

**SUPPLEMENTARY REPORTS OF THE TECHNICAL
COMMITTEES**

to the meeting of the

NEGOTIATING COUNCIL

to be held at 10:00 on Friday

28 MAY 1993

CONFIDENTIAL

STRICTLY EMBARGOED UNTIL FRIDAY 28 MAY

1993 AT 12:00

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SUPPLEMENTARY REPORTS OF THE TECHNICAL COMMITTEES

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A. CONSTITUTIONAL MATTERS

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THIS REPORT IS EMBARGOED UNTIL 12H00
ON FRIDAY 28 MAY 1993

<p>THIRD REPORT TO THE NEGOTIATING COUNCIL ON CONSTITUTIONAL PRINCIPLES BY THE TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS 27 May 1993</p>

1. Introduction

- 1.1 We were requested by the Planning Committee to develop our Second Report on Constitutional Issues (19 May 1993) so as to formulate a comprehensive set of constitutional principles, and in particular principles on the powers and functions of regions to serve the purpose suggested by us in paragraph 6.3 of our Second Report.

- 1.2 We do not think that any good purpose will be served by attempting to analyse each of the submissions made to us in order to indicate the type of constitution that is contemplated by the various participants, or how they differ from one another. We have considered all the proposals put to us, and have decided that we can best give effect to the request from the Planning Committee by formulating a set of constitutional principles for debate in the Negotiating Council. In formulating these principles, we have drawn on the Codesa documents, and on our own knowledge and experience as well as the submissions of the participants.

- 1.3 The principles that we offer for debate do not accord wholly with the submissions of any of the parties, and we appreciate that they are likely to meet some resistance from all of the participants. It seems to us, however, that areas of agreement, disagreement and possible compromise will emerge from the debate on our report, and that in the process, the participants may be able to find a solution along the lines suggested by us in paragraph 6.3 our

Second Report (19 May 1993). For the sake of clarity we deal with general constitutional principles and principles on SPR's in separate paragraphs. Together they constitute one body of constitutional principles.

- 1.4 We have not yet had a response to paragraph 3.6 of our Second Report. In the circumstances we do not intend dealing in this report with the question of confederation. How, if at all, a confederation can be accommodated within one set of constitutional principles may depend on that response.

2. **General Constitutional Principles**

- 2.1 The constitution of South Africa shall provide for the establishment of a single sovereign state with a democratic system of government and a common South African citizenship.
- 2.2 The constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial and all other forms of discrimination and promote racial and gender equality and national unity.
- 2.3 There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- 2.4 The judiciary shall be competent, independent, legitimate and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.
- 2.5 There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.

- 2.6 Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.
- 2.7 Formal legislative procedures shall be adhered to by legislative organs at all levels of government.
- 2.8 The diversity of languages, cultures and religions shall be acknowledged, promoted and protected.
- 2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.
- 2.10 All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.
- 2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
- 2.12 The status of traditional leaders shall be acknowledged and recognised in an appropriate manner in the constitution. Unless provided otherwise by legislation, indigenous law shall be applied to the extent that it is compatible with the provisions of the fundamental rights contained in the constitution.
- 2.13 Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

2.14 Amendments to the constitution shall require special procedures involving specified majorities.

3. **Principles dealing with the allocation of powers to different levels of government**

3.1 Government shall be structured at national, SPR and local levels.

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

3.3 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.

3.4 The powers and functions of each level of government shall be defined in the constitution. Amendments to the constitution which alter the powers, boundaries, functions or institutions of regions shall in addition to any other procedures specified in the constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.

3.5 The powers and functions of each level of government may include exclusive and concurrent powers, as well as the power to perform functions for other levels of government on an agency or delegation basis.

3.6 Each level of government shall have fiscal powers which will be defined in the constitution.

3.7 A Financial and Fiscal Commission, including representatives of each of the SPR's, shall be constituted to advise the national government on the distribution of financial and fiscal resources.

- 3.8 Fiscal and financial allocations by the national government to SPR governments shall be made on an equitable basis after taking into account the national interest, disparities within SPR's, the advice of the Financial and Fiscal Commission, the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.
- 3.9 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

3.9.1 General¹

- 3.9.1.1 The level at which there is most control over the quality and delivery of services, should be the level responsible for the execution of the programme or the delivery of the services.
- 3.9.1.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the territorial, functional or institutional integrity of the SPR's.
- 3.9.1.3 In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.

¹ In dealing with this issue we have made extensive use of the report on Constitutional Options and their Implications for Good Government and a Sound Economy prepared by a group of experts which consisted largely of South Africans of different political persuasions, published in March 1993 by the Consultative Business Movement.

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

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

3.9.2 National Government

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

3.9.2.2 Where uniformity across the nation is regarded as important with regard to a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.

3.9.2.3 Where minimum standards across the nation are regarded as important for the delivery of public services, the power to set such standards should be allocated to the national government.

