

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

MINUTES OF THE MEETING OF THE NEGOTIATING COUNCIL HELD AT 12h40 ON TUESDAY 16 NOVEMBER 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

The participants were welcomed.

3. Ratification of Agenda

The agenda was ratified with no amendments, but it was agreed that flexibility would be maintained to accommodate Technical Committee work programmes.

4. Minutes

4.1 The minutes of the meeting of 8 October 1993 were ratified with no amendments.

4.2 No matters arising were noted out of the minutes of the meeting of 8 October 1993.

5. Substantive Issues

5.1 Constitutional Issues - Chapter 8:

5.1.1 The Technical Committee on Constitutional Issues was welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier and F Venter. Apologies were noted from A Chaskalson and M Wiechers. It was noted that the Technical Committee had not been present at the commencement of this debate due to its drafting commitments,

but had arrived during the course of the debate on Chapter 8.

5.1.2 It was noted that this chapter had been previously agreed to but was being revisited by the Council as the South African Government had reserved its position on a number of clauses.

5.1.3 Clause 1 (1) "Establishment and Appointment" refers:

* It was suggested that the word "Public Protector" should be deleted and replaced with "National Ombudsman". This was not agreed to.

* It was suggested that the words "By choice and preference of a particular incumbent he or she may be known as the Ombudsman, the Ombudswoman or Ombud." This was not agreed to.

5.1.4 Clause 2 (3) "Independence and Impartiality" refers:

* It was agreed that the word "improperly" should be removed from the clause. The Technical Committee expressed concern over this agreement. It was suggested that if the word "improperly" remains, the word "interfere" should be replaced by "intervene". The Technical Committee was requested to reconsider this clause taking into account the debate in the Negotiating Council.

5.1.5 Clause 3 (1) (a) (v) "Powers, Functions and Duties" refers:

* It was agreed that the word "other" should be deleted from the clause.

5.1.6 Clause 3 (1) (c) (ii) "Powers, Functions and Duties" refers:

* It was agreed that the word "appropriate" be inserted between the word "other" and "recommendation" and that the words "or any other" be inserted between the words "the affected" and "public body".

5.1.7 Clause 3 (2) "Powers, Functions and Duties" refers:

* It was agreed that the words "and the law of privilege" should be deleted from the clause but the Technical Committee was requested to consider a formulation that would protect people against self-incrimination. It was noted that the Technical Committee would reconsider

this clause taking into account the debate in the Negotiating Council. Agreement that cases could arise where people giving evidence should be protected and the Technical Committee should find the appropriate way of dealing with this problem.

- * The DP reserved its position on clause 3 (2) (b).

5.1.8 Clause 5 (1) "Provincial Public Protector offices" refers:

- * It was suggested that the words "Provincial Public Protector" be deleted and replaced by "the Provincial Ombudsman. By choice and preference of a particular incumbent he or she may be known as Ombudsman, Ombudswoman or Ombud". This was not agreed to.

5.1.9 Clause 5 "Provincial Public Protector offices" refers:

- * It was suggested that the following should be added to clause 5 to form new sub-clauses, i.e. clause 5 (4) and clause 5 (5):

"5 (4) The functions, powers and duties of the Provincial Ombudsman shall be those set out above in respect of the National Ombudsman save that they may be exercised only in respect of those institutions and persons falling under the sole jurisdiction of the Provincial legislature".

5 (5) Such powers, duties and functions are to be exercised in consultation and conjunction with the National Public Protector who has concurrent jurisdiction in the region concerned."

It was agreed to insert the proposed clause 5 (5) but not the proposed clause 5 (4). Furthermore, clause 5 (1) remains as formulated.

5.1.10 Clause 6 (5) "Human Rights Commission - Establishment and appointment" refers:

- * It was agreed that a sub-clause 6 (5) (f) should be inserted to read "to receive and consider recommendations or representations from any person or organisation on the application of Chapter 3 of the Constitution".

5.1.11 Clause 6 (7) "Human Rights Commission - Establishment and appointment" refers:

* It was agreed to insert the words "arrange for or" after the word "may" and to insert the following words to the end of the sentence "or direct a complainant to an appropriate forum". It was noted that the DP objected to this.

5.1.12 The remainder of Chapter 8 was agreed to as formulated.

5.1.13 The Technical Committee was at this point excused from the meeting but would appear before Council again during the course of the day when further Constitutional Issues were dealt with.

5.2 **Technical Committee on Fundamental Rights during the Transition:**

5.2.1 The Technical Committee was welcomed. Present were LM du Plessis and Z Yacoob. Apologies were noted from H Corder, G Grove and S Nene. The Technical Committee presented the addendum to the Twelfth Progress Report (see Addendum B).

5.2.2 It was noted that the Negotiating Council had to take a decision on the inclusion of clause 32 in the Draft Bill on Fundamental Rights during the Transition, if necessary by sufficient consensus. If a deadlock arose, the clause would not be included in the Draft Bill on Fundamental Rights during the Transition. Participants were urged to find a compromise in this regard.

The meeting adjourned for tea at 14h10.

The meeting reconvened at 14h40.

5.2.3 Before the meeting commenced with its debate around the report of the Technical Committee, the proposal that sub-clauses (1) and (2) of the Equality Clause be included as part of the Limitation Clause 34 (1) (b) (aa) was revisited. This proposal had been put forward to the Negotiating Council meeting of 15 November 1993. It was noted that informal consultation had occurred between the Technical Committee and various delegates. After discussion it was agreed that this proposal stands down.

5.2.4 The issue of Family Law under Religion was discussed. The proposal of the Technical Committee was amended to read:

"Clause 14 (3) Nothing in this section shall preclude legislation recognising:

- (a) personal and family law under religion, and
- (b) the validity of marriages concluded under religious law subject to specified procedures."

5.2.5 Discussion and debate proceeded around whether Clause 32 should be included in the Bill of Rights, whether the First Option in the Addendum to the Twelfth Progress Report of the Technical Committee should be included in the Bill of Rights or whether the Second Option in the said Addendum should be included in the Draft Constitution.

5.2.6 It was proposed that the Second Option of the Technical Committee on Fundamental Rights during the Transition be included in the Draft Constitution. This proposal was seconded.

5.2.7 It was further proposed that the present clause 32 be included in the Bill of Rights. This was seconded. This proposal was put to the meeting after which the Chairperson, with reference to the Standing Rules, ruled that there was neither consensus nor sufficient consensus and, therefore, the proposal stands down and clause 32 would not form part of the Bill of Rights.

5.2.8 The further proposal as referred to in item 5.2.6 above was put to the meeting after which the Chairperson, with reference to the Standing Rules, ruled that there was neither consensus nor sufficient consensus and, therefore the proposal stood down.

5.2.9 The Traditional Leaders noted that this issue would be raised once again at the Plenary Session of the Negotiating Process.

5.2.10 The Technical Committee was thanked for its work completed.

5.3 **Twenty Sixth Report of the Technical Committee on Constitutional Issues:**

5.3.1 The Technical Committee on Constitutional Issues was again welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier and F Venter. Apologies were

noted from A Chaskalson and M Wiechers.

5.3.2 The "Preamble" refers:

- * The clause as formulated was agreed to.

5.3.3 Chapter 1, clause 2 "National Symbols" refers:

- * The clause as formulated was agreed to.

5.3.4 Chapter 1, clause 3 "Languages" refers:

- * Clause 3 (1) as formulated was agreed to. It was noted that the correct spelling of the prefix before "Venda" would be supplied to the Technical Committee.
- * Clause 3 (2) as formulated was agreed to.
- * Clause 3 (3) as formulated was agreed to.
- * Clause 3 (4) as formulated was agreed to.
- * Clause 3 (5) as formulated was agreed to.
- * With regard to clause 3 (6), it was agreed that the words "determined by law in terms of" be deleted and replaced by "as contemplated in". The clause as amended was agreed to.
- * Clause 3 (7) as formulated was agreed to.
- * Clause 3 (8) as formulated was agreed to.
- * Clause 3 (9) as formulated was agreed to.
- * With regard to clause 3 (10), it was noted that the reference to subsection (1) should read subsection (9). The clause as amended was agreed to.
- * Clause 3 (11) as formulated was agreed to.
- * It was agreed to insert the following paragraph as clause 3 (12):

"The Board shall be responsible for promoting respect for and the development of Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and other languages used by

communities in South Africa, as well as Arabic and Hebrew and other languages used for religious purposes."

It was agreed that the language "Urdu" should be specifically mentioned in clause 3 (12).

- 5.3.5 Clause 64, "Signature and enrolment of Acts" refers:
- * The clause as formulated was agreed to.
- 5.3.6 Clause 110, "Signature and Enrolment of provincial legislation" refers:
- * The clause as formulated was agreed to.
- 5.3.7 Clause 4, "The supremacy of the Constitution" refers:
- * The clause as formulated was agreed to.
- 5.3.8 Clause 5, "Citizenship" refers:
- * The clause as formulated was agreed to with the proviso that the Negotiating Council seek further legal advice on this clause. This should be done before the Constitution was submitted to Parliament. The PAC expressed concerns with regard to this clause.
- 5.3.9 Clause 6, "The franchise" refers:
- * Clause 6 (a) as formulated was agreed to.
 - * Clause 6 (b) as formulated was agreed to.
 - * Clause 6 (c) as formulated was agreed to.
- 5.3.10 Schedule 7, "Constitutional Principles" refers:
- * Constitutional Principle No. 2 was agreed to as formulated.
 - * Constitutional Principle No. 11 was agreed to by sufficient consensus. The Traditional Leaders objected to this and gave notice that they wanted to consult with their principals in this regard. The Chairperson noted that the Traditional Leaders were free to put forward a further proposal to the Negotiating Council for its

further consideration in this regard, but the sufficient consensus ruling stands, unless the Negotiating Council agreed otherwise.

- * Constitutional Principle No. 18 was agreed to as formulated.
- * Constitutional Principle No. 20 was agreed to as formulated.
- * Constitutional Principle No. 21.1 was agreed to as formulated.
- * Constitutional Principle No. 21.2 was agreed to as formulated.
- * Constitutional Principle No. 21.5 was agreed upon to read "The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government".
- * Constitutional Principle No. 21.6 was agreed to as formulated.
- * Constitutional Principle No. 27 was agreed to as amended. (The words indicated in brackets should be deleted.)
- * It was agreed to revisit Constitutional Principle No. 28 during the course of the day after informal discussions had occurred. After informal discussions had taken place, it was agreed to amend Constitutional Principle No. 28 to read as follows:

"Notwithstanding any principle dealing with freedom of association, 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. Provision shall be made that every person shall have the right to fair labour practices."
- * After informal discussions had taken place during the course of the day on Constitutional Principle No. 30, it was agreed that the last sentence of Constitutional

Principle No. 30 (1) should read as follows:

"The structures and functioning of the public service as well as the terms and conditions of service of its members shall be regulated by law."

5.3.11 It was agreed that the term "Ombudsman" should be amended to read "Public Protector" in Constitutional Principle No. 29. Furthermore, the term "Commission for Administration" should read "Public Service Commission".

5.3.12 "Schedule 9" refers:

* The Schedule as formulated was agreed upon.

* After informal discussions had taken place during the course of the day, it was agreed to amend section 118 (3) (d) to read as follows:

"It is necessary for the determination of national economic policies, the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour or the maintenance of national security; or". Resulting from this amendment, schedule 9 would be amended to include the "Environment".

* After informal discussions had taken place, it was agreed that the reference to nature conservation should read as follows:

" Nature Conservation excluding national parks established by or under the National Parks Act no. 57 of 1976, national botanical gardens and marine resources."

* It was suggested that "Water Supply" should be included in the Schedule. It was agreed to revisit this proposal during the course of the day after informal discussions had occurred. After informal discussions, it was agreed to not include "Water Supply" in Schedule 9.

5.3.13 A document entitled "Proposal to Technical Committee on Constitutional Issues on the Establishment of a Commission to

deal with Gender and other related issues" was distributed by the womens caucus to members and the Technical Committee on Constitutional Issues. The Technical Committee was requested to consider the proposal and make a recommendation to the Negotiating Council (see Addendum C).

5.3.14 At this point, it was noted that the State President, FW de Klerk was present in the Negotiating Council. The State President was welcomed by the meeting and made a brief input.

5.4 **Twenty Fifth Report of the Technical Committee on Constitutional Issues, Chapter 10, Local Government and the Further Twenty Fifth Report of the Technical Committee on Constitutional Issues, Proposals by the South African Government and the African National Congress to the Negotiating Council:**

5.4.1 The South African Government and the ANC proceeded to give an input on the suggested amendments which had resulted from bilateral meetings held. Questions of clarity were put forward to the South African Government and the ANC. It was agreed that the debate and decisions on this chapter would occur after supper. It was noted that the Technical Committee on Constitutional Issues was not present at any stage when this chapter was dealt with.

5.4.2 When the meeting reconvened after dinner, debate proceeded on this chapter.

5.4.3 The Chapter as amended was agreed to (see Addendum D).

5.4.4 With regard to clause 141 (6) it was noted that:

- * The NPP neither supported or objected to the clause;
- * The Labour Party objected to the clause;
- * The NIC/TIC objected to the clause; and
- * The PAC objected to the clause.

