of State, but to "one" State.

* It was agreed by consensus to amend the principle to read as follows:

"The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races."

2.2 The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.

It was agreed to adopt this principle as is.

2.8 The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

* A decision was still required as to whether the following specific reference to fundamental rights should be added to this principle: **"provided that this is done subject to [the provisions of] fundamental rights contained in the constitution."**

* It was agreed that the proposed amendment should be excluded and the principle accepted as is.

2.10 All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.

* It was suggested that the following words should be added at the end of the principle: "and to which all other provisions in the Constitution shall be subject". After discussion and input from the Technical Committee the proposer of the amendment withdrew the amendment.

* It was agreed that the principle be adopted as is.

2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of

equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

- * It was suggested that the words "Constitution and" be inserted in the first line between the words "The" and "legal". After discussion and an input by the Technical Committee, the amendment was withdrawn by the proposer.
- * Questions of clarity were put to the Technical Committee on this principle.
- * It was agreed to accept the principle as is.

The meeting adjourned for lunch at 13h20.

The meeting reconvened at 14h40

2.12 The status according to indigenous law of traditional leadership shall be recognised in the Constitution. Indigenous law shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution (and to legislation dealing specifically therewith).

- * The following amendment was proposed:

"2.12 The institution, status and role of Traditional Leaders shall be acknowledged, promoted and protected in the Constitution" and that a new Item 2.13 be inserted "2.13 Indigenous law and all other laws of the land shall be applied to the extent that it is not incompatible with Fundamental Human Rights contained in the Constitution, and all laws of the land shall be subject to legislation".

Discussion and debate followed on this proposal and questions concerning the proposed amendment were put to the Technical Committee.

* It was agreed to leave this matter in abeyance until further bi-laterals had been held on this principle and that it be revisited after the afternoon tea break.

* After the tea break the following formulation was put to the meeting:

"The institution, status and role of Traditional Leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law like, common law, shall be recognised and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith."

It was agreed to adopt this as the principle.

2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.

* Discussion and debate on this principle followed.

* The KP noted that, due to logistical restrictions, it was unable to provide the necessary documentation to the Negotiating Council to facilitate the debate on self-determination. An input on self-determination was given by the KP.

* The following amendment was suggested: "Collective rights to form, join and maintain organs of civil society, including linguistic, cultural and religious associations which shall on the basis of non-discrimination and free association, be recognised and protected." After discussion, the proposer withdrew the proposal.

* It was agreed to accept the above principle as it stands.

* It was agreed that the KP will have a meeting with the Planning Committee to discuss the right of self-determination of peoples. The KP accepted the above principle on this basis.

The meeting adjourned at 16h40 for tea.

The meeting reconvened at 17h10.

- * After the meeting of the KP with the Planning Committee, the following principle was put forward to the meeting for consideration:

"The right of self-determination of peoples, which allows them to determine their own political status through legislative and executive powers in the form of territorial independence and autonomy, is acknowledged."

- * After discussion it was agreed that this whole issue be referred back to the Technical Committee with a request for a recommendation to the Negotiating Council on how the matter should be processed, taking into account the linkages and the debates that the Negotiating Council has had on this issue. Furthermore, the Draft Constitution and the answers/submissions to the questions presented to the KP by participants and by the Technical Committee in their special report should be taken into consideration.

- * It was agreed that the proposed principle from the AVU be referred to the Technical Committee.

2.16 At each level of government there shall be democratic representation.

- * Questions of clarity were addressed to the Technical Committee on this principle. Discussion and debate followed regarding to Traditional Leadership.
- * The Technical Committee suggested that the following words be inserted after the word "government" "with the exception of the institution of Traditional Leadership,". This was not accepted by the meeting.
- * It was proposed that the following sentence be added to the above principle: "This principle shall not derogate from the provisions of Principle 2.12".

This was agreed to and therefore the principle as amended was accepted.

2.17 **Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.**

* Questions of clarity were addressed to the Technical Committee. It was agreed to accept the principle as it is.

2.18 **The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPR's shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, alternatively, if there is such a chamber, a specified majority of a chamber of parliament composed of regional representatives, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.**

* It was suggested that the words "and entrenched" be inserted after the word "defined" in the first sentence. After discussion and debate and an input from the Technical Committee, the proposer withdrew this suggestion.