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

3.9.3 SPR Government

SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

3.9.4 Concurrent Powers

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

3.9.5 Residual Powers

Powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall vest in the national government, alternatively in the SPR governments. (This is a fundamental issue which calls for a political decision).

4. **Asymmetry**

Certain parties have made submissions to our committee that the constitution should make provision for SPR asymmetry. Regional asymmetry may manifest itself in the following ways:

4.1 Geographical and demographic asymmetry

It stands to reason that a measure of geographical and demographic asymmetry will exist amongst SPR's. If such asymmetry becomes disproportionate and creates possibilities of economic decline or disruption of inter-regional relationships, constitutional mechanisms could be applied to rectify the position (eg adjustment of SPR borders on a basis of consent by the people concerned and approval by the respective SPR's as well as the national legislature).

4.2 Asymmetry in respect of functions and powers

There can be asymmetry in the allocation of powers and functions. In the submissions to our Committee it has been suggested that SPR's may require different powers and functions depending on their location, the nature and extent of the development that has taken place in a particular SPR, and even the composition of the population. It has been suggested that asymmetry could be extended not only to powers and functions, but also to matters such as SPR citizenship, and the recognition and use of languages.

4.3 Institutional asymmetry

There can be asymmetry in the institutions of government, ie different types of legislatures, different electoral systems etc. There can also be asymmetrical institutions, ie different institutions for the accommodation and recognition of traditional leaders, and linguistic, cultural and religious groups etc.

4.4 Temporal Asymmetry

SPR governments, institutions, functions and powers may be phased in at different times.

We have not dealt with asymmetry as a principle because it is not clear to us what the views of all the parties are on this issue. The principles that we have formulated are of general application and ought not to hamper a debate on asymmetry.

5. **Matters requiring the consideration of the Negotiating Council:**

- 5.1 Matters such as the powers, functions and boundaries of the SPR's and local governments in the interim depend on decisions to be taken by the Negotiating Council in regard to the process of transition and can only be dealt with after such decisions have been taken.
- 5.2 The process of decision making with regard to the allocation of exclusive, concurrent or residual powers specifically to different levels of government, is a matter requiring political negotiation in the light of this report. The final model should be one which, inter alia, is financially viable and conducive to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.

B. VIOLENCE

EXECUTIVE SUMMARY

REPORT NUMBER THREE OF THE TECHNICAL COMMITTEE ON VIOLENCE: 27 MAY 1993

The Committee has started dealing with issues which relate to the responsibilities of political parties. This report covers three areas - political rivalry, negotiating process, and mass action.

A number of recommendations on political rivalry are made, all with the intent of getting political parties more committed to and working with acceptable forms of political rivalry in an effort to reduce politically motivated violence.

A number of issues relating to violence and the negotiation process are raised. The Committee believes these will need to be addressed by the Negotiating Council and its members, in order to attempt to reduce this potential for violence while the negotiating process is proceeding.

The Committee is proposing that the parties at the Negotiating Council consider alternative views regarding the introduction of a moratorium on mass action for a limited time during the negotiating process. However, the fundamental right to mass action is supported, but requesting parties which do exercise that right to observe some specific requirements when so doing.

The Committee has dealt with more areas but is not ready to include them in a report.

**REPORT NUMBER THREE OF THE TECHNICAL COMMITTEE ON
VIOLENCE: 27 MAY 1993**

1. INTRODUCTION

1.1 Based on the submissions to this Committee, we identified a number of violence "issues" which have been allocated into six major areas of resolution, being:

- 1.1.1 Political Parties
- 1.1.2 South African Government
- 1.1.3 Other Governments and Administrations
- 1.1.4 Armed formations
- 1.1.5 Peace Structures
- 1.1.6 Other

1.2 This report deals with the issues which pertain to Political Parties. Those "issues" cover the causes, potential causes, and manifestations of violence. The following are the issues identified:

- 1.2.1 "Killing" talk by political leaders/ inflammatory speech; speeches inciting violence;
- 1.2.2 Political parties creating a climate for violence/ tactics and strategies implemented either overtly or covertly;
- 1.2.3 Private political armies;
- 1.2.4 Mass action;
- 1.2.5 Hostels;
- 1.2.6 The threat of violence emanating from the Right-wing.
- 1.2.7 The need for political reconciliation between the ANC and the IFP and the inability of these parties to effectively spread joint messages of peace and political tolerance;
- 1.2.8 Concerted efforts to derail the negotiation process by political activists/ parties/ others;
- 1.2.9 Impatience with the pace of constitutional negotiations
- 1.2.10 Freedom of political participation/ association/ assembly;
- 1.2.11 Political intolerance;
- 1.2.12 Political intimidation;
- 1.2.13 Leaders of political parties not doing enough to promote political tolerance;
- 1.2.14 Some parties at the Multi-Party Negotiating Process have failed to sign the National Peace Accord;