5.4.5 It was noted that the PAC reserved its position on clause 142.

5.4.6 It was noted that the PAC reserved its position on clause 143.

5.4.7 It was suggested that the formula for proportional representation should be predetermined and included in the Local Government Transition Bill.

5.4.8 It was noted that the Delimitation/Demarcation Board would be

established before the election to examine the boundaries of existing local authorities.

- 5.4.9 The South African Government noted that it would not undertake any restructuring that was in conflict with the spirit of this Chapter 10.

5.5 Constitutional Issues - Report on Proposed Amendments, Chapter 7:

- 5.5.1 The Technical Committee on Constitutional Issues was welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier and F Venter. Apologies were noted from A Chaskalson and M Wiechers.

- 5.5.2 Paragraph 1, Clause 87 refers:

It was agreed to substitute the following subclause for subclause (2):

"(2) There shall be a President of the Constitutional Court who shall, subject to the provisions of section 89, be appointed by the President after consultation with the Chief Justice and in consultation with the Cabinet for a non-renewable period of 7 years."

- 5.5.3 Paragraph 2, Clause 88 refers:

It was agreed to substitute the following subclause for subclause (3):

"(3) Subject to the provisions of section 90 (2) the Constitutional Court shall have original jurisdiction over issues referred to in subsection (2) to the extent that such jurisdiction does not overlap with the provisions of section 91 (3)."

- 5.5.4 Paragraph 3, Clause 89 refers:

* With regard to subparagraph 3.1, it was agreed to substitute the following subclause for subclause (1):

"(1) The judges of the Constitutional Court shall be appointed by the President in accordance with the provisions of subsections (3) and (4) for a non-renewable period of 7 years."

* It was agreed that subparagraph 3.2 should stand over

and would be dealt with during the course of the day.

5.5.5 Clause 90 refers:

It was agreed to delete the word "after" in the fourth line and to insert the word "in" in its place.

5.5.6 Clause 91 refers:

- * With regard to subparagraph 5.1, it was agreed to substitute the following paragraphs for paragraph (b) and (c) of subclause (3):

"(b) the violation or anticipated violation of the fundamental rights enshrined in Chapter 3 of this Constitution within the area of its jurisdiction:

(c) subject to subparagraph (a), the constitutionality or validity or administrative actions of all organs of the state taken in terms of any legislation or law applicable within the area of its jurisdiction;"

- * With regard to subparagraph 5.2, it was agreed to renumber paragraph (e) of subclause (3) as paragraph (f) and to insert the following new paragraph (e):

"(e) to consider and advise on the constitutionality of a provincial bill or draft bill;"

5.5.7 Clause 92 refers:

It was agreed to substitute the following subclause for subclause (13):

"(13) Appeals arising from matters referred to in section 91 (3) and which related to issues of constitutionality shall lie with the Constitutional Court."

5.5.8 Clause 95 refers:

- * With regard to subparagraph 7.1, it was agreed to substitute the following paragraphs for paragraphs (e) and (f) of subclause (1):

"(e) two practising advocates designated by the

advocate's profession;

(f) two practising attorneys designated by the attorney's profession;".

* With regard to subparagraph 7.2, it was agreed to substitute the following paragraph for paragraph (i) of subclause (1):

"(i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet."

* With regard to subparagraph 7.3, it was agreed to delete the word "dismissal" in the first line of paragraph (a) of subclause (2) and to insert the words "removal from office" in its place.

* With regard to subparagraph 7.4, it was agreed to renumber paragraph (b) of subclause (2) as paragraph (c) and to insert the following new paragraph:

"(b) to make recommendations regarding the removal from office of judges of the Constitutional Court in terms of section 94 (4);"

* With regard to subparagraph 7.5, it was agreed to delete "(2) (b)" in subclause (3) and to insert "(2) (c)" in its place.

5.5.9 Clause 98 refers:

It was agreed to substitute the following subclause for subclause (4) of the transitional proposals that had been approved by the Council:

"(4) Subject to the provisions of this Constitution all measures and legislation in operation on the date of the coming into operation of this Constitution in respect of all judicial officers and attorneys-general, shall, subject to the same measures regarding the remuneration, pension, leave, gratuity and any other condition of service or service benefits which applied to such judicial officers and attorneys-general before the coming into operation of this Constitution, remain in operation until amended or repealed by the competent legislature

or authority: Provided that, except in accordance with an applicable law, no such measures shall be changed which affects such judicial officers or attorneys-general to their detriment."

5.5.10 Clause 91 refers:

It was agreed that the following be inserted as a new clause 91 (6):

"Subject to the provisions of section 92 (13) and notwithstanding the provisions of sections 88 (2) and 91 (3), a provincial division of the Supreme Court may hear a matter, provided that all interest parties shall agree to the jurisdiction of that Court as a court of first instance."

5.5.11 Clause 97 (2) refers:

The Technical Committee on Constitutional Issues was instructed to draft clause 97 (2) to fall in line with the agreement reached on languages in the Council.

The meeting adjourned for dinner at 18h40. It was noted that two reports on discriminatory legislation would be distributed during the adjournment and would be dealt with during the course of the evening.

The meeting reconvened at 20h00.

5.6 Repeal or Amendment of Discriminatory Legislation:

5.6.1 The convenor of the Task Group, J van der Westhuizen, was welcomed. Z Titus, on behalf of the Planning Committee presented a report containing recommendations to the Negotiating Council on the repeal of legislation. The report as amended was agreed to by the Negotiating Council (see Addendum E).

5.6.2 With regard to paragraph 14, it was noted that the TEC would take over the function of processing from the Multi-Party Negotiating Process. It was noted that the DP reserved its position with regard to the mechanism.

5.6.3 The Task Group proceeded to present its report on Freedom of Speech and Race Relations, section 47 (2) (c) and (d) of the Publications Act and Section 62 of the Internal Security Act to

the Negotiating Council. It was noted that the Council should focus on and address paragraph 3 "Recommendations" of the report.

- 5.6.4 The meeting proceeded to discuss the recommendations.
- 5.6.5 It was suggested that sections 47 (2) (c) and (d) be repealed but only after the investigation in terms of 3 (v) had been conducted. Therefore, the following words should be added to the end of item 3 (i):
- "after the investigation referred to in terms of 3 (v)."
- After discussion it was agreed by sufficient consensus to accept 3 (i) as formulated. The objection of the National Party and the South African Government was noted.
- 5.6.6 Item 3 (ii) was agreed to as formulated.
- 5.6.7 With regard to item 3 (iii), it was suggested that Section 62 be repealed. Other participants did not agree with this viewpoint. It was agreed this item be revisited after informal discussion had occurred. After informal discussions had occurred, it was agreed that item 3 (iii) should read:
- "Section 62 of the Internal Security Act 74 of 1982 be retained until investigation under item 3 (v) of the said recommendations had been completed. On the basis of the investigation the decision should be taken that the section should be amended or repealed. If repealed an alternative should be formulated to address the publication of views which promote racial hatred."
- 5.6.8 Item 3 (iv) was agreed to as formulated.
- 5.6.9 With regard to item 3 (v), it was agreed to insert the following words after the word "general":
- "and publication of views which promote racial hatred".
- 5.6.10 The Task Group was thanked for its work so far completed.

The meeting adjourned for tea at 21h30.

The meeting reconvened at 21h50. When the meeting reconvened it proceeded to deal with local government (see item 5.4.2 above).

The meeting adjourned at 22h15 for the Planning Committee to meet.

The meeting reconvened at 24h05. The Planning Committee proceeded to report back to the Negotiating Council on its meeting (see item 6 below).

5.7 Twenty Seventh Report of the Technical Committee on Constitutional Issues:

- 5.7.1 The Technical Committee on Constitutional Issues was welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier, F Venter and M Wiechers. Apologies were noted from A Chaskalson. The Technical Committee presented an overview of the report to the meeting. The meeting proceeded to debate the report clause by clause. The Technical Committee presented each clause in depth to the meeting and debate followed. Questions of clarity were put throughout the duration of the debate.
- 5.7.2 The PAC noted that it was protesting at having the report presented at this stage and having to deal with it immediately. It was further noted that the PAC reserved its position on the whole of Chapter 13. Furthermore, the PAC would participate in this debate without prejudice.
- 5.7.3 Clause 186 "South African Police Service - Establishment" refers:
- * Clause 186 (1) was agreed to and amended to read:

"There shall be established and regulated by an Act of Parliament a South African Police Service structured both at national and provincial levels which shall function under the direction of both the national and provincial governments."
 - * Clause 186 (2) as formulated was agreed to.
 - * The South African Government reserved its position on this clause.
- 5.7.4 Clause 187 "South African Police Service - Powers and functions" refers:
- * The clause as formulated was agreed to.

5.7.5

Clause 188 "South African Police Service - Minister and Commissioner" refers:

- * Clause 188 (1) was agreed to as formulated.
- * Clause 188 (2) was agreed to as formulated with the proviso that the South African Government reserved its right to revisit clause 188 (2).
- * Clause 188 (3) was agreed to as formulated.

5.7.6

Clause 189 "South African Police Service - Powers of Province" refers:

- * It was noted that the reference in clause 189 (1) should read "section 192 (1)". The clause as amended was agreed to.
- * It was noted that the reference in clause 189 (2) (a) should read "section 190 (1) (b)". The whole clause as amended was agreed to. It was noted that the NPP objected to clause 189 (2) (a).
- * The PAC at this point again stated its objection to Chapter 13 and Chapter 14 and noted that it was taking leave of the meeting.
- * It was noted that the reference in clause 189 (3) should read "section 192 (1)". The clause as amended was agreed to.
- * Clause 189 (4) was agreed to as formulated.

5.7.7

Clause 190 "South African Police Service - National Commissioner" refers:

- * It was noted that the reference in clause 190 (1) (n) should read "section 190". Clause 190 (1) as formulated was agreed to.
- * It was agreed that clause 190 (2) should stand over.

5.7.8

Clause 191 "South African Police Service - Provincial commissioners" refers:

- * Clause 191 (1) was agreed to as formulated.

- * Clause 191 (2) was agreed to as formulated.
- 5.7.9 Clause 192 "South African Police Service - Co-ordination and co-operation" refers:
- * Clause 192 (1) was agreed to as formulated.
 - * It was noted that the word "to" in the third line of clause 192 (2) should read "in terms of". The clause as amended was agreed to.
- 5.7.10 Clause 193 "South African Police Service - Local Policing" refers:
- * Clause 193 (1) was agreed to as formulated.
 - * Clause 193 (2) was agreed to as formulated.
 - * It was agreed that the words "the agreement" should be deleted from clause 193 (3) (a). The rest of clause 193 (3) was agreed to as formulated.
- 5.7.11 Clause 194 "South African Police Service - Independent complaints mechanism" refers:
- * The clause was agreed to as formulated.
- 5.7.12 Clause 195 "South African Police Service - Acts of members outside their territorial jurisdiction" refers:
- * The DP noted that any agreement it gave from this clause onwards was without prejudice.
 - * Clause 195 (1) was agreed to as formulated.
 - * Clause 195 (2) was agreed to as formulated.
- 5.7.13 Clause 196 "South African Police Service - Transitional Provisions" refers:
- * Clause 196 (1) was agreed to as formulated.
 - * Clause 196 (2) was agreed to as formulated.
 - * Clause 196 (3) was agreed to as formulated.
 - * The NPP noted that it would support this section with

a reservation.

5.7.14 Chapter 13, Clause 1 "Establishment of a National Defence Force" refers:

- * Clause 1 (1) was agreed to as formulated.
- * It was noted that the word "does" in the second last line of clause 1 (2) should read "did". The balance of the clause was agreed to as formulated. The South African Government reserved its position on this clause.
- * Clause 1 (3) was agreed to as formulated.

5.7.15 Chapter 13, Clause 2 "Chief of the National Defence Force" refers:

- * It was agreed that this clause should stand over.

5.7.16 Chapter 13, Clause 3 "Members of the National Defence Force" refers:

- * Clause 3 (1) was agreed to as formulated.
- * Clause 3 (2) was agreed to as formulated.
- * Clause 3 (3) was agreed to as formulated.
- * Clause 3 (4) was agreed to as formulated.
- * Clause 3 (5) was agreed to as formulated.
- * Clause 3 (6) was agreed to as formulated.
- * After discussion, it was agreed that clause 3 (7) should stand over.
- * Clause 3 (8) was agreed to as formulated.
- * Clause 3 (9) was agreed to as formulated.

5.7.17 Chapter 13, Clause 4 "Functions of the National Defence Force" refers:

- * Clause 4 (1) was agreed to as formulated.
- * Clause 4 (2) was agreed to as formulated. The South

African Government reserved its position on clause 4 (2) (b).

* Clause 4 (3) was agreed to as formulated.

5.7.18 Chapter 13, Clause 5 "National Defence Force - Accountability" refers:

* Clause 5 (1) was agreed to as formulated. The South African Government reserved its position on this clause.

* Clause 5 (2) was agreed to as formulated.

* Clause 5 (3) was agreed to as formulated.

* It was agreed that the number of seats referred to in clause 5 (3) (a) should be ten and not twenty. The balance of the clause was agreed to as formulated.