* It was suggested that regions should have the ability and right to have legislative and executive powers, but in conformity with the national constitution. It was agreed that this issue be explored by the Technical Committee.

* It was suggested that the word "alternatively" in the second sentence be replaced by the word "and". After discussion and debate it was agreed that the Technical Committee should explore this and advise the Negotiating Council accordingly.

2.22 **Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR's and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.**

* It was suggested that the following words should be inserted at the beginning of the principle : "In addition to revenue derived from their own resources,". After debate and discussion, the proposer withdrew the amendment.

* It was agreed to adopt this principle as is.

2.23 A Financial and Fiscal Commission, representing inter alia each of the SPR's, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, disparities within the SPR's as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

* It was suggested that, instead of a Financial and Fiscal commission, a formula be put in the Constitution which could be reviewed after a defined period. Discussion and debate followed on this suggestion.

* It was agreed to adopt the principle as is. It was noted that the Ciskei Government reserved their position in this regard.

2.24 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

2.24.1 The level at which there is most control over the quality and delivery of services, should be the level responsible and accountable for the execution of the programme or the delivery of the services.

* It was suggested that the additional wording as suggested in the Third Supplementary Report of the Technical Committee be combined with this principle.

* After discussion and debate it was agreed that the SA Government draft a proposal for submission.

* The Technical Committee suggested that

the following wording be inserted after the word "level", "allocated with the necessary functions and powers".

- * It was agreed to refer this principle back to the Technical Committee for reconsideration.

2.24.3 **Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.**

- * It was agreed to accept this proposal as is.

National Government

2.24.6 **Where uniformity across the nation is required for a particular function, then legislative power over that function should be allocated predominantly, if not wholly, to the national government.**

- * It was agreed to accept this principle as is.

2.24.7 **Where minimum standards across the nation are required for the delivery of public services, the power to set such standards should be allocated to the national government.**

- * It was agreed to adopt this principle as is.

2.24.9 SPR Government

SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary,

inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

- * It was suggested that after the word "government", the following be inserted: "as defined in the Constitution" and that the rest of the paragraph be deleted.
- * It was suggested that the following wording should be added to the end of the principle "as well as other functions taking into account the criteria set out here before".
- * It was suggested that the wording "and aspects" be replaced by "such as".
- * It was agreed that general criteria instead of examples should be referred to in the principle.
- * It was agreed that the Technical Committee reformulate this principle.

Concurrent Powers

2.24.10

Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

- * It was agreed to adopt the principle as is.

2.24.11

In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.

- * It was suggested that this principle was not necessary. This was not accepted.

* It was suggested that the word "national" at the end of the sentence be removed and replaced with "SPR". This was not accepted.

* It was suggested that the following wording be inserted between the words "government" and "precedence", "which cannot be resolved by a court on a construction of the Constitution".

This was agreed to and therefore the principle as amended was accepted.

* The Ciskei reserved its position.

Residual Powers

2.24.12 **The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with.**

* It was suggested that the principle be reformulated to read as follows:

"The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national or SPR governments."

This was agreed to.

4.1.5 Additional Constitutional Principles:

4.1.5.1 The following proposed principle was put to the meeting:

Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognised

and protected.

- * It was suggested that this principle be added as Item 2.9. The subsequent numbering would be amended accordingly.
- * It was suggested that this principle should be accommodated in the Bill of Fundamental Human Rights.
- * It was agreed to accept this as an additional principle to be inserted where appropriate, with the subsequent numbering accordingly.

4.1.5.2

The following proposed principle was put to the meeting:

The independence and impartiality of a Commission for Administration, a Reserve Bank, an Auditor general and an Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

- * It was suggested that the concept of the Attorney General be included within the principle. The Technical Committee was requested to consider this and report back to the Negotiating Council.
- * It was suggested that this proposed principle falls within the area of the principle in 2.3 so this proposed principle should not be accepted.
- * Questions of clarity were put to the Technical Committee on this principle.
- * It was agreed to accept this principle and that it should be inserted where appropriate with the subsequent numbering to be accordingly amended.

4.1.5.3

The following proposed principle was put to the meeting:

Every member of the security forces (police, military and intelligence) shall be required to perform his or

her duties and functions and exercise his or her powers in the national interest and shall be prohibited to intentionally further or prejudice party political interest.