- 1.2.15 Failure of signatories to the National Peace Accord to meet;
 - 1.2.16 Certain parties have failed to suspend the armed struggle;
 - 1.2.17 Parties have failed to accept responsibility and accountability for contraventions of the Peace Accord and political violence committed by their members/ supporters;
 - 1.2.18 Failure of parties to co-operate with security forces;
 - 1.2.19 Dangerous weapons;
 - 1.2.20 Lack of constructive mobilisation of African leadership;
 - 1.2.21 Covert and clandestine operations.
 - 1.2.22 Political rivalry and fear of losing political support
 - 1.2.23 Despondency that the negotiation process will not yield the desired party political results;
 - 1.2.24 Lack of control by political formations of their rank and file members;
 - 1.2.25 Deteriorating socio-economic conditions
 - 1.2.26 Improper conduct by the police in the course of investigations
 - 1.2.27 Lack of capacity by police to effectively investigate acts of political violence;
 - 1.2.28 Fear of change on the part of people with vested interests in the constitutional status quo;
 - 1.2.29 Unlawful and politically biased activities and actions of security forces and/ or individuals in such forces;
- 1.3 On further consideration of these issues, five areas of critical concern have been identified: political rivalry; political negotiations, weapons, mass action, covert and clandestine operations.
- 1.4 This report deals only with those issues on which the Committee has managed to make progress to date i.e. political rivalry, political negotiations and mass action.

2. POLITICAL RIVALRY

- 2.1 Robust yet peaceful political rivalry is a healthy and necessary feature of democracy. However the democratisation process has been accompanied by forms of political rivalry and methods of mobilisation which go well beyond what is politically acceptable.
- 2.2 It is well known that violence has increased substantially since February 2nd, 1990, when a more competitive and open political process was initiated. Considerably increased political rivalry has become a trigger of violence. It is

useful to quote from one of the submissions before us: "political rivalry is a major trigger of violence". (Goldstone Commission report)

2.3 Unacceptable forms of conduct include:

- inflammatory rhetoric;
- creating a climate for and inciting violence either overtly or covertly;
- political intolerance; and
- political intimidation.

2.4 Experience has shown that legislation alone can not put an end to violence. Consequently it is recommended that:

2.4.1 All parties which are signatories to the National Peace Accord report to the Multi-Party Negotiating Process on steps taken by them to commit themselves to the Code of Conduct for Political Parties as contained in the National Peace Accord.

2.4.2 Non-signatories to the National Peace Accord should sign it and commit themselves to its Code of Conduct for Political Parties.

2.4.3 Parties should accept responsibility and accountability for any contravention in the Code of Conduct for Political Parties of the National Peace Accord by members/supporters.

2.4.4 political parties should promote peaceful politics to their members and the public at large. In this regard this Technical Committee suggests that the Negotiating Council consider the following:

2.4.4.1 re-emphasising the importance of bilateral discussions between rival organisations;

2.4.4.2 re-emphasising the importance of leadership meetings between rival organisations;

2.4.4.3 re-emphasising the importance of joint public meetings as a mechanism to demonstrate the commitment of rival political leaderships and organisations to peace;

2.4.4.4 re-emphasising the importance of meetings of grassroots supporters of rival organisations; and

2.4.4.5 the importance of public education programmes.

- 2.4.5 all parties should establish mechanisms, within their own organisations, for dealing with transgressions of the National Peace Accord by their party members.
- 2.4.6 those parties to the MPNP who are not signatories of the Peace Accord should report to the Negotiating Council on steps taken by them to deal with unlawful, violent and unacceptable conduct on the part of their members and supporters
- 2.4.7 all parties which have not yet suspended violence should do so immediately.
- 2.4.8 political leaders and supporters of political parties/organisations must refrain from making speeches inciting violence.
- 2.4.9 all parties should co-operate with the police in solving violent crimes.

3. VIOLENCE AND THE NEGOTIATION PROCESS

- 3.1 The Committee recognises that there is a direct relation between the lack of a political agreement regarding the future South Africa and the phenomenon of violence. Different Parties/Organisations/Administrations have differing perceptions, hopes, fears and expectations regarding the negotiating process. Equally there are differing perceptions, hopes, fears and expectations regarding the process amongst the general public. These differences have led to confusion, tension, division, despondency and anger and are playing a significant role in the proliferation of political violence.
- 3.2 The Committee has identified the following issues which it recommends should be addressed by the Negotiating Council:
 - 3.2.1 Widespread concern regarding the pace and urgency of negotiations;
 - 3.2.2 Fears that the negotiating process will not deliver sufficiently to meet the expectations of the organisations in the MPNP, their constituencies and the wider public.
 - 3.2.3 Covert and overt actions to derail the negotiating process;
 - 3.2.4 Fear of change among people with vested interests the constitutional status quo;