* Clause 5 (3) (b) was agreed to as formulated.

* It was agreed that clause 5 (3) (c) should stand over.

* Clause 5 (4) was agreed to as formulated.

* Clause 5 (5) was agreed to as formulated.

5.7.19 Chapter 13, Clause 6 "National Defence Force - Transitional provisions" refers:

* Clause 6 (1) was agreed to as formulated.

* Clause 6 (2) was agreed to as formulated.

* Clause 6 (3) was agreed to as formulated.

* Clause 6 (4) was agreed to as formulated.

* Clause 6 (5) was agreed to as formulated.

* Clause 6 (6) was agreed to as formulated.

* Clause 6 (7) was agreed to as formulated.

* The South African Government reserved its position on this entire clause.

5.7.20 Proposed subsection (4) to be inserted in section 76 (Chapter 4) refers:

- * It was agreed to include the proposed subsection.
- * It was agreed that clause 76 (4) (b) (i) should read as follows:

"declare, with the approval of Parliament, a state of national defence;"
- * The balance of the clause was agreed to as formulated.

5.7.21 The meeting proceeded to deal with Chapter 14, "General and Transitional Provisions". It was noted that the ANC and the DP reserved their positions with regard to this chapter. The Chairperson noted that all parties had the right to revisit any clauses of this Chapter.

5.7.22 Clause 190 "Repeal of laws" refers:

- * Clause 190 (1) was agreed to as formulated.
- * Clause 190 (2) was agreed to as formulated.

5.7.23 Clause 191 "Continuation of existing laws and conventions" refers:

- * Clause 191 (1) was agreed to as formulated.
- * It was agreed to insert the words "until amended by the appropriate authority" into clause 191 (2) at the appropriate place.

5.7.24 Clause 192 "Continuation of international rights and obligations" refers

- * The clause was agreed to as formulated.

5.7.25 Clause 192A "Status of International Law" refers:

- * It was noted that the words "subject to this Constitution" should be deleted in Clause 192A (1). The clause as amended was agreed to.
- * Clause 192A (2) was agreed to as formulated.

- * Clause 192A (3) was agreed to as formulated.
- 5.7.26 Clause 193 "Construction of certain references" refers:
- * It was noted this clause was still to be drafted by the Technical Committee.
- 5.7.27 Clause 194 "Transition : Legislatures" refers:
- * Clause 194 (1) was agreed to as formulated.
 - * Clause 194 (2) was agreed to as formulated.
 - * Clause 194 (3) was agreed to as formulated.
 - * Clause 194 (4) was agreed to as formulated.
 - * Clause 194 (5) was agreed to as formulated.
 - * Clause 194 (6) was agreed to as formulated.
- 5.7.28 Clause 195 "Transitional arrangements : The Executive" refers:
- * Clause 195 (1) was agreed to as formulated.
 - * With regard to clause 195 (2), the Technical Committee was requested to consider the period until the new appointees take up their offices.
- 5.7.29 At this point the following proposal was put to the meeting:
- * That the Negotiating Council meeting be adjourned;
 - * That the Technical Committee identifies the sections of this chapter which are absolutely essential to process before the Plenary to complete the draft Constitution in principle;
 - * That the Negotiating Council should identify what elements this chapter should have so that agreement could be reached on what this chapter should contain; and
 - * The elements that do not have to be agreed upon or that cannot be agreed upon due to time constraints, be referred by the Plenary back to the Negotiating Council for its attention.

The proposal was agreed to by consensus.

5.2.30 It was noted that all outstanding issues would be revisited during the course of the next meeting of the Negotiating Council on 17 November 1993.

6. Planning Committee Reportback

6.1 Z Titus on behalf of the Planning Committee submitted the following report to the Negotiating Council:

6.1.1 It was noted that all the arrangements and procedures for the Plenary session were on schedule. The Planning Committee recommended that the Plenary session commence at 13h45. This was agreed to.

6.1.2 Z Titus requested PJ Gordhan to deal with the detailed procedures with regard to the Plenary session.

6.1.3 PJ Gordhan proceeded to give a report on procedures and proposed documentation to the meeting.

6.1.4 The proposed draft Agenda was presented. It was agreed that the Judges Mohammed and Schabort chair the First Session of the Plenary.

6.1.5 It was noted that proposed Guidelines/Rules for the Plenary were being typed and that these would be distributed to members. An overview of the proposed Guidelines/Rules of the Plenary was given to members. It was agreed that Planning Committee members serve as the proposed Steering Committee.

6.1.6 The Planning Committee recommended the following procedure for the substantive issues of the Plenary:

- * Each of the bills would be put in total as a package to the Plenary for adoption;
- * The Constitution would be considered a chapter at a time for the purposes of endorsement;
- * Parties were free to express reservations and objections. In addition, a schedule would be attached to the agenda indicating whether a party had reserved its position or objected to a clause in the Negotiating Council;
- * Furthermore the Planning Committee suggested that no extensive debates on substantive matters take place on floor of the Plenary; Only amendments of a technical nature should be submitted via the Steering Committee and be referred to the Negotiating Council for

processing;

- * It was agreed that if speeches occurred during the course of this session a time limit of two-three minutes would be allowed overall.

- 6.1.7 It was agreed that the function of the Plenary was to formally adopt agreements.
- 6.1.8 The procedure recommended by the Planning Committee was agreed to by consensus.
- 6.1.9 It was noted that the proposed report of the Negotiating Council to the Plenary would be put before Council for its approval at its meeting of 17 November 1993 preceding the Plenary session .
- 6.1.10 It was noted that the role of the Technical Committees would be acknowledged at the Plenary session in an appropriate way.
- 6.1.11 It was agreed to, via a proposed resolution, request the Plenary to mandate the Negotiating Council to attend to any outstanding issues on its behalf.
- 6.1.12 The PAC noted that it would not object to the participation of the two judges but requested that consideration be given to the participation of the international community in some form or another.

7. **Future Meetings**

It was agreed that the Negotiating Council meeting should commence at 09h30 on 17 November 1993.

8. **Closure**

The meeting adjourned at 03h30.

These minutes were ratified at the meeting of the Negotiating Council of 30 November 1993 and the amended version signed by the Chairperson of the original meeting on 1/12/1993.....


.....
CHAIRPERSON

Addendum A

The following delegates and advisers were present at the meeting of the Negotiating Council on Tuesday 16 November 1993:

DJ de Villiers : Chairperson
 L Landers : Assistant Chairperson
 MJ Mahlangu : Assistant Chairperson

Organisation	Delegates	Advisers
ANC	C Ramaphosa B Kgosisile	M Manzini PM Maduna
AVU	C Kruger A Pienaar	AJ Horn
Bophuthatswana		
Cape Trad. Leaders	M Nonkonyana SN Sigcau	GD Gwadiso
Ciskei		
DP	CW Eglin D Smuts	K Andrew
Dikwankwetla	SOM Moji	K Ngwenya TJ Mohapi
IFP		
IYP	NJ Mahlangu NS Mtsweni	Q Vilankulu AP Laka
KP		
INM	SS Ripinga ND Mokoena	BJ Mogiba GG Zama
Kwazulu		
Labour Party	L Landers C August	T Potgieter PAC Hendrickse
NIC/TIC	PJ Gordhan F Hajaij	C Saloojee B Pillay
NP	OAW van Zyl TJ King	LH Fiek SJ Schoeman
NPP	A Rajbansi VA Rajbansi	G Chetty S Mudalay

Trad. Leaders	MB Mota RH Mopeli	MA Molefe
PAC	B Alexander P de Lille	ER Sibeko B Desai
Solidarity	DS Rajah K Moodley	
SACP	J Slovo L Jacobus	E Pahad
SA Government	T Delpont LR Brink	JC Pauw DS du Toit
Transkei	Z Titus N Jajula	R Nogumla
TVL Trad. Leaders	LM Mokoena MA Netshimbupfe	NE Ngomane
UPF	A Chabalala MJ Mahlangu	J Maake
Venda	SE Moeti	S Makhuvha
XPP	GNK Hetisani MH Matjokana	PT Shilubana DMD Mahlangu

T Eloff	:	Administration
G Hutchings	:	Minutes
P Lelaka	:	Administration
M Radebe	:	Administration

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

ADDENDUM TO THE TWELFTH PROGRESS REPORT

The impasse which resulted from the Council's discussion of the clause on customary law (clause 32) may be resolved in one of the following ways:

1. CUSTOMARY LAW

First Option

By the inclusion of the following clause in Chapter 3 either instead of the existing clause 32 or as an addition to clause 22:

"(1) Subject to sections 7(2) and 34(2) and to rules and procedures prescribed by law, parties to a dispute who -

(a) belong to a community which observes the rules and practices of a system of customary, indigenous or religious law; or

(b) who of own choice observe such rules and practices;

shall have the right to agree, of free and informed choice and at any stage during proceedings aimed at determining such dispute, to the

application of the said system for the purpose of determining their dispute.

- (2) Indigenous law may be regulated by law, including legislation designed to assist its development in accordance with the values embodied in this Chapter."

Second Option

By the inclusion of the following provision somewhere else in the Constitution but preferably not in the Chapter on Traditional Authorities:

- "(1) Subject to sections 7(2) and 34(2) and to rules and procedures prescribed by law, parties to a dispute who -
- (a) belong to a community which observes the rules and practices of a system of customary, indigenous and religious law; or
 - (b) who of own choice observe such rules and practices;

may, at any stage during proceedings aimed at determining such dispute, of free and informed choice agree to the application of the rules of the said system for the purpose of determining their dispute.

(2) [The same as subclause (2) above.]"

In both instances the present clause 1 of Chapter "Y" must be deleted. With the first option the entitlement to rely on the said systems of law ~~are~~^{is} subject to the criteria of the Limitation clause (clause 34). It is in other words, easier to limit a right than an entitlement couched in the language of the clause proposed under the second option. For the rest it makes little difference where the provision is actually included for in both instances it will form part of a constitution which, as a whole, is supreme law (see clause 4 of the Constitution)

2. FAMILY LAW UNDER RELIGION

In order to address the concern which has been raised about religious law the following subclause could be included under the existing clause 14:

- "(3) Nothing in this section shall preclude legislation recognising -
- (a) personal and family law under religion, and
 - (b) the validity of marriages concluded under religious law subject to specified conditions."

**PROPOSALS TO TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES ON THE ESTABLISHMENT
OF A COMMISSION TO DEAL WITH GENDER
AND OTHER RELATED ISSUES**

1. In accordance with the directive given by the Negotiating Council on 16 November instant we present herewith our suggested addition to the Constitution. We wish to state that our recommendations have the support of the Women's Caucus.
2. The motivation and necessity for establishing a commission has already been set out in the proposal currently serving before you.
3. The importance of obtaining advice by legislative authorities from those who are not in parliament has been recognised in the draft Constitution (see clause 67).
4. We propose that provision be made in the draft constitution for the establishment of a commission on the status of women and other related issues and that the detailed functioning thereof be provided for in a future law.
5. We therefore recommend that the relevant clause should read thus:

"Development of law in so far as it relates to women.

- A. For purposes of the development of the law (including customary law and or indigenous law) relating specifically to women, and in order to give effect to the provisions of chapter three of this Constitution and the other provisions thereof, there shall be established by Act of Parliament a commission which shall make recommendations to a provincial legislature, the National Assembly or the Senate on any law (including the common law and indigenous law), proposed legislation or any other matter relating to women."

OR

"Establishment of a commission on status of women.

- B(1) There is hereby established a commission which shall have power to make recommendations to a provincial legislature, the National Assembly or the Senate on any law (including the common law and indigenous law) or proposed legislation or on any other matter relating to the status of women.
- (2) The Commission shall also have power to make recommendations to the bodies specified in subsection (1) on the provisions of any law (including the common law and indigenous law) so as to bring it into conformity with Chapter 3 and the other provisions of this Constitution.

- (3) The composition, terms of office, functions, procedures and all other matters relating to, or to the functioning of, such commission shall be prescribed by law."
6. These are the two options we are offering to you. It appears to us that any one of them could easily be accommodated under chapter 13 of the draft Constitution.

**TRANSKEI GOVERNMENT DELEGATION
16 NOVEMBER 1993**

Chapter 10 Local Government

Establishment and status of local government

140. (1) Local government shall be established for residents of areas demarcated by law.
- (2) Any law passed by a competent legislature providing for or relating to local government may make provision for categories of metropolitan, urban and rural governments with the differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories.
- (3) A local government shall be autonomous and within the limits prescribed by law, shall be entitled to regulate its affairs.
- (4) A competent legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.
- (5) A bill of a competent legislature which materially affects the status, boundaries, powers and functions of local government shall be published for comment in the Government Gazette or the Provincial Gazette as the case may be, and a local government, interested persons or groups of persons affected thereby, including organised local government shall be given a reasonable opportunity to make written representations in regard thereto to the legislature concerned.

Powers and functions of local government

141. (1) The powers, functions and structures of local government shall be determined by law.
- (2) A local government shall have powers and functions to provide such services as may be necessary to maintain and promote the wellbeing of all persons within the area of the local government.