* It was suggested that the words "Every security force" be used to begin the clause.

* It was suggested that the words "and the security forces as a whole" be inserted after the word "intelligence)". This was agreed to. Various grammatical amendments were suggested. The principle would then read as follows:

"Every member of the security forces (police, military and intelligence) shall be required to perform his or her duties and functions and exercise his or her powers in the national interest and shall be prohibited from furthering or prejudicing party political interest. The security forces as a whole shall perform its duties and functions and exercise its powers according to the above mentioned criteria applicable to individual members."

4.1.5.4 The following principle was proposed to the meeting:

Nothing in the above Constitutional Principles shall prevent an SPR from democratically approving its own Constitution, which shall not be in conflict with the National Constitution.

* It was agreed that this proposal be pursued in bi-lateral meetings and that it be dealt with at a later stage.

4.1.6 The following additional points were noted:

4.1.6.1 The principles with regard to the question of the drafting of SPR Constitutions and the question of self-determination are still outstanding.

4.1.6.2 The Ciskei Government wanted its opposition to the granting of decisive powers and functions to national government instead of SPR authorities to be recorded, as it was of the opinion that it flies in the face of democracy and effectively endorses a unitary state.

4.1.6.3 The KP reserved its position and opposed all principles stated above that, in its view, endorsed a unitary state.

4.1.7 The Fifth Report of the Technical Committee:

4.1.7.1 It was agreed that the Technical Committee be mandated to proceed with their work as referred to in paragraph 4 and 5 of their Fifth Report. This would include the drafting of a constitution along the basic framework as suggested in paragraph 4 of the said report.

4.1.7.2 The drafting of this constitution should be interpreted in the light of the resolution on Steps to be Taken for the Purposes of Establishing a New Constitutional Order as adopted by the Negotiating Council on 30 June 1993 (see Addendum B).

4.1.8 The Technical Committee was thanked for its excellent work so far completed.

4.2 Report from the Technical Committee on the TEC and its Sub-Councils

4.2.1 The members of the Technical Committee were welcomed. Present were Z du Toit, F Haysom, JC Heunis, J Renene and D van Wyk. Apologies were noted from ME Mapheto.

4.2.2 The Technical Committee presented its reports.

4.2.3 The Technical Committee was thanked for the excellent work so far completed.

4.2.4 It was proposed that:

* The Technical Committee on the TEC and its Sub-Councils begins the drafting of legislation on the basis of the framework presented in paragraph 1 of their First Report, thereby putting into one document all the provisions and present the Negotiating Council with draft legislation.

* Furthermore, that the Negotiating Council agrees in principle that a TEC will be established, in line with the Resolution on Steps to be Taken for the Purposes of Establishing a New Constitutional Order as adopted by the Negotiating Council on 30 June 1993 (see Addendum B).

* Finally, that this is an in-principle decision and the details of

the draft legislation will still have to be discussed.

This proposal was agreed to.

4.2.5 The following additional points were noted:

- * That participants would have the opportunity to revisit this matter when the draft legislation is placed before the Negotiating Council.
- * That the purpose of the TEC as a structure is to level the playing fields before the elections.
- * That the Ciskei Government was strongly opposed to the decision.
- * That the Bophuthatswana Government was not in agreement with the decision.
- * That the AVU was directly in opposition to the principle of the TEC and the decision.
- * That the KP was directly in opposition to the principle of the TEC and the decision.

5. Closure

5.1 It was agreed to meet as a Negotiating Council at 08h30 on 2 July 1993 to deal with the following issues:

- * The minutes of the Negotiating Council of 30 June 1993;
- * The Commission of Inquiry into the Attack on the Negotiating Process;
- * The Report to the Negotiating Forum.

5.2 The meeting was closed at 21h10.

These minutes were ratified at the meeting of the Negotiating Council of 19 July 1993 and the amended version signed by the Chairperson of the original meeting on ...*3 AUGUST 1993*.....