- 3.2.5 Lack of confidence and trust between political leadership;
 - 3.2.6 A lack of confidence and trust in political leadership;
 - 3.2.7 The flow of information about the negotiation process has not led to an adequate and constructive public comprehension thereof;
 - 3.2.8 The retention of the armed struggle as an official policy by political organisations
 - 3.2.9 Parties to the MPNP send out conflicting signals regarding their commitment to the negotiating process and keep armed options open;
 - 3.2.10 The potential for even higher levels of violence if the negotiations reach deadlock.
- 3.3 The Committee believes that with the exception of 3.2.7 all of the issues which have been identified are fundamentally political in nature and require resolution by those represented at the Negotiating Council themselves.
- 3.4 As far as 3.2.7 is concerned the Committee proposes that the Negotiating Council consider authorising a body of the Multi-Party Negotiating Process to speak to the Media on behalf of the Multi-Party Negotiating Process itself. This means that in addition to the variety of party-political and other Press conferences which already occur, there will be an opportunity for the Multi-Party Negotiating Process to regularly address the South African public with one voice.

4. MASS ACTION

- 4.1 Mass action is taken to cover all acts of mass protest gatherings, marches, boycotts etc.
- 4.2 Recently, as the various institutions involved in mass action and its regulation have worked together in accordance with guidelines formulated through structures of the Peace Accord, there has been a number of mass actions, particularly marches and rallies, which have proceeded without violent

incidents. However a number of unregulated and ill disciplined mass actions also have occurred, which have led to violence and loss of life.

- 4.3 The Goldstone Commission has investigated mass action and has produced two reports on the regulation of gatherings which cover many aspects of mass action. These reports have proposed modus operandi for the regulation of gatherings and a Bill to consolidate legislation pertaining to public gatherings, to provide for general measures setting out procedures, requirements, powers, and responsibilities of local and state authorities, the police and organisers of gatherings, and to provide for matters incidental thereto.
- 4.4 Although the Committee supports the general thrust of the Bill, it believes that certain amendments are required in order to ensure that all parties support the provisions of the Bill. The Committee proposes that the National Peace Committee should be requested to submit the necessary amendments.
- 4.5 As is stated in the preamble to the Bill, every person has the right to express their view on any matter freely in public and enjoy the protection of the state while doing so. Mindful that all persons have this right but mindful also of the tense and violent political environment in our country, the following views have been expressed in this Committee:
- 4.5.1 The right to demonstrate is fundamental and cannot be taken away. Nevertheless, in the current climate mass action leads to unnecessary deaths and a moratorium should be placed on it.
- 4.5.2 The right to demonstrate is fundamental and cannot be taken away. A moratorium on mass action could in fact increase political pressure and would be counter productive in the search for peace.
- 4.5.3 All members of the committee agree that if and when the right to demonstrate publicly is exercised every party doing so must:
- 4.5.3.1 Give priority to the need to promote peace;
- 4.5.3.2 Avoid deliberate provocation of opponents;
- 4.5.3.3 Ensure that the structures of the Peace Accord are kept fully informed and are utilized to maximum effect;

- 4.5.3.4 Commit themselves to negotiate in good faith with all relevant parties regarding demonstrations;
- 4.5.3.5 Bind themselves to comply with all agreements reached regarding demonstrations;
- 4.5.3.6 Comply with provisions of the Goldstone Bill once agreement has been reached on amendments to it, and once it has been enacted.

**C. FUNDAMENTAL RIGHTS DURING THE
TRANSITION**

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THIS REPORT IS EMBARGOED UNTIL 12h00
ON FRIDAY 28 MAY 1993

**SUMMARY OF THE THIRD PROGRESS REPORT OF THE
TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS DURING
THE TRANSITION**

At the request of the Planning Committee this Report - amplifying and supplementing the Committee's Second Report - deals with the following matters:

1. Criteria for determining which fundamental rights and freedoms are to be entrenched during the transition;
2. Further elucidation of the criteria for the limitation and suspension of rights; and
3. Means and mechanisms for the adjudication of fundamental rights and freedoms.

The Committee draws particular attention to paragraph 4 of this Report in which criteria are proposed to help determine which rights and freedoms should be entrenched during the transition.

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TECHNICAL COMMITTEE ON FUNDAMENTAL RIGHTS
DURING THE TRANSITION : THIRD PROGRESS REPORT
28 MAY 1993

1. BACKGROUND

The Committee was requested by the Planning Committee on 25 May 1993 to formulate specific criteria for the identification of rights and freedoms which are "fundamental" or "directly relevant" to the transitional phase, to explicate the criteria for the limitation and suspension of entrenched rights and freedoms and to recommend means and mechanisms for the adjudication of such rights and freedoms during the transition.

The Committee would like to point out that the identification of rights and freedoms for the purpose of entrenchment during the transition was seen by the Committee as its primary task from the outset. In its First Report it identified different categories of rights. In its Second Report the Committee refined its initial approach by categorising rights and freedoms according to certain practical criteria formulated by reference to the nature and anticipated course of the transitional process.

For this purpose the Committee distinguished between three categories of rights and freedoms, namely:

- * Those necessary to ensure democracy during the transition;
- * Those aimed at the overall security and well-being of all during the transition; and
- * Those conducive to the overall security, well-being and upliftment of all people under conditions of political and socio-economic reconstruction.