- (3) A local government shall to the extent determined in any applicable law make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health, education, housing and security, within a safe and healthy environment: provided that such services and amenities are rendered in a sustainable manner and are financially and physically practicable.
- (4) A local government shall have the power to make by laws not inconsistent with an Act of Parliament or a provincial law.
- (5) A local government shall have executive powers which shall allow it to function effectively.
- (6) A local government may, in its discretion by means of a council resolution, provide for the delegation of specified functions to local bodies or submunicipal entities within its area of jurisdiction as prescribed and regulated in law where, in the opinion of the council, such delegation shall facilitate or enhance the provision or administration of services, the adherence to municipal by laws or, more generally, further good governance in the public interest: Provided that:-
 - (a) such delegation shall not be inconsistent with provincial and or national legislation; and
 - (b) such delegation shall not constitute the abrogation by the local authority of its primary political responsibilities.

142. **Council resolutions**

A resolution of a council of a local government pertaining to the budget shall be taken by a two-thirds majority, and a resolution of such council pertaining to town planning shall be taken by an absolute majority of all councillors.

143. **Executive Committee**

A council of a local government shall elect according to a system of proportional representation from amongst its members an executive committee to exercise such powers and perform such duties and functions determined by such council: Provided that -

- (a) the council shall determine the number of members of and the quorum for the executive committee;
- (b) the executive committee shall exercise its powers and perform its functions and duties on the basis of consensus: Provided that where consensus cannot be achieved, any resolution of the executive committee shall be taken by a two-thirds majority; and
- (c) the executive committee may, instead of exercising such power or performing such duty or function, submit its report and recommendation to the council concerned for its decision in the matter.

144. **Administration and finance**

- (1) The local government shall ensure that its administration is based on the sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.
- (2) A local government shall, subject to conditions prescribed by law passed by a competent legislature after taking into consideration recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its duties and functions : provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction.
- (3) A local government shall be entitled to an equitable allocation by the provincial government of funds and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations taking into account the different categories of local government referred to in section 140 (2).

145. **Elections**

- (1) A local government shall be elected democratically and such elections shall take place in terms of provincial legislation and at intervals of not less than 3 and not more than 5 years: Provided that the first local government elections after the coming into force of this Constitution shall take place on the same day.

- (2)(a) The electoral system for a local government shall include both proportional and ward representation and shall be regulated by a competent legislature.
- (2)(b) For the purposes of the first election for members of a local government, the area of jurisdiction of such local government shall be divided into wards in accordance with the applicable law.
- (2)(c) Forty percent of the members of local government shall be elected according to the system of proportional representation applying at the national level and sixty percent of the members shall be elected on the basis that each such member shall represent a ward as contemplated in paragraph (b): Provided that where the area of jurisdiction of the local government includes -
- (i) the area of jurisdiction of any institution or body contemplated in section 84 (1) (f) of the Provincial Government Act, 1961 (Act No 32 of 1961); and
 - (ii) any other area not falling within the area of jurisdiction of the institution or body referred to in subparagraph (i),
- no area referred to in subparagraphs (i) and (ii) shall be allocated less than half of the total number of wards of the local government concerned
- (3) A voter for the election of a local government shall be -
- (a) a natural person who -
 - (i) is eligible to vote in terms of section 6 of this Constitution ;
 - (ii) is ordinarily resident within the area of jurisdiction of the local government for which such election is held, or under law is liable for the payment of assessment rates, rent, service charges or levies to the local government concerned;
 - (iii) is registered on the voter's role of the local government.
- (4) A voter shall not have more than one vote per local government.
- (5) No person shall be elected a member of a local government if he or she -
- (a) is not eligible to vote in terms of subsection (3); and
 - (b) is an elected member of any other legislature; or

- (c) does not qualify to be elected as a member of the National Assembly under this Constitution; or
- (d) is an employee of a local government unless, with due regard to the public interest, exemption of disqualification is given by the executive council of the province and proof of such exemption accompanies the nomination of such person; and
- (e) is disqualified in terms of any other law.

146. Code of conduct

An enforceable code of conduct for members and officials of local government shall be provided for by law.

147. Transitional arrangement

- (1) Until elections have been held in terms of the Local Government Transition Act, 1993, restructuring of local government shall not take place otherwise than in accordance with the provisions of that Act.
- (2) Restructuring of local government which takes place as a result of legislation enacted by a competent authority after the election referred to in subsection (1) have been held, shall be effected in accordance with the principles embodied in this chapter and the Constitution as a whole.

**DECISION OF THE NEGOTIATING COUNCIL MEETING OF
16 NOVEMBER 1993
ON REPEAL OF LEGISLATION**

(Note that the recommendations address the matters raised in Professor van der Westhuizen's report to the Planning Committee on 15 November 1993 which is addended to this report.)

Date: 16 November 1993

1. Clause 2.1:

This recommendation should be accepted and the Bill should be introduced during the November 1993 session.

2. Clause 2.2:

The repeals mentioned in this clause should, as suggested, be included and covered in the Abolition of Restrictions on Free Political Activity Bill and introduced during the November 1993 session.

3. Clause 2.3:

This matter is crucial to the electoral process and, therefore, the requisite amendment should be introduced during the November 1993 session of parliament.

4. Clause 2.4:

The necessary amendments should be drafted and the Negotiating Council should, after the constitutional principles and the principles relating to the public service which are set out in the draft Constitution have been approved finally, determine what should be done to give effect to what is set out in this clause.

5. Clause 2.5:

A separate law dealing with the amendment or repeal of the statutes dealing with gatherings and demonstrations should be drafted. This is so because the "Goldstone Bill" has never been referred to the Negotiating Council. The amendments should be introduced during the November 1993 session.

Clause 3.1:

The required legislation should be drafted in the manner suggested.

7. **Clause 3.2:**

The proposal should be accepted and, in respect of KwaZulu, Mr Varney should in the meantime be authorised to draft the legislation on behalf of the Multiparty Negotiating Process.

8. **Clause 4:**

The Task Group should oversee the drafting of all the required legislation, not only by the TBVC States, but also by the South African Government. The Task Group should receive copies from the SATBVC States of the draft legislation, check it in final form to ensure that it complies with the decisions of the Negotiating Council and thereafter report on the matter to the Negotiating Council or its successor. The matters which the Negotiating Council directed should be finalised and passed during the November 1993 session should be submitted to parliament then. In respect of the TBVC States 15 December 1993 should be set as a deadline in respect of the finalisation and introduction of the required legislation. The final text of such legislation should be filed of record with the Multiparty Negotiating Process and its successor.

9. **Clause 5:**

The Task Group should deal with medium and long term issues and should report to the Negotiating Council and thereafter to its successor. The detailed time-frames should be fixed later but all the outstanding legislation must have been amended or repealed by the 15th of January 1994.

10. **Clause 5.1:**

South Africa should in accordance with an earlier decision of the Negotiating Council, be added to the list of TBVC States and the Task Group should attend to the matters set out in this clause.

11. **Clause 5.2:**

The project relating to the identification of discriminatory legislation should go ahead and the requisite legislation drafted. Members of the Negotiating Council should be invited to make inputs and suggestions to the Task Group.

12. **Clause 5.3:**

The Task Group should be mandated to conduct research and make proposals on the entire area of security legislation. Members of the Negotiating Council are free to make representations. The Task Group was mandated to identify those other laws which have to be amended or repealed in future so as to bring them into conformity with the Bill of Rights and the Constitution.

13. **Clause 5.4:**

This matter is dealt with in a separate report and will be finalised by the Negotiating Council on the 16th of November 1993.

14. **Additional proposal:**

The South African Government should be directed, in accordance with an earlier Negotiating Council decision, to present to Parliament during the November 1993 session legislation empowering the State President to repeal, amend, supplement or alter discriminatory legislation or legislation inhibiting free political activity by proclamation. The wording of the empowering clause should be the same as that previously approved by the Negotiating Council in respect of the self-governing territories.

15. **Planning Committee Mandate:**

The Planning Committee was mandated to work out work schedule and time frames in conjunction with the Task Group.

**TASK GROUP ON THE IDENTIFICATION AND REPEAL OF LEGISLATION
IMPEDING FREE POLITICAL ACTIVITY AND DISCRIMINATORY
LEGISLATION**

MEMORANDUM

TO : THE PLANNING COMMITTEE

DATE : 15 NOVEMBER 1993

After the tabling of the Task Group's First and Second Substantial Reports in the Negotiating Council on 01 and 11 November, the Task Group would like to make some recommendations, as well as to ask for guidance on a number of issues:

1. The Task Group was asked to revisit and to draft recommendations as to Section 47(2)(c) and (d) of the Publications Act and Section 62 of the Internal Security Act, regarding free speech and race relations. A short report with recommendations will be ready on Monday 15 November 1993.
2. Concerning the **decisions reached by the Negotiating Council** -
 - 2.1 it is recommended that the draft "**Abolition of Restrictions on Free Political Activity Bill**", attached to the Second Report as Annexure A, be used as the basis for repeal and amendment (with further attention to be given to the abovementioned clauses on free speech and "hate speech");
 - 2.2 it is recommended that the repeal of **subversion (Section 54(2))** of the Internal Security Act 74 of 1982) and of **Section 29** of the Internal Security Act could be included in the abovementioned draft bill. If necessary, the Task Group could further liaise with state law adviser Mr Kellner, who assisted with the drafting, in this regard;
 - 2.3 as to the decision taken on the amendment of the meaning of the term "**aliens**" in all relevant legislation (page 14 of the Second Report) the Task Group would like to know whether it should proceed with the drafting (in terms of the Planning Committee's submissions on 1 November - see page 1 of the Second Report) with the assistance of a state law adviser, for the November session of Parliament, or not;
 - 2.4 the Task Group would appreciate feed-back on the issue of the guide-lines recommended with regard to **restrictions on the political activities of civil servants**, where the outstanding question was whether these (accepted by the Council with two amendments - see 7.32(e) on page 17 and the inclusion of judicial officers under the category of police officers etc) should be concretized into draft legislation immediately, or referred to a later structure

or process; and whether the Task Group should proceed to work with state law advisers to draft all the necessary amendments of the various laws, or not;

- 2.5 as to the various statutes dealing with **gatherings and demonstrations**, the Task Group would like to know whether to proceed with draft legislation to repeal these, or whether the recommendations that these laws were going to be repealed by the "Goldstone Bill", or ought to be dealt with in terms of the "Goldstone Bill", have been accepted.
3. As to the decisions taken on the **Self-Governing Territories**,
 - 3.1 Should the Task Group proceed to process the drafting of the agreed amendments to the **Self-Governing Territories Constitution Act 21 of 1971** (see page 14), with assistance of a state law adviser?
 - 3.2 As far as the many amendments are concerned that need to be made by the **governments of the respective Self-Governing Territories**, we propose that the law advisers of those territories work together with Mr Howard Varney of the Task Group, in view of the technical nature of some of the amendments.
 4. Re decisions requiring the **TBVC territories** to amend or repeal legislation (as recommended in the First and Second Reports), it is submitted that the Task Group could offer assistance, if needed in order to affect these speedily.
 5. A number of issues amy still have to be dealt with by the Task Group, **in the medium or longer term future**, if required to do so, as proposed by the Planning Committee (page 1 of Second Report). The Task Group needs guidance as to (a) whether to proceed at all, (b) time frames and (c) structures to report back to. Such issues include the following:
 - 5.1 After the discussion of the Task Group's comprehensive ("Varney") Report on the Self-Governing Territories, the Task Group was asked **to investigate legislation in the TBVC territories, which has not been dealt with but which may resemble the Self-Governing Territories**, in order to bring it in line with the last-mentioned.
 - 5.2 The Task Group is, in principle, prepared to continue to investigate **discriminatory legislation** and to make recommendations to relevant structures. As previously mentioned, submissions have recently been received on alleged discrimination on grounds of sexual orientation, in the Defence Act and on religious grounds. Some of these prima facie seem to be quite substantial and deserve serious attention. Numerous other aspects regarding race discrimination will need to be addressed in the longer term. (The Centre for Human Rights, based at the University of Pretoria, in which Professors Van der Westhuizen and Heyns are included, have been conducting a research project on discrimination for some time now, which could be useful.)

- 5.3 As part of the recommendations made in the two reports on detention and on terrorism, subversion and other crimes against the state, it was submitted that the entire area of security legislation is in need of thorough reform, in view of a Bill of Fundamental Rights, as well as common law principles and notions of democracy. These recommendations (eg on pages 8 and 11 of the Second Report) were agreed to. The Task Group is, in principle, prepared to do such research and to make recommendations, depending on time frames etc and would appreciate guidance.
- 5.4 More or less the same applies to freedom of expression, and "hate speech" and state security in so far as laws that are presently amended will need to be amended or repealed in future.

JOHANN VAN DER WESTHUIZEN
CONVENOR

THESE DRAFT MINUTES ARE CONFIDENTIAL AND RESTRICTED TO MEMBERS OF THE NEGOTIATING COUNCIL. THE MINUTES ARE STILL TO BE RATIFIED AT THE NEXT MEETING OF THE NEGOTIATING COUNCIL.

DRAFT MINUTES OF THE MEETING OF THE NEGOTIATING COUNCIL HELD AT 12h40 ON TUESDAY 16 NOVEMBER 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

The participants were welcomed.