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CHAIRPERSON

Addendum A

The following delegates and advisers were present at the meeting of the Negotiating Council on Thursday 1 July 1993:

L Landers : Chairperson
 MJ Mahlangu : Assistant Chairperson

Organisation	Delegates	Advisers
ANC	C Ramaphosa B Kgosisile	MV Moosa M Manzini
AVU	CD de Jager J Gouws	JJC Botha
Bophuthatswana	R Cronje R Mangope	SG Mothibe SS Seane
Cape Trad. Leaders	M Nonkonyana SN Sigcau	DM Jongilanga GD Gwadiso
Ciskei	M Webb VT Gqiba	TM Bulube SM Faku
DP	C Eglin M Finnemore	K Andrew AJ Leon
Dikwankwetla	JSS Phatang K Ngwenya	SOM Moji TJ Mohapi
IFP	VJ Matthews FX Gasa	WS Felgate
IYP	NJ Mahlangu Q Vilankulu	AP Laka
KP	A Budd	CP Mulder SC Jacobs
INM	SS Ripinga ND Mokoena	PMH Maduna
Kwazulu	BS Ngubane H Ngubane	SH Gumede
Labour Party	J Douw CC August	D Lockey
NIC/TIC	C Saloojee E Gandhi	K Mayet C Saloojee
NP	L Wessels TJ King	

P	A Rajbansi A Rambarran	AA Koobair VP Rattan
OFS Trad. Leaders	M Moroke RH Mopeli	MB Mota AM Molefe
PAC	P de Lille M Litheko	E Sibeko
Solidarity	JN Reddy DS Rajah	AS Razak Y Moolla
SACP	J Slovo L Jacobus	E Pahad S Shilowa
SA Government	RP Meyer C Schmidt	D Govender
Transkei	Z Titus N Jajula	LL Mtshizana
TVL Trad. Leaders	MA Netshimbupfe FF Kekana	LM Mokoena NE Ngomane
UPF	MJ Mahlangu A Chabalala	RJ Dombo
Venda	SE Moeti	GM Ligege S Makhuvha
XPP	PT Shiluvana MH Matjokana	TB Shibambu

T Eloff	:	Administration
G Hutchings	:	Minutes
M Radebe	:	Administration
G Briggs	:	Administration

**RESOLUTION ON STEPS TO BE TAKEN FOR THE
PURPOSES OF ESTABLISHING A NEW CONSTITUTIONAL ORDER
ADOPTED BY THE NEGOTIATING COUNCIL ON 30 JUNE 1993**

1. The Negotiating Council agrees on the following steps to be taken for the purposes of establishing a new constitutional order:
 - 1.1 The MPNP shall adopt the Constitutional Principles, including principles of regional government, providing for both strong regional government and strong national government;
 - 1.2 The Constitutional Principles shall be binding on the Constitution-Making Body and shall be justiciable by a Constitutional Court/Tribunal;
 - 1.3 The Commission on Delimitation/Demarcation appointed by the MPNP will make recommendations to the MPNP on regional boundaries for the purposes of elections and regional government for the transitional phase;
 - 1.4 The MPNP shall agree on legislation to make provision for the following structures for the purpose of levelling the playing field and promoting conditions conducive to the holding of free and fair elections:
 - 1.4.1 A Transitional Executive Council;
 - 1.4.2 An Independent Electoral Commission;
 - 1.4.3 An Independent Media Commission and an Independent Broadcasting Authority;
 - 1.5 The MPNP shall agree on details of discriminatory legislation to be repealed;
 - 1.6 The MPNP shall agree on a Constitution for the transitional period;
2. The Negotiating Council accordingly requests the Technical Committee on Constitutional Issues to draft a Constitution for the transition which shall make provision for:
 - 2.1 The election according to a system of proportional representation of a Constitution-Making Body, legislature and national government for the transitional phase which will include a national and regional component. With regard to constitution making, this Constitution shall provide for dead-lock breaking and special majorities by which decisions will be taken;

- 2.2 The election of regional legislatures and the establishment of regional governments in the transition;
 - 2.3 The powers, functions and structures of regions for the transitional period;
 - 2.4 Fundamental human rights on a justiciable basis during the transitional period;
 - 2.5 A Constitutional Court/Tribunal to ensure the justiciability of the Constitutional Principles, of the fundamental rights and of the Constitution itself;
3. Participants are given until the 12th of July 1993, to make further inputs to the Technical Committee with regard to the above draft Constitution for the transition.
 4. This is agreed against the background of paragraph 6 of the Explanatory Memorandum adopted by the Negotiating Council on 30 April 1993.