The Committee recommended that only the First and Second Categories be considered for inclusion during the transition, because rights in the Third Category are bound to be generally regarded as too controversial to be entrenched during the said period.

In view of the Planning Committee's request for further elaboration, this Report is

to be read as an amplification of and indeed - to a large extent - a supplement to the Committee's Second Report. Attention will be paid to:

- * The explication of criteria for determining which fundamental rights and freedoms are to be entrenched during the transition;
- * The explication of criteria for the limitation and suspension of the rights and freedoms referred to above; and
- * Means and mechanisms for the adjudication of such rights and freedoms during the transition.

To begin with, the Committee also suggests minor amendments of formulations in the Second Report.

2. AMENDMENTS TO FORMULATIONS IN THE SECOND REPORT

2.1 Editorial Changes

2.1.1 On page 2 of the Report, at the end of the third line of the seventh paragraph from the top, "a Bill of" should be inserted before "Rights".

2.1.2 In paragraph 5.1 where reference is made to "a general limitations clause" the words "and a suspension" should be inserted before "clause".

2.2 Substantive Changes

2.2.1 "Upliftment"

In formulating the criteria for its Third Category of rights the Committee refers to the "upliftment of all people". The word "development" should be substituted for "upliftment" throughout the Report.

2.2.2 "Well-being"

Delete the words "and well-being" where they occur in the second asterisk on page 1 of this report and the introduction to 2.2. The reason for this amendment will be explained in 3.4 below.

2.2.3 References to Affirmative Action

In its Second Report the Committee expresses the view that an affirmative action clause could qualify the equality clause (see e.g. 2.1.1.4.). The word "qualify" (or expressions to a similar effect) must be replaced by "amplify" (or expressions to a similar effect) throughout the Report.

2.2.4 Customary Law

Insert after 2.3.10 on page 8 of the Second Report the following:

"2.3.11 The recognition of the rights arising out of customary law and the extent to which they should be limited, etc."

Delete "etc" at the end of this sentence in 2.3.10 and replace the comma with a semi-colon.

3. CRITERIA

3.1 Introductory Remarks

The period of transition is generally perceived as coinciding in time with the movement towards full democracy in South Africa. With this in mind, the Committee's point of departure has been, and still is, that in order to facilitate the democratisation of society during the transition, at least those rights and freedoms which are inseparable from what is generally understood by "democracy" will have to be entrenched. The rights and freedoms which obviously come to mind here are the so-called first-generation rights and freedoms, i.e. the civil and political rights and freedoms which, although "Western" in origin, are generally recognised in the constitutions and/or common law of most democracies throughout the world.

The Committee did not simply compile a list of these first-generation rights, because it thought that a single comprehensive list would not facilitate negotiation amongst the parties, given their divergent views on the entrenchment of fundamental rights and freedoms during the transition. For some parties such a list would be too wide, while for others it would be too narrow. This is also the reason why the Committee (with the three generations of rights in mind) opted for a practical categorisation.

In the Committee's view, negotiation should first be focused on rights and freedoms listed under the First Category in the Second Report and parties should endeavour to agree on the entrenchment of these rights and freedoms during the transition. They should then proceed to the Second Category and

eliminate the rights on which no agreement can be reached. Rights listed under the Third Category should not be considered for inclusion during the transition, unless there is express agreement that they ought to be included.

As and when agreement is reached on specific rights, the Committee will immediately start formulating such rights in specific terms and submit its formulations to the Council.

- 3.2 To return now to the Planning Committee's request. If the transitional dispensation is to be based on democratic principles, a wide spectrum of first-generation rights will inevitably have to be regarded as "fundamental" or "directly relevant" to the transition. This will be the position regardless of the criteria which may be employed. The Committee recommends that the Council bases its deliberations on the categories as suggested by the Committee in the Second Report, because these allow for a practical and therefore more flexible approach.

In formulating practical criteria to help determine which rights and freedoms will have to be entrenched during the transition, the Committee assumes that the transitional process:

- * Will have to be as democratic as possible; and
- * Must be aimed at achieving full democracy.

- 3.3 Rights and freedoms ensuring democracy as such during the transition will therefore have to be included. This general proposition must, however, be qualified:

3.3.1 Democracy of a particular type (e.g. "liberal" or "social" or "African" democracy) should not be decided on for purposes of the transition. An elected and legitimate constitution-making authority will have to exercise this particular choice. Rights aimed at promoting democracy of a particular type should therefore be excluded during the transition.

3.3.2 It follows from 3.3.1 above that only "neutral rights and freedoms" ensuring minimum standards of democracy as such should be included. For this purpose their universal acceptance in international human rights declarations, instruments, literature and thinking must be taken into account: they must be time-honoured and non-controversial.