3. Ratification of Agenda

The agenda was ratified with no amendments, but it was agreed that flexibility would be maintained to accommodate Technical Committee work programmes.

4. Minutes

4.1 The minutes of the meeting of 8 October 1993 were ratified with no amendments.

4.2 No matters arising were noted out of the minutes of the meeting of 8 October 1993.

5. Substantive Issues

5.1 Constitutional Issues - Chapter 8:

5.1.1 The Technical Committee on Constitutional Issues was welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier and F Venter. Apologies were noted from A Chaskalson and M Wiechers. It was noted that the Technical Committee had not been present at the

commencement of this debate due to its drafting commitments, but had arrived during the course of the debate on Chapter 8.

5.1.2 It was noted that this chapter had been previously agreed to but was being revisited by the Council as the South African Government had reserved its position on a number of clauses.

5.1.3 Clause 1 (1) "Establishment and Appointment" refers:

* It was suggested that the word "Public Protector" should be deleted and replaced with "National Ombudsman". This was not agreed to.

* It was suggested that the words "By choice and preference of a particular incumbent he or she may be known as the Ombudsman, the Ombudswoman or Ombud." This was not agreed to.

5.1.4 Clause 2 (3) "Independence and Impartiality" refers:

* It was agreed that the word "improperly" should be removed from the clause. The Technical Committee expressed concern over this agreement. It was suggested that if the word "improperly" remains, the word "interfere" should be replaced by "intervene". The Technical Committee was requested to reconsider this clause taking into account the debate in the Negotiating Council.

5.1.5 Clause 3 (1) (a) (v) "Powers, Functions and Duties" refers:

* It was agreed that the word "other" should be deleted from the clause.

5.1.6 Clause 3 (1) (c) (ii) "Powers, Functions and Duties" refers:

* It was agreed that the word "appropriate" be inserted between the word "other" and "recommendation" and that the words "or any other" be inserted between the words "the affected" and "public body".

5.1.7 Clause 3 (2) "Powers, Functions and Duties" refers:

* It was agreed that the words "and the law of privilege" should be deleted from the clause but the Technical Committee was requested to consider a formulation that would protect people against self-incrimination. It was

noted that the Technical Committee would reconsider this clause taking into account the debate in the Negotiating Council. Agreement that cases could arise where people giving evidence should be protected and the Technical Committee should find the appropriate way of dealing with this problem.

- * The DP reserved its position on clause 3 (2) (b).

5.1.8 Clause 5 (1) "Provincial Public Protector offices" refers:

- * It was suggested that the words "Provincial Public Protector" be deleted and replaced by "the Provincial Ombudsman. By choice and preference of a particular incumbent he or she may be known as Ombudsman, Ombudswoman or Ombud". This was not agreed to.

5.1.9 Clause 5 "Provincial Public Protector offices" refers:

- * It was suggested that the following should be added to clause 5 to form new sub-clauses, i.e. clause 5 (4) and clause 5 (5):

"5 (4) The functions, powers and duties of the Provincial Ombudsman shall be those set out above in respect of the National Ombudsman save that they may be exercised only in respect of those institutions and persons falling under the sole jurisdiction of the Provincial legislature".

5 (5) Such powers, duties and functions are to be exercised in consultation and conjunction with the National Public Protector who has concurrent jurisdiction in the region concerned."

It was agreed to insert the proposed clause 5 (5) but not the proposed clause 5 (4). Furthermore, clause 5 (1) remains as formulated.

5.1.10 Clause 6 (5) "Human Rights Commission - Establishment and appointment" refers:

- * It was agreed that a sub-clause 6 (5) (f) should be inserted to read "to receive and consider recommendations or representations from any person or organisation on the application of Chapter 3 of the

Constitution".

5.1.11 Clause 6 (7) "Human Rights Commission - Establishment and appointment" refers:

* It was agreed to insert the words "arrange for or" after the word "may" and to insert the following words to the end of the sentence "or direct a complainant to an appropriate forum". It was noted that the DP objected to this.

5.1.12 The remainder of Chapter 8 was agreed to as formulated.

5.1.13 The Technical Committee was at this point excused from the meeting but would appear before Council again during the course of the day when further Constitutional Issues were dealt with.

5.2 **Technical Committee on Fundamental Rights during the Transition:**

5.2.1 The Technical Committee was welcomed. Present were LM du Plessis and Z Yacoob. Apologies were noted from H Corder, G Grove and S Nene. The Technical Committee presented the addendum to the Twelfth Progress Report (see Addendum B).

5.2.2 It was noted that the Negotiating Council had to take a decision on the inclusion of clause 32 in the Draft Bill on Fundamental Rights during the Transition, if necessary by sufficient consensus. If a deadlock arose, the clause would not be included in the Draft Bill on Fundamental Rights during the Transition. Participants were urged to find a compromise in this regard.

The meeting adjourned for tea at 14h10.

The meeting reconvened at 14h40.

5.2.3 Before the meeting commenced with its debate around the report of the Technical Committee, the proposal that sub-clauses (1) and (2) of the Equality Clause be included as part of the Limitation Clause 34 (1) (b) (aa) was revisited. This proposal had been put forward to the Negotiating Council meeting of 15 November 1993. It was noted that informal consultation had occurred between the Technical Committee and various delegates. After discussion it was agreed that this

proposal stands down.

5.2.4 The issue of Family Law under Religion was discussed. The proposal of the Technical Committee was amended to read:

"Clause 14 (3) Nothing in this section shall preclude legislation recognising:

(a) personal and family law under religion, and

(b) the validity of marriages concluded under religious law subject to specified procedures."

5.2.5 Discussion and debate proceeded around whether Clause 32 should be included in the Bill of Rights, whether the First Option in the Addendum to the Twelfth Progress Report of the Technical Committee should be included in the Bill of Rights or whether the Second Option in the said Addendum should be included in the Draft Constitution.

5.2.6 It was proposed that the Second Option of the Technical Committee on Fundamental Rights during the Transition be included in the Draft Constitution. This proposal was seconded.

5.2.7 It was further proposed that the present clause 32 be included in the Bill of Rights. This was seconded. This proposal was put to the meeting after which the Chairperson, with reference to the Standing Rules, ruled that there was neither consensus nor sufficient consensus and, therefore, the proposal stands down and clause 32 would not form part of the Bill of Rights.

5.2.8 The further proposal as referred to in item 5.2.6 above was put to the meeting after which the Chairperson, with reference to the Standing Rules, ruled that there was neither consensus nor sufficient consensus and, therefore the proposal stood down.

5.2.9 The Traditional Leaders noted that this issue would be raised once again at the Plenary Session of the Negotiating Process.

5.2.10 The Technical Committee was thanked for its work completed.

5.3 **Twenty Sixth Report of the Technical Committee on Constitutional Issues:**

5.3.1 The Technical Committee on Constitutional Issues was again

welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier and F Venter. Apologies were noted from A Chaskalson and M Wiechers.

5.3.2 The "Preamble" refers:

- * The clause as formulated was agreed to.

5.3.3 Chapter 1, clause 2 "National Symbols" refers:

- * The clause as formulated was agreed to.

5.3.4 Chapter 1, clause 3 "Languages" refers:

- * Clause 3 (1) as formulated was agreed to. It was noted that the correct spelling of the prefix before "Venda" would be supplied to the Technical Committee.
- * Clause 3 (2) as formulated was agreed to.
- * Clause 3 (3) as formulated was agreed to.
- * Clause 3 (4) as formulated was agreed to.
- * Clause 3 (5) as formulated was agreed to.
- * With regard to clause 3 (6), it was agreed that the words "determined by law in terms of" be deleted and replaced by "as contemplated in". The clause as amended was agreed to.
- * Clause 3 (7) as formulated was agreed to.
- * Clause 3 (8) as formulated was agreed to.
- * Clause 3 (9) as formulated was agreed to.
- * With regard to clause 3 (10), it was noted that the reference to subsection (1) should read subsection (9). The clause as amended was agreed to.
- * Clause 3 (11) as formulated was agreed to.
- * It was agreed to insert the following paragraph as clause 3 (12):

"The Board shall be responsible for promoting respect

for and the development of Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu and other languages used by communities in South Africa, as well as Arabic and Hebrew and other languages used for religious purposes."

It was agreed that the language "Urdu" should be specifically mentioned in clause 3 (12).

- 5.3.5 Clause 64, "Signature and enrolment of Acts" refers:
- * The clause as formulated was agreed to.
- 5.3.6 Clause 110, "Signature and Enrolment of provincial legislation" refers:
- * The clause as formulated was agreed to.
- 5.3.7 Clause 4, "The supremacy of the Constitution" refers:
- * The clause as formulated was agreed to.
- 5.3.8 Clause 5, "Citizenship" refers:
- * The clause as formulated was agreed to with the proviso that the Negotiating Council seek further legal advice on this clause. This should be done before the Constitution was submitted to Parliament. The PAC expressed concerns with regard to this clause.
- 5.3.9 Clause 6, "The franchise" refers:
- * Clause 6 (a) as formulated was agreed to.
 - * Clause 6 (b) as formulated was agreed to.
 - * Clause 6 (c) as formulated was agreed to.
- 5.3.10 Schedule 7, "Constitutional Principles" refers:
- * Constitutional Principle No. 2 was agreed to as formulated.
 - * Constitutional Principle No. 11 was agreed to by sufficient consensus. The Traditional Leaders objected to this and gave notice that they wanted to consult with their principals in this regard. The Chairperson noted

that the Traditional Leaders were free to put forward a further proposal to the Negotiating Council for its further consideration in this regard, but the sufficient consensus ruling stands, unless the Negotiating Council agreed otherwise.

- * Constitutional Principle No. 18 was agreed to as formulated.
- * Constitutional Principle No. 20 was agreed to as formulated.
- * Constitutional Principle No. 21.1 was agreed to as formulated.
- * Constitutional Principle No. 21.2 was agreed to as formulated.
- * Constitutional Principle No. 21.5 was agreed upon to read "The determination of national economic policies, and the power to promote inter-provincial commerce and to protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government".
- * Constitutional Principle No. 21.6 was agreed to as formulated.
- * Constitutional Principle No. 27 was agreed to as amended. (The words indicated in brackets should be deleted.)
- * It was agreed to revisit Constitutional Principle No. 28 during the course of the day after informal discussions had occurred. After informal discussions had taken place, it was agreed to amend Constitutional Principle No. 28 to read as follows:

"Notwithstanding any principle dealing with freedom of association, 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. Provision shall be made that every person shall have the right to fair labour practices."

* After informal discussions had taken place during the

course of the day on Constitutional Principle No. 30, it was agreed that the last sentence of Constitutional Principle No. 30 (1) should read as follows:

"The structures and functioning of the public service as well as the terms and conditions of service of its members shall be regulated by law."

5.3.11 It was agreed that the term "Ombudsman" should be amended to read "Public Protector" in Constitutional Principle No. 29. Furthermore, the term "Commission for Administration" should read "Public Service Commission".

5.3.12 "Schedule 9" refers:

* The Schedule as formulated was agreed upon.

* After informal discussions had taken place during the course of the day, it was agreed to amend section 118 (3) (d) to read as follows:

"It is necessary for the determination of national economic policies, the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial commerce, the protection of the common market in respect of the mobility of goods, services, capital or labour or the maintenance of national security; or". Resulting from this amendment, schedule 9 would be amended to include the "Environment".

* After informal discussions had taken place, it was agreed that the reference to nature conservation should read as follows:

" Nature Conservation excluding national parks established by or under the National Parks Act no. 57 of 1976, national botanical gardens and marine resources."

* It was suggested that "Water Supply" should be included in the Schedule. It was agreed to revisit this proposal during the course of the day after informal discussions had occurred. After informal discussions, it was agreed to not include "Water Supply" in Schedule 9.

- 5.3.13 A document entitled "Proposal to Technical Committee on Constitutional Issues on the Establishment of a Commission to deal with Gender and other related issues" was distributed by the womens caucus to members and the Technical Committee on Constitutional Issues. The Technical Committee was requested to consider the proposal and make a recommendation to the Negotiating Council (see Addendum C).
- 5.3.14 At this point, it was noted that the State President, FW de Klerk was present in the Negotiating Council. The State President was welcomed by the meeting and made a brief input.
- 5.4 **Twenty Fifth Report of the Technical Committee on Constitutional Issues, Chapter 10, Local Government and the Further Twenty Fifth Report of the Technical Committee on Constitutional Issues, Proposals by the South African Government and the African National Congress to the Negotiating Council:**
- 5.4.1 The South African Government and the ANC proceeded to give an input on the suggested amendments which had resulted from bilateral meetings held. Questions of clarity were put forward to the South African Government and the ANC. It was agreed that the debate and decisions on this chapter would occur after supper. It was noted that the Technical Committee on Constitutional Issues was not present at any stage when this chapter was dealt with.
- 5.4.2 When the meeting reconvened after dinner, debate proceeded on this chapter.
- 5.4.3 The Chapter as amended was agreed to (see Addendum D).
- 5.4.4 With regard to clause 141 (6) it was noted that:
- * The NPP neither supported or objected to the clause;
 - * The Labour Party objected to the clause;
 - * The NIC/TIC objected to the clause; and
 - * The PAC objected to the clause.
- 5.4.5 It was noted that the PAC reserved its position on clause 142.
- 5.4.6 It was noted that the PAC reserved its position on clause 143.
- 5.4.7 It was suggested that the formula for proportional representation should be predetermined and included in the Local Government Transition Bill.