3.3.3 Paragraph 3.3.2 by itself does not constitute a sufficient criterion since not all universally accepted, time-honoured and non-controversial fundamental rights and freedoms need to be entrenched during the transition. The transition as a process and, in particular, a political process of a peculiar kind, has to be understood and honoured in order

to help determine which rights and freedoms should be entrenched during its limited lifetime. With this in mind, certain rights and freedoms enjoy priority over others. This does not imply that the former rights and freedoms are, generally speaking, more fundamental or more important than the latter ones. A classification or categorisation of rights and freedoms for purposes of the transition will not and need not reflect the process of rights-determination in the long term.

- 3.3.4 During the transition, everyday life for all people in the country will go on. Provision will therefore have to be made for the overall security of all. Social, economic and political stability during the transition will depend on the extent to which the population experiences a sense of security and identity. Fundamental rights and freedoms which will help instill and promote this sense of security and identity will therefore have to be entrenched to a sufficient degree.

In its Second Report the Committee refers to rights and freedoms aimed at achieving the overall security and well-being of all during the transition. For purposes of this Third Report the words "and well-being" have been deleted (see 2.2.2 above). This has been done because the term "well-being" can also be understood as referring to the socio-economic development of people - a process which will have to be set in motion by a legitimate constitution-making authority and which can be fully attended to only after (or in the later stages of) the transition. The words "and well-being" were therefore deleted in order to avoid misunderstanding.

- 3.3.5 The entrenchment of rights and freedoms during the transition will inevitably impact on their entrenchment in an eventual dispensation. If the exercise of a sufficient minimum of rights and freedoms cannot successfully be secured during the transition, the citizenry will lose faith in the value and even the relevance of the means and mechanisms for the entrenchment of rights and freedoms. Endeavours to entrench rights and freedoms during the transition should therefore not be over-ambitious, but at the same time they should also not be meaningless. A balance must be struck between protecting, on the one hand, too many and, on the other, too few fundamental rights and freedoms. This balance has to be reflected in the selection of rights and freedoms to be entrenched during the transition.

4. SUMMARY AND PROPOSED APPLICATION OF THE CRITERIA SUGGESTED IN THIS REPORT

All the considerations raised in paragraph 3 above are of considerable importance and need to be weighed in relation to one another in order to arrive at a carefully balanced decision as to whether or not certain rights and freedoms should be included during the transition. Without derogating from the importance of each of the said considerations, the Committee is constrained to propose a practical working summary of the criteria and to propose a way in which they could be applied. Of the three sets of criteria mentioned below, the Committee suggests that rights and freedoms would qualify as fundamental if they meet the criteria described in 4.1 **and** 4.2. If they do not meet the criteria in 4.1 and 4.2 they must meet the criteria described in 4.3 before they qualify for inclusion.

4.1 Rights and freedoms will, of necessity, qualify for entrenchment during the transition if:

4.1.1 Their inclusion would facilitate:

4.1.1.1 Free and fair elections; and

4.1.1.2 Free, fair and full consultation amongst people and groups of people in regard to all matters relevant to the transition; or

4.1.2 Their exclusion would limit or detrimentally affect the freedom, fairness or completeness of the processes described in 4.1.1.

and

4.2 The inclusion of these rights and freedoms **do not** pre-empt or unduly limit the right or power of a constitution-making authority to:

4.2.1 eventually draft a full Bill of Rights; or

4.2.2 determine laws or constitutional provisions aimed at the socio-economic reconstruction of society; or

4.2.3 remove or correct the imbalances which exist and which have been brought about by unfair or undemocratic practices.

4.3 Alternatively, rights and freedoms which do not qualify for entrenchment in terms of 4.1 and 4.2 will have to be included during the transition if they are nevertheless so fundamental that:

4.3.1 A constitution-making authority will not exclude or substantially limit them; or

4.3.2 It would be highly undesirable for such an authority to exclude or unduly limit them;

Rights and freedoms are "fundamental" for purposes of 4.3 either because they are universally accepted and beyond debate or because the negotiating parties agree that 4.3.1 or 4.3.2 apply to them.

It is the Committee's view that the acceptance of these working criteria would mean that all the rights in the First and Second Categories of this Second Report would be non-controversial, except that the rights described below and mentioned in the Second Report will have to be subject to agreement in terms of the criteria described in 4.3.3. before they qualify for inclusion. These are the following rights and freedoms (numbered as in the Second Report):

- "2.1.1.5 Freedom from servitude and forced labour.
- 2.1.1.9 The right to life.
- 2.2.1 Language and cultural rights.
- 2.2.3 Freedom of choice of residence and to pursue a livelihood anywhere in South Africa.
- 2.2.7 Freedom to participate in economic activity.
- 2.2.8 The rights to strike and to lock out.
- 2.2.9 The right to own property.
- 2.2.14 The right of equal access to State or State-aided educational institutions."

The rights included in the Third Category of the Committee's Second Report do not qualify for inclusion, unless there is express agreement that they ought to be included during the transition. The Committee is - in terms of the criteria in 4.1. to 4.3. above - unable to provide any argument in support of the proposition that they should be included.