5.4.8 It was noted that the Delimitation/Demarcation Board would be established before the election to examine the boundaries of existing local authorities.

5.4.9 The South African Government noted that it would not undertake any restructuring that was in conflict with the spirit of this Chapter 10.

5.5 Constitutional Issues - Report on Proposed Amendments, Chapter 7:

5.5.1 The Technical Committee on Constitutional Issues was welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier and F Venter. Apologies were noted from A Chaskalson and M Wiechers.

5.5.2 Paragraph 1, Clause 87 refers:

It was agreed to substitute the following subclause for subclause (2):

"(2) There shall be a President of the Constitutional Court who shall, subject to the provisions of section 89, be appointed by the President after consultation with the Chief Justice and in consultation with the Cabinet for a non-renewable period of 7 years."

5.5.3 Paragraph 2, Clause 88 refers:

It was agreed to substitute the following subclause for subclause (3):

"(3) Subject to the provisions of section 90 (2) the Constitutional Court shall have original jurisdiction over issues referred to in subsection (2) to the extent that such jurisdiction does not overlap with the provisions of section 91 (3)."

5.5.4 Paragraph 3, Clause 89 refers:

* With regard to subparagraph 3.1, it was agreed to substitute the following subclause for subclause (1):

"(1) The judges of the Constitutional Court shall be appointed by the President in accordance with the provisions of subsections (3) and (4) for a non-renewable period of 7 years."

- * It was agreed that subparagraph 3.2 should stand over and would be dealt with during the course of the day.

5.5.5 Clause 90 refers:

It was agreed to delete the word "after" in the fourth line and to insert the word "in" in its place.

5.5.6 Clause 91 refers:

- * With regard to subparagraph 5.1, it was agreed to substitute the following paragraphs for paragraph (b) and (c) of subclause (3):

"(b) the violation or anticipated violation of the fundamental rights enshrined in Chapter 3 of this Constitution within the area of its jurisdiction:

(c) subject to subparagraph (a), the constitutionality or validity or administrative actions of all organs of the state taken in terms of any legislation or law applicable within the area of its jurisdiction;"

- * With regard to subparagraph 5.2, it was agreed to renumber paragraph (e) of subclause (3) as paragraph (f) and to insert the following new paragraph (e):

"(e) to consider and advise on the constitutionality of a provincial bill or draft bill;"

5.5.7 Clause 92 refers:

It was agreed to substitute the following subclause for subclause (13):

"(13) Appeals arising from matters referred to in section 91 (3) and which related to issues of constitutionality shall lie with the Constitutional Court."

5.5.8 Clause 95 refers:

- * With regard to subparagraph 7.1, it was agreed to substitute the following paragraphs for paragraphs (e) and (f) of subclause (1):

"(e) two practising advocates designated by the advocate's profession;

(f) two practising attorneys designated by the attorney's profession;" .

* With regard to subparagraph 7.2, it was agreed to substitute the following paragraph for paragraph (i) of subclause (1):

"(i) four persons, two of whom shall be practising attorneys or advocates, who shall be designated by the President in consultation with the Cabinet."

* With regard to subparagraph 7.3, it was agreed to delete the word "dismissal" in the first line of paragraph (a) of subclause (2) and to insert the words "removal from office" in its place.

* With regard to subparagraph 7.4, it was agreed to renumber paragraph (b) of subclause (2) as paragraph (c) and to insert the following new paragraph:

"(b) to make recommendations regarding the removal from office of judges of the Constitutional Court in terms of section 94 (4);"

* With regard to subparagraph 7.5, it was agreed to delete "(2) (b)" in subclause (3) and to insert "(2) (c)" in its place.

5.5.9 Clause 98 refers:

It was agreed to substitute the following subclause for subclause (4) of the transitional proposals that had been approved by the Council:

"(4) Subject to the provisions of this Constitution all measures and legislation in operation on the date of the coming into operation of this Constitution in respect of all judicial officers and attorneys-general, shall, subject to the same measures regarding the remuneration, pension, leave, gratuity and any other condition of service or service benefits which applied to such judicial officers and attorneys-general before the coming into operation of this Constitution, remain in operation

until amended or repealed by the competent legislature or authority: Provided that, except in accordance with an applicable law, no such measures shall be changed which affects such judicial officers or attorneys-general to their detriment."

5.5.10 Clause 91 refers:

It was agreed that the following be inserted as a new clause 91 (6):

"Subject to the provisions of section 92 (13) and notwithstanding the provisions of sections 88 (2) and 91 (3), a provincial division of the Supreme Court may hear a matter, provided that all interest parties shall agree to the jurisdiction of that Court as a court of first instance."

5.5.11 Clause 97 (2) refers:

The Technical Committee on Constitutional Issues was instructed to draft clause 97 (2) to fall in line with the agreement reached on languages in the Council.

The meeting adjourned for dinner at 18h40. It was noted that two reports on discriminatory legislation would be distributed during the adjournment and would be dealt with during the course of the evening.

The meeting reconvened at 20h00.

5.6 Repeal or Amendment of Discriminatory Legislation:

- 5.6.1 The convenor of the Task Group, J van der Westhuizen, was welcomed. Z Titus, on behalf of the Planning Committee presented a report containing recommendations to the Negotiating Council on the repeal of legislation. The report as amended was agreed to by the Negotiating Council (see Addendum E).
- 5.6.2 With regard to paragraph 14, it was noted that the TEC would take over the function of processing from the Multi-Party Negotiating Process. It was noted that the DP reserved its position with regard to the mechanism.
- 5.6.3 The Task Group proceeded to present its report on Freedom of Speech and Race Relations, section 47 (2) (c) and (d) of the

Publications Act and Section 62 of the Internal Security Act to the Negotiating Council. It was noted that the Council should focus on and address paragraph 3 "Recommendations" of the report.

- 5.6.4 The meeting proceeded to discuss the recommendations.
- 5.6.5 It was suggested that sections 47 (2) (c) and (d) be repealed but only after the investigation in terms of 3 (v) had been conducted. Therefore, the following words should be added to the end of item 3 (i):
- "after the investigation referred to in terms of 3 (v)."
- After discussion it was agreed by sufficient consensus to accept 3 (i) as formulated. The objection of the National Party and the South African Government was noted.
- 5.6.6 Item 3 (ii) was agreed to as formulated.
- 5.6.7 With regard to item 3 (iii), it was suggested that Section 62 be repealed. Other participants did not agree with this viewpoint. It was agreed this item be revisited after informal discussion had occurred. After informal discussions had occurred, it was agreed that item 3 (iii) should read:
- "Section 62 of the Internal Security Act 74 of 1982 be retained until investigation under item 3 (v) of the said recommendations had been completed. On the basis of the investigation the decision should be taken that the section should be amended or repealed. If repealed an alternative should be formulated to address the publication of views which promote racial hatred."
- 5.6.8 Item 3 (iv) was agreed to as formulated.
- 5.6.9 With regard to item 3 (v), it was agreed to insert the following words after the word "general":
- "and publication of views which promote racial hatred".
- 5.6.10 The Task Group was thanked for its work so far completed.

The meeting adjourned for tea at 21h30.

The meeting reconvened at 21h50. When the meeting reconvened it proceeded to deal with

al government (see item 5.4.2 above).

The meeting adjourned at 22h15 for the Planning Committee to meet.

The meeting reconvened at 24h05. The Planning Committee proceeded to report back to the Negotiating Council on its meeting (see item 6 below).

5.7 Twenty Seventh Report of the Technical Committee on Constitutional Issues:

5.7.1 The Technical Committee on Constitutional Issues was welcomed. Present were GE Devenish, E Moseneke, B Ngoepe, M Olivier, W Olivier, F Venter and M Wiechers. Apologies were noted from A Chaskalson. The Technical Committee presented an overview of the report to the meeting. The meeting proceeded to debate the report clause by clause. The Technical Committee presented each clause in depth to the meeting and debate followed. Questions of clarity were put throughout the duration of the debate.

5.7.2 The PAC noted that it was protesting at having the report presented at this stage and having to deal with it immediately. It was further noted that the PAC reserved its position on the whole of Chapter 13. Furthermore, the PAC would participate in this debate without prejudice.

5.7.3 Clause 186 "South African Police Service - Establishment" refers:

* Clause 186 (1) was agreed to and amended to read:

"There shall be established and regulated by an Act of Parliament a South African Police Service structured both at national and provincial levels which shall function under the direction of both the national and provincial governments."

* Clause 186 (2) as formulated was agreed to.

* The South African Government reserved its position on this clause.

5.7.4 Clause 187 "South African Police Service - Powers and functions" refers:

- * The clause as formulated was agreed to.
- 5.7.5 Clause 188 "South African Police Service - Minister and Commissioner" refers:
- * Clause 188 (1) was agreed to as formulated.
 - * Clause 188 (2) was agreed to as formulated with the proviso that the South African Government reserved its right to revisit clause 188 (2).
 - * Clause 188 (3) was agreed to as formulated.
- 5.7.6 Clause 189 "South African Police Service - Powers of Province" refers:
- * It was noted that the reference in clause 189 (1) should read "section 192 (1)". The clause as amended was agreed to.
 - * It was noted that the reference in clause 189 (2) (a) should read "section 190 (1) (b)". The whole clause as amended was agreed to. It was noted that the NPP objected to clause 189 (2) (a).
 - * The PAC at this point again stated its objection to Chapter 13 and Chapter 14 and noted that it was taking leave of the meeting.
 - * It was noted that the reference in clause 189 (3) should read "section 192 (1)". The clause as amended was agreed to.
 - * Clause 189 (4) was agreed to as formulated.
- 5.7.7 Clause 190 "South African Police Service - National Commissioner" refers:
- * It was noted that the reference in clause 190 (1) (n) should read "section 190". Clause 190 (1) as formulated was agreed to.
 - * It was agreed that clause 190 (2) should stand over.
- 5.7.8 Clause 191 "South African Police Service - Provincial commissioners" refers:

- * Clause 191 (1) was agreed to as formulated.
 - * Clause 191 (2) was agreed to as formulated.
- 5.7.9 Clause 192 "South African Police Service - Co-ordination and co-operation" refers:
- * Clause 192 (1) was agreed to as formulated.
 - * It was noted that the word "to" in the third line of clause 192 (2) should read "in terms of". The clause as amended was agreed to.
- 5.7.10 Clause 193 "South African Police Service - Local Policing" refers:
- * Clause 193 (1) was agreed to as formulated.
 - * Clause 193 (2) was agreed to as formulated.
 - * It was agreed that the words "the agreement" should be deleted from clause 193 (3) (a). The rest of clause 193 (3) was agreed to as formulated.
- 5.7.11 Clause 194 "South African Police Service - Independent complaints mechanism" refers:
- * The clause was agreed to as formulated.
- 5.7.12 Clause 195 "South African Police Service - Acts of members outside their territorial jurisdiction" refers:
- * The DP noted that any agreement it gave from this clause onwards was without prejudice.
 - * Clause 195 (1) was agreed to as formulated.
 - * Clause 195 (2) was agreed to as formulated.
- 5.7.13 Clause 196 "South African Police Service - Transitional Provisions" refers:
- * Clause 196 (1) was agreed to as formulated.
 - * Clause 196 (2) was agreed to as formulated.
 - * Clause 196 (3) was agreed to as formulated.

- * The NPP noted that it would support this section with a reservation.
- 5.7.14 Chapter 13, Clause 1 "Establishment of a National Defence Force" refers:
- * Clause 1 (1) was agreed to as formulated.
 - * It was noted that the word "does" in the second last line of clause 1 (2) should read "did". The balance of the clause was agreed to as formulated. The South African Government reserved its position on this clause.
 - * Clause 1 (3) was agreed to as formulated.
- 5.7.15 Chapter 13, Clause 2 "Chief of the National Defence Force" refers:
- * It was agreed that this clause should stand over.
- 5.7.16 Chapter 13, Clause 3 "Members of the National Defence Force" refers:
- * Clause 3 (1) was agreed to as formulated.
 - * Clause 3 (2) was agreed to as formulated.
 - * Clause 3 (3) was agreed to as formulated.
 - * Clause 3 (4) was agreed to as formulated.
 - * Clause 3 (5) was agreed to as formulated.
 - * Clause 3 (6) was agreed to as formulated.
 - * After discussion, it was agreed that clause 3 (7) should stand over.
 - * Clause 3 (8) was agreed to as formulated.
 - * Clause 3 (9) was agreed to as formulated.
- 5.7.17 Chapter 13, Clause 4 "Functions of the National Defence Force" refers:
- * Clause 4 (1) was agreed to as formulated.

* Clause 4 (2) was agreed to as formulated. The South African Government reserved its position on clause 4 (2) (b).

* Clause 4 (3) was agreed to as formulated.

5.7.18 Chapter 13, Clause 5 "National Defence Force - Accountability" refers:

* Clause 5 (1) was agreed to as formulated. The South African Government reserved its position on this clause.