5. EXPLICATION OF THE NEED AND CRITERIA FOR THE LIMITATION AND SUSPENSION OF FUNDAMENTAL RIGHTS AND FREEDOMS INCLUDED IN ANY BILL OR CHARTER OF RIGHTS.

5.1. Limitation

- 5.1.1 It is commonly accepted in most countries of the world, in the international sphere, and in every human rights instrument today, that very few rights and freedoms are unlimited in scope and application. Typical among those which are regarded as absolutely inviolable, are freedom from torture and freedom of conscience, religion, belief, thought and opinion. The vast majority of rights and freedoms, however, are necessarily limited by the basic duty (which is the counterpart of every right) to respect the rights of others. Thus, for example, freedom of speech generally does not include the right to defame another person, nor the right to shout "Fire!" in a crowded theatre when no such fire exists, and freedom of movement does not envisage unauthorised access to property or premises controlled by another legal occupant.
- 5.1.2 Every formulation for the protection of rights and freedoms must, therefore, allow for the limitation or circumscription of most rights, unless it wishes to run the risk of irrelevance through lack of enforceability. This limitation must, however, occur under close supervision and on relatively restrictive and precisely-defined terms. Again, typically, the legislature is viewed as the appropriate body to lay down the circumstances (in law) in which limitation may legally occur, and the judiciary is seen to provide the forum in which any such apparent limitation can be tested against the formula used in the Bill of Rights itself. In other words, the Bill must contain the circumstances of its own limitation.
- 5.1.3 Limitation (the preferred term here) can take one of three forms: a general limitations clause applicable to each and every protected right and freedom (with a few exceptions); a series of specific limitations clauses, each qualifying a specific right or freedom; or a combination of these two categories. The last-mentioned approach is the one adopted in the Committee's Second Report. It has the advantages, in our view, of providing a common standard against which all purported limitations can be measured, thus enabling the legislature and judiciary rapidly to develop an understanding of what is viewed as an acceptable curtailment in respect of the protected rights and freedoms, while also

allowing for a degree of flexibility by the subjection of certain rights and freedoms to further grounds upon which legislative curtailment may be justified.

- 5.1.4 For example, a general limitations clause might approve curtailment of rights and freedoms "where reasonably necessary in the public interest" while a specific limitation in regard to the right to liberty may provide that liberty may be deprived in the interests of "justice, public health or immigration". Again, once liberty has been lawfully deprived, a specific limitations clause may stipulate a maximum period of detention "unless further detention is ordered after a fair hearing by a court of law".
- 5.1.5 In a sense, the specific limitation spells out unambiguously how the general limitation ought to be applied in specific circumstances, or elaborates on the general limitation.
- 5.1.6 Limitation clauses are normally justiciable by the courts (or the highest court alone). In choosing the exact formulation for such clauses, most human rights instruments attempt to define with a fair degree of precision the guidelines which the judges should follow in fulfilling their duty in this respect. This is particularly so as the judges are generally secure in their tenure (in order to ensure independence) and so therefore less democratically accountable than the legislature, on whose laws they sit in judgment. Such guidelines may be all the more necessary in a legal system moving into judicial review of legislative action for the first time.
- 5.1.7 The Committee proposes a series of principles in its Second Progress Report (see paragraph 3.1. on page 9) which function cumulatively to define the judicial task quite narrowly, without eliminating judicial discretion to exercise the court's important controlling function. In particular, the Committee draws attention to:
- * The overall goal that limitations must be consonant with the needs of a free, open and democratic society (paragraph 3.1.2.);
 - * The fact that limitation should not have the effect of destroying the essence of the right (paragraph 3.1.3.); and
 - * The fact that any limitation should not be more drastic than the circumstances require (paragraph 3.1.4.).

5.2. Suspension

- 5.2.1 While limitation clauses are regarded as necessary and long-lasting, a suspension clause is aimed at ensuring the survival of a Bill of Rights after a temporary period of national crisis or natural disaster. For the duration of such a state of affairs, it may be necessary to suspend the operation of most or some of the rights and freedoms entrenched in the Bill of Rights, in order to allow the State to restore order and peace. Thus, for example, people may have their freedom of movement and association removed during a flood or in war-time. Without providing for such suspension, a Bill of Rights runs the risk of inviting ignorance (and thus disrespect) in such calamitous circumstances.
- 5.2.2 The drastic nature of suspension, however, demands that the most stringent procedural safeguards be followed before suspension of rights and freedoms can occur legally, such as are set out in paragraph 3.2. (page 9) of the Committee's Second Report. In particular, the following principles should be noted:
- * Suspension should only occur in the form of a state of emergency declared by the executive under specific conditions, which would be reviewable by the courts (paragraph 3.2.1.);
 - * Legislative ratification of both the declaration and any emergency measures would be required within a certain time (paragraphs 3.2.4. and 5); and
 - * That the suspension of rights and freedoms would not imply immunity of State officials for their unlawful conduct during such emergency (paragraph 3.2.6.).
- 5.2.3 As with the limitations clause, there are certain rights which would be regarded as absolute in all circumstances, and therefore as not being capable of suspension. These would include freedom from torture and freedom of conscience, belief, thought and opinion.