* Clause 5 (2) was agreed to as formulated.

* Clause 5 (3) was agreed to as formulated.

* It was agreed that the number of seats referred to in clause 5 (3) (a) should be ten and not twenty. The balance of the clause was agreed to as formulated.

* Clause 5 (3) (b) was agreed to as formulated.

* It was agreed that clause 5 (3) (c) should stand over.

* Clause 5 (4) was agreed to as formulated.

* Clause 5 (5) was agreed to as formulated.

5.7.19 Chapter 13, Clause 6 "National Defence Force - Transitional provisions" refers:

* Clause 6 (1) was agreed to as formulated.

* Clause 6 (2) was agreed to as formulated.

* Clause 6 (3) was agreed to as formulated.

* Clause 6 (4) was agreed to as formulated.

* Clause 6 (5) was agreed to as formulated.

* Clause 6 (6) was agreed to as formulated.

* Clause 6 (7) was agreed to as formulated.

* The South African Government reserved its position on this entire clause.

5.7.20 Proposed subsection (4) to be inserted in section 76 (Chapter 4) refers:

- * It was agreed to include the proposed subsection.
- * It was agreed that clause 76 (4) (b) (i) should read as follows:

"declare, with the approval of Parliament, a state of national defence;"
- * The balance of the clause was agreed to as formulated.

5.7.21 The meeting proceeded to deal with Chapter 14, "General and Transitional Provisions". It was noted that the ANC and the DP reserved their positions with regard to this chapter. The Chairperson noted that all parties had the right to revisit any clauses of this Chapter.

5.7.22 Clause 190 "Repeal of laws" refers:

- * Clause 190 (1) was agreed to as formulated.
- * Clause 190 (2) was agreed to as formulated.

5.7.23 Clause 191 "Continuation of existing laws and conventions" refers:

- * Clause 191 (1) was agreed to as formulated.
- * It was agreed to insert the words "until amended by the appropriate authority" into clause 191 (2) at the appropriate place.

5.7.24 Clause 192 "Continuation of international rights and obligations" refers

- * The clause was agreed to as formulated.

5.7.25 Clause 192A "Status of International Law" refers:

- * It was noted that the words "subject to this Constitution" should be deleted in Clause 192A (1). The clause as amended was agreed to.
- * Clause 192A (2) was agreed to as formulated.

- * Clause 192A (3) was agreed to as formulated.
- 5.7.26 Clause 193 "Construction of certain references" refers:
- * It was noted this clause was still to be drafted by the Technical Committee.
- 5.7.27 Clause 194 "Transition : Legislatures" refers:
- * Clause 194 (1) was agreed to as formulated.
 - * Clause 194 (2) was agreed to as formulated.
 - * Clause 194 (3) was agreed to as formulated.
 - * Clause 194 (4) was agreed to as formulated.
 - * Clause 194 (5) was agreed to as formulated.
 - * Clause 194 (6) was agreed to as formulated.
- 5.7.28 Clause 195 "Transitional arrangements : The Executive" refers:
- * Clause 195 (1) was agreed to as formulated.
 - * With regard to clause 195 (2), the Technical Committee was requested to consider the period until the new appointees take up their offices.
- 5.7.29 At this point the following proposal was put to the meeting:
- * That the Negotiating Council meeting be adjourned;
 - * That the Technical Committee identifies the sections of this chapter which are absolutely essential to process before the Plenary to complete the draft Constitution in principle;
 - * That the Negotiating Council should identify what elements this chapter should have so that agreement could be reached on what this chapter should contain; and
 - * The elements that do not have to be agreed upon or that cannot be agreed upon due to time constraints, be referred by the Plenary back to the Negotiating Council for its attention.

The proposal was agreed to by consensus.

5.2.30 It was noted that all outstanding issues would be revisited during the course of the next meeting of the Negotiating Council on 17 November 1993.

6. Planning Committee Reportback

6.1 Z Titus on behalf of the Planning Committee submitted the following report to the Negotiating Council:

6.1.1 It was noted that all the arrangements and procedures for the Plenary session were on schedule. The Planning Committee recommended that the Plenary session commence at 13h45. This was agreed to.

6.1.2 Z Titus requested PJ Gordhan to deal with the detailed procedures with regard to the Plenary session.

6.1.3 PJ Gordhan proceeded to give a report on procedures and proposed documentation to the meeting.

6.1.4 The proposed draft Agenda was presented. It was agreed that the Judges Mohammed and Schabort chair the First Session of the Plenary.

6.1.5 It was noted that proposed Guidelines/Rules for the Plenary were being typed and that these would be distributed to members. An overview of the proposed Guidelines/Rules of the Plenary was given to members. It was agreed that Planning Committee members serve as the proposed Steering Committee.

6.1.6 The Planning Committee recommended the following procedure for the substantive issues of the Plenary:

- * Each of the bills would be put in total as a package to the Plenary for adoption;
- * The Constitution would be considered a chapter at a time for the purposes of endorsement;
- * Parties were free to express reservations and objections. In addition, a schedule would be attached to the agenda indicating whether a party had reserved its position or objected to a clause in the Negotiating Council;
- * Furthermore the Planning Committee suggested that no extensive debates on substantive matters take place on floor of the Plenary; Only amendments of a technical nature should be submitted via the Steering Committee and be referred to the Negotiating Council for

processing;

- * It was agreed that if speeches occurred during the course of this session a time limit of two-three minutes would be allowed overall.

- 6.1.7 It was agreed that the function of the Plenary was to formally adopt agreements.
- 6.1.8 The procedure recommended by the Planning Committee was agreed to by consensus.
- 6.1.9 It was noted that the proposed report of the Negotiating Council to the Plenary would be put before Council for its approval at its meeting of 17 November 1993 preceding the Plenary session .
- 6.1.10 It was noted that the role of the Technical Committees would be acknowledged at the Plenary session in an appropriate way.
- 6.1.11 It was agreed to, via a proposed resolution, request the Plenary to mandate the Negotiating Council to attend to any outstanding issues on its behalf.
- 6.1.12 The PAC noted that it would not object to the participation of the two judges but requested that consideration be given to the participation of the international community in some form or another.

7. **Future Meetings**

It was agreed that the Negotiating Council meeting should commence at 09h30 on 17 November 1993.

8. **Closure**

The meeting adjourned at 03h30.

These minutes were ratified at the meeting of the Negotiating Council of 1993 and the amended version signed by the Chairperson of the original meeting on

.....
CHAIRPERSON

Addendum A

The following delegates and advisers were present at the meeting of the Negotiating Council on Tuesday 16 November 1993:

DJ de Villiers : Chairperson
L Landers : Assistant Chairperson
MJ Mahlangu : Assistant Chairperson

Organisation	Delegates	Advisers
ANC	C Ramaphosa B Kgosisile	M Manzini PM Maduna
AVU	C Kruger A Pienaar	AJ Horn
Bophuthatswana		
Cape Trad. Leaders	M Nonkonyana SN Sigcau	GD Gwadiso
Ciskei		
DP	CW Eglin D Smuts	K Andrew
Dikwankwetla	SOM Moji	K Ngwenya TJ Mohapi
IFP		
IYP	NJ Mahlangu NS Mtsweni	Q Vilankulu AP Laka
KP		
INM	SS Ripinga ND Mokoena	BJ Mogiba GG Zama
Kwazulu		
Labour Party	L Landers C August	T Potgieter PAC Hendrickse
NIC/TIC	PJ Gordhan F Hajaij	C Saloojee B Pillay
NP	OAW van Zyl TJ King	LH Fiek SJ Schoeman
NPP	A Rajbansi VA Rajbansi	G Chetty S Mudalay

Trad. Leaders	MB Mota RH Mopeli	MA Molefe
PAC	B Alexander P de Lille	ER Sibeko B Desai
Solidarity	DS Rajah K Moodley	
SACP	J Slovo L Jacobus	E Pahad
SA Government	T Delpont LR Brink	JC Pauw DS du Toit
Transkei	Z Titus N Jajula	R Nogumla
TVL Trad. Leaders	LM Mokoena MA Netshimbupfe	NE Ngomane
UPF	A Chabalala MJ Mahlangu	J Maake
Venda	SE Moeti	S Makhuvha
XPP	GNK Hetisani MH Matjokana	PT Shilubana DMD Mahlangu

T Eloff	:	Administration
G Hutchings	:	Minutes
P Lelaka	:	Administration
M Radebe	:	Administration

TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS

ADDENDUM TO THE TWELFTH PROGRESS REPORT

The impasse which resulted from the Council's discussion of the clause on customary law (clause 32) may be resolved in one of the following ways:

1. CUSTOMARY LAW

First Option

By the inclusion of the following clause in Chapter 3 either instead of the existing clause 32 or as an addition to clause 22:

"(1) Subject to sections 7(2) and 34(2) and to rules and procedures prescribed by law, parties to a dispute who -

(a) belong to a community which observes the rules and practices of a system of customary, indigenous or religious law; or

(b) who of own choice observe such rules and practices;

shall have the right to agree, of free and informed choice and at any stage during proceedings aimed at determining such dispute, to the

application of the said system for the purpose of determining their dispute.

- (2) Indigenous law may be regulated by law, including legislation designed to assist its development in accordance with the values embodied in this Chapter."

Second Option

By the inclusion of the following provision somewhere else in the Constitution but preferably not in the Chapter on Traditional Authorities:

"(1) Subject to sections 7(2) and 34(2) and to rules and procedures prescribed by law, parties to a dispute who -

- (a) belong to a community which observes the rules and practices of a system of customary, indigenous and religious law; or
- (b) who of own choice observe such rules and practices;

may, at any stage during proceedings aimed at determining such dispute, of free and informed choice agree to the application of the rules of the said system for the purpose of determining their dispute.

(2) [The same as subclause (2) above.]"

In both instances the present clause 1 of Chapter "Y" must be deleted. With the first option the entitlement to rely on the said systems of law ~~are~~^{is} subject to the criteria of the Limitation clause (clause 34). It is in other words, easier to limit a right than an entitlement couched in the language of the clause proposed under the second option. For the rest it makes little difference where the provision is actually included for in both instances it will form part of a constitution which, as a whole, is supreme law (see clause 4 of the Constitution)

2. FAMILY LAW UNDER RELIGION

In order to address the concern which has been raised about religious law the following subclause could be included under the existing clause 14:

"(3) Nothing in this section shall preclude legislation recognising -

- (a) personal and family law under religion, and
- (b) the validity of marriages concluded under religious law subject to specified conditions."

**PROPOSALS TO TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES ON THE ESTABLISHMENT
OF A COMMISSION TO DEAL WITH GENDER
AND OTHER RELATED ISSUES**

1. In accordance with the directive given by the Negotiating Council on 16 November instant we present herewith our suggested addition to the Constitution. We wish to state that our recommendations have the support of the Women's Caucus.
2. The motivation and necessity for establishing a commission has already been set out in the proposal currently serving before you.
3. The importance of obtaining advice by legislative authorities from those who are not in parliament has been recognised in the draft Constitution (see clause 67).
4. We propose that provision be made in the draft constitution for the establishment of a commission on the status of women and other related issues and that the detailed functioning thereof be provided for in a future law.
5. We therefore recommend that the relevant clause should read thus:

"Development of law in so far as it relates to women.

- A. For purposes of the development of the law (including customary law and or indigenous law) relating specifically to women, and in order to give effect to the provisions of chapter three of this Constitution and the other provisions thereof, there shall be established by Act of Parliament a commission which shall make recommendations to a provincial legislature, the National Assembly or the Senate on any law (including the common law and indigenous law), proposed legislation or any other matter relating to women."

OR

"Establishment of a commission on status of women.

- B(1) There is hereby established a commission which shall have power to make recommendations to a provincial legislature, the National Assembly or the Senate on any law (including the common law and indigenous law) or proposed legislation or on any other matter relating to the status of women.
- (2) The Commission shall also have power to make recommendations to the bodies specified in subsection (1) on the provisions of any law (including the common law and indigenous law) so as to bring it into conformity with Chapter 3 and the other provisions of this Constitution.

(3) The composition, terms of office, functions, procedures and all other matters relating to, or to the functioning of, such commission shall be prescribed by law."

6. These are the two options we are offering to you. It appears to us that any one of them could easily be accommodated under chapter 13 of the draft Constitution.

**TRANSKEI GOVERNMENT DELEGATION
16 NOVEMBER 1993**

**Chapter 10
Local Government**

Establishment and status of local government

140. (1) Local government shall be established for residents of areas demarcated by law.
- (2) Any law passed by a competent legislature providing for or relating to local government may make provision for categories of metropolitan, urban and rural governments with the differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories.
- (3) A local government shall be autonomous and within the limits prescribed by law, shall be entitled to regulate its affairs.
- (4) A competent legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government.
- (5) A bill of a competent legislature which materially affects the status, boundaries, powers and functions of local government shall be published for comment in the Government Gazette or the Provincial Gazette as the case may be, and a local government, interested persons or groups of persons affected thereby, including organised local government shall be given a reasonable opportunity to make written representations in regard thereto to the legislature concerned.

Powers and functions of local government

141. (1) The powers, functions and structures of local government shall be determined by law.
- (2) A local government shall have powers and functions to provide such services as may be necessary to maintain and promote the wellbeing of all persons within the area of the local government.

- (3) A local government shall to the extent determined in any applicable law make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health, education, housing and security, within a safe and healthy environment: provided that such services and amenities are rendered in a sustainable manner and are financially and physically practicable.
- (4) A local government shall have the power to make by laws not inconsistent with an Act of Parliament or a provincial law.
- (5) A local government shall have executive powers which shall allow it to function effectively.
- (6) A local government may, in its discretion by means of a council resolution, provide for the delegation of specified functions to local bodies or submunicipal entities within its area of jurisdiction as prescribed and regulated in law where, in the opinion of the council, such delegation shall facilitate or enhance the provision or administration of services, the adherence to municipal by laws or, more generally, further good governance in the public interest: Provided that:-
 - (a) such delegation shall not be inconsistent with provincial and or national legislation; and
 - (b) such delegation shall not constitute the abrogation by the local authority of its primary political responsibilities.

142. **Council resolutions**

A resolution of a council of a local government pertaining to the budget shall be taken by a two-thirds majority, and a resolution of such council pertaining to town planning shall be taken by an absolute majority of all councillors.

143. **Executive Committee**

A council of a local government shall elect according to a system of proportional representation from amongst its members an executive committee to exercise such powers and perform such duties and functions determined by such council: Provided that -

- (a) the council shall determine the number of members of and the quorum for the executive committee;
- (b) the executive committee shall exercise its powers and perform its functions and duties on the basis of consensus: Provided that where consensus cannot be achieved, any resolution of the executive committee shall be taken by a two-thirds majority; and
- (c) the executive committee may, instead of exercising such power or performing such duty or function, submit its report and recommendation to the council concerned for its decision in the matter.

144. Administration and finance

- (1) The local government shall ensure that its administration is based on the sound principles of public administration, good government and public accountability so as to render efficient services to the persons within its area of jurisdiction and effective administration of its affairs.
- (2) A local government shall, subject to conditions prescribed by law passed by a competent legislature after taking into consideration recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its duties and functions : provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction.
- (3) A local government shall be entitled to an equitable allocation by the provincial government of funds and the Financial and Fiscal Commission shall make recommendations regarding criteria for such allocations taking into account the different categories of local government referred to in section 140 (2).

145. Elections

- (1) A local government shall be elected democratically and such elections shall take place in terms of provincial legislation and at intervals of not less than 3 and not more than 5 years: Provided that the first local government elections after the coming into force of this Constitution shall take place on the same day.

- (2)(a) The electoral system for a local government shall include both proportional and ward representation and shall be regulated by a competent legislature.
- (2)(b) For the purposes of the first election for members of a local government, the area of jurisdiction of such local government shall be divided into wards in accordance with the applicable law.
- (2)(c) Forty percent of the members of local government shall be elected according to the system of proportional representation applying at the national level and sixty percent of the members shall be elected on the basis that each such member shall represent a ward as contemplated in paragraph (b): Provided that where the area of jurisdiction of the local government includes -
 - (i) the area of jurisdiction of any institution or body contemplated in section 84 (1) (f) of the Provincial Government Act, 1961 (Act No 32 of 1961); and
 - (ii) any other area not falling within the area of jurisdiction of the institution or body referred to in subparagraph (i),no area referred to in subparagraphs (i) and (ii) shall be allocated less than half of the total number of wards of the local government concerned
- (3) A voter for the election of a local government shall be -
 - (a) a natural person who -
 - (i) is eligible to vote in terms of section 6 of this Constitution ;
 - (ii) is ordinarily resident within the area of jurisdiction of the local government for which such election is held, or under law is liable for the payment of assessment rates, rent, service charges or levies to the local government concerned;
 - (iii) is registered on the voter's role of the local government.
- (4) A voter shall not have more than one vote per local government.
- (5) No person shall be elected a member of a local government if he or she -
 - (a) is not eligible to vote in terms of subsection (3); and
 - (b) is an elected member of any other legislature; or

- (c) does not qualify to be elected as a member of the National Assembly under this Constitution; or
- (d) is an employee of a local government unless, with due regard to the public interest, exemption of disqualification is given by the executive council of the province and proof of such exemption accompanies the nomination of such person; and
- (e) is disqualified in terms of any other law.

146. **Code of conduct**

An enforceable code of conduct for members and officials of local government shall be provided for by law.

147. **Transitional arrangement**

- (1) Until elections have been held in terms of the Local Government Transition Act, 1993, restructuring of local government shall not take place otherwise than in accordance with the provisions of that Act.
- (2) Restructuring of local government which takes place as a result of legislation enacted by a competent authority after the election referred to in subsection (1) have been held, shall be effected in accordance with the principles embodied in this chapter and the Constitution as a whole.

**DECISION OF THE NEGOTIATING COUNCIL MEETING OF
16 NOVEMBER 1993
ON REPEAL OF LEGISLATION**

(Note that the recommendations address the matters raised in Professor van der Westhuizen's report to the Planning Committee on 15 November 1993 which is added to this report.)

Date: 16 November 1993

1. Clause 2.1:

This recommendation should be accepted and the Bill should be introduced during the November 1993 session.

2. Clause 2.2:

The repeals mentioned in this clause should, as suggested, be included and covered in the Abolition of Restrictions on Free Political Activity Bill and introduced during the November 1993 session.

3. Clause 2.3:

This matter is crucial to the electoral process and, therefore, the requisite amendment should be introduced during the November 1993 session of parliament.

4. Clause 2.4:

The necessary amendments should be drafted and the Negotiating Council should, after the constitutional principles and the principles relating to the public service which are set out in the draft Constitution have been approved finally, determine what should be done to give effect to what is set out in this clause.

5. Clause 2.5:

A separate law dealing with the amendment or repeal of the statutes dealing with gatherings and demonstrations should be drafted. This is so because the "Goldstone Bill" has never been referred to the Negotiating Council. The amendments should be introduced during the November 1993 session.

● **Clause 3.1:**

The required legislation should be drafted in the manner suggested.

7. **Clause 3.2:**

The proposal should be accepted and, in respect of KwaZulu, Mr Varney should in the meantime be authorised to draft the legislation on behalf of the Multiparty Negotiating Process.

8. **Clause 4:**

The Task Group should oversee the drafting of all the required legislation, not only by the TBVC States, but also by the South African Government. The Task Group should receive copies from the SATBVC States of the draft legislation, check it in final form to ensure that it complies with the decisions of the Negotiating Council and thereafter report on the matter to the Negotiating Council or its successor. The matters which the Negotiating Council directed should be finalised and passed during the November 1993 session should be submitted to parliament then. In respect of the TBVC States 15 December 1993 should be set as a deadline in respect of the finalisation and introduction of the required legislation. The final text of such legislation should be filed of record with the Multiparty Negotiating Process and its successor.

9. **Clause 5:**

The Task Group should deal with medium and long term issues and should report to the Negotiating Council and thereafter to its successor. The detailed time-frames should be fixed later but all the outstanding legislation must have been amended or repealed by the 15th of January 1994.

10. **Clause 5.1:**

South Africa should in accordance with an earlier decision of the Negotiating Council, be added to the list of TBVC States and the Task Group should attend to the matters set out in this clause.

11. **Clause 5.2:**

The project relating to the identification of discriminatory legislation should go ahead and the requisite legislation drafted. Members of the Negotiating Council should be invited to make inputs and suggestions to the Task Group.

12. **Clause 5.3:**

The Task Group should be mandated to conduct research and make proposals on the entire area of security legislation. Members of the Negotiating Council are free to make representations. The Task Group was mandated to identify those other laws which have to be amended or repealed in future so as to bring them into conformity with the Bill of Rights and the Constitution.

13. **Clause 5.4:**

This matter is dealt with in a separate report and will be finalised by the Negotiating Council on the 16th of November 1993.

14. **Additional proposal:**

The South African Government should be directed, in accordance with an earlier Negotiating Council decision, to present to Parliament during the November 1993 session legislation empowering the State President to repeal, amend, supplement or alter discriminatory legislation or legislation inhibiting free political activity by proclamation. The wording of the empowering clause should be the same as that previously approved by the Negotiating Council in respect of the self-governing territories.

15. **Planning Committee Mandate:**

The Planning Committee was mandated to work out work schedule and time frames in conjunction with the Task Group.

**TASK GROUP ON THE IDENTIFICATION AND REPEAL OF LEGISLATION
IMPEDING FREE POLITICAL ACTIVITY AND DISCRIMINATORY
LEGISLATION**

MEMORANDUM

TO : THE PLANNING COMMITTEE

DATE : 15 NOVEMBER 1993

After the tabling of the Task Group's First and Second Substantial Reports in the Negotiating Council on 01 and 11 November, the Task Group would like to make some recommendations, as well as to ask for guidance on a number of issues:

1. The Task Group was asked to revisit and to draft recommendations as to Section 47(2)(c) and (d) of the Publications Act and Section 62 of the Internal Security Act, regarding free speech and race relations. A short report with recommendations will be ready on Monday 15 November 1993.
2. Concerning the **decisions reached by the Negotiating Council** -
 - 2.1 it is recommended that the draft "**Abolition of Restrictions on Free Political Activity Bill**", attached to the Second Report as Annexure A, be used as the basis for repeal and amendment (with further attention to be given to the abovementioned clauses on free speech and "hate speech");
 - 2.2 it is recommended that the repeal of **subversion (Section 54(2))** of the Internal Security Act 74 of 1982) and of **Section 29** of the Internal Security Act could be included in the abovementioned draft bill. If necessary, the Task Group could further liaise with state law adviser Mr Kellner, who assisted with the drafting, in this regard;
 - 2.3 as to the decision taken on the amendment of the meaning of the term "**aliens**" in all relevant legislation (page 14 of the Second Report) the Task Group would like to know whether it should proceed with the drafting (in terms of the Planning Committee's submissions on 1 November - see page 1 of the Second Report) with the assistance of a state law adviser, for the November session of Parliament, or not;
 - 2.4 the Task Group would appreciate feed-back on the issue of the guide-lines recommended with regard to **restrictions on the political activities of civil servants**, where the outstanding question was whether these (accepted by the Council with two amendments - see 7.32(e) on page 17 and the inclusion of judicial officers under the category of police officers etc) should be concretized into draft legislation immediately, or referred to a later structure

or process; and whether the Task Group should proceed to work with state law advisers to draft all the necessary amendments of the various laws, or not;

- 2.5 as to the various statutes dealing with **gatherings and demonstrations**, the Task Group would like to know whether to proceed with draft legislation to repeal these, or whether the recommendations that these laws were going to be repealed by the "Goldstone Bill", or ought to be dealt with in terms of the "Goldstone Bill", have been accepted.
3. As to the decisions taken on the **Self-Governing Territories**,
 - 3.1 Should the Task Group proceed to process the drafting of the agreed amendments to the **Self-Governing Territories Constitution Act 21 of 1971** (see page 14), with assistance of a state law adviser?
 - 3.2 As far as the many amendments are concerned that need to be made **by the governments of the respective Self-Governing Territories**, we propose that the law advisers of those territories work together with Mr Howard Varney of the Task Group, in view of the technical nature of some of the amendments.
 4. Re decisions requiring the **TBVC territories** to amend or repeal legislation (as recommended in the First and Second Reports), it is submitted that the Task Group could offer assistance, if needed in order to affect these speedily.
 5. A number of issues amy still have to be dealt with by the Task Group, **in the medium or longer term future**, if required to do so, as proposed by the Planning Committee (page 1 of Second Report). The Task Group needs guidance as to (a) whether to proceed at all, (b) time frames and (c) structures to report back to. Such issues include the following:
 - 5.1 After the discussion of the Task Group's comprehensive ("Varney") Report on the Self-Governing Territories, the Task Group was asked **to investigate legislation in the TBVC territories, which has not been dealt with but which may resemble the Self-Governing Territories**, in order to bring it in line with the last-mentioned.
 - 5.2 The Task Group is, in principle, prepared to continue to investigate **discriminatory legislation** and to make recommendations to relevant structures. As previously mentioned, submissions have recently been received on alleged discrimination on grounds of sexual orientation, in the Defence Act and on religious grounds. Some of these prima facie seem to be quite substantial and deserve serious attention. Numerous other aspects regarding race discrimination will need to be addressed in the longer term. (The Centre for Human Rights, based at the University of Pretoria, in which Professors Van der Westhuizen and Heyns are included, have been conducting a research project on discrimination for some time now, which could be useful.)

- 5.3 As part of the recommendations made in the two reports on detention and on terrorism, subversion and other crimes against the state, it was submitted that the entire area of security legislation is in need of thorough reform, in view of a Bill of Fundamental Rights, as well as common law principles and notions of democracy. These recommendations (eg on pages 8 and 11 of the Second Report) were agreed to. The Task Group is, in principle, prepared to do such research and to make recommendations, depending on time frames etc and would appreciate guidance.
- 5.4 More or less the same applies to freedom of expression, and "hate speech" and state security in so far as laws that are presently amended will need to be amended or repealed in future.

JOHANN VAN DER WESTHUIZEN
CONVENOR