6. AN INSTITUTION TO ADJUDICATE ON FUNDAMENTAL RIGHTS DURING THE TRANSITION

6.1. General Observations

- 6.1.1 South Africa's legal history does not know the concept of judicial review in a constitutional sense, nor the entrenchment of certain rights and freedoms as fundamental. It is widely acknowledged that litigation and judicial decision-making in the constitutional sphere are substantially different from conventional legal practice to this point. Some South African judges and legal practitioners and many academics have, however, been exposed to human rights theory and practice, especially as neighbouring states (such as Namibia and Zimbabwe) have adopted Bills of Rights and written constitutions. It is instructive that, after some initial hesitancy and shortcomings in the judicial process, most lawyers (including judges) schooled in the common law tradition (which characterises South African law in this respect) have adapted quite quickly to the new legal dispensation. This process of adaptation is reflected at the popular level - it is universally recognised that the successful implementation of any Bill of Rights depends largely on the development of a "human rights culture" among the population generally. It is noteworthy that this process was emphasized by the South African Law Commission in its Working Paper on Group and Human Rights in 1989, and has been a feature of the programmes of most organisations and movements which resisted apartheid. Programmes of basic education in the human rights field are now widespread in non-governmental organisations, and the South African Government has announced a similar programme this year.
- 6.1.2 There is a second major factor which must be borne in mind here. South Africa's courts, through their implementation of unjust laws, particularly over the past 45 years, have suffered considerably in reputation and legitimacy among the majority of the population. There has been much disquiet about the effects of the manner in which judges are appointed, a system which has led to a Bench which is, with two exceptions, white and male. The patent political profile and power of the courts will inevitably heighten under a system of entrenched rights and judicial review of the Constitution. This means that the appointment of judicial officials as well as measures to enhance their democratic accountability and independence from the

legislature and executive during tenure of office, are matters which need urgent attention. These are matters, however, of the utmost political contention, which demand the widest level of consultation and consideration by a representative governing authority.

6.1.3 With these realities in mind, the Committee is required to consider the desirable mechanism for the adjudication of fundamental rights during the transition. The Committee has no doubt that an eventual constitutional dispensation (drafted by a democratic constitution-making authority) should seriously contemplate a full package of adjudication mechanisms, including at least:

- * A Constitutional Court, with appellate and well-defined original jurisdiction, as the final arbiter on constitutional and rights issues;
- * A Human Rights Commission, with advisory, mediating, investigative and educational functions, to promote knowledge about and implementation of fundamental rights and freedoms;
- * An Ombud with substantially expanded powers of investigation and review of the regularity and legality of administrative actions; and
- * An extended notion of standing to sue in constitutional matters, and financial and logistical support for litigants who wish to challenge the constitutionality of Government action which infringes on rights and freedoms.

6.1.4 The legitimacy of such institutions will depend on the manner of their establishment and the legitimacy of the body which creates them. These are matters to which, in the view of the Committee, a constitution-making authority would have to give the most urgent attention.

6.2. Considerations Pertaining to the Transition

6.2.1 The Committee at this stage finds itself in a difficult position in respect of making specific recommendations for the transition. While the South African Government has submitted (on 25 May 1993) its "Preliminary Views and Proposals regarding the Independence of the Judicial Authority" in which it states that certain changes to judicial structures are necessary, even during the transition, it has not motivated such a proposition, and no other party or body has to date (27 May 1993) submitted any definite proposals in this respect.

6.2.2 In addition, the Committee's view on this matter is very likely to be influenced by the proposals of at least the Technical Committees Constitutional Matters, Independent Electoral Commission and Repeal of Discriminatory Legislation, as each of these bodies could potentially propose codes of protected rights and means and mechanisms for their enforcement.

6.2.3 This Committee therefore earnestly requests all participants in the Negotiating Council to inform it of their views as to:

6.2.3.1 The appropriate adjudicative institution(s) to enforce fundamental rights during the transition;

6.2.3.2 Reasons for adopting such a course and for the timing of its introduction;

6.2.3.3 Methods of constituting any new bodies suggested, and of selecting their members;

6.2.3.4 Supplementary mechanisms to make the functions of the adjudicative institution effective and accessible.

7. RECOMMENDATIONS

On the understanding that the recommendations in 7.2 to 7.4 below replace the recommendations in 5.3 and 5.4 of the Committee's Second Report, the Committee recommends to the Council that it:

- 7.1. Accepts the Committee's recommendations in 5.1 and 5.2 of the Second Report subject to 7.3 below;
- 7.2. Agrees in principle to the criteria proposed by the Committee in paragraph 4 of this Report;
- 7.3. Advises the Committee as to whether the rights and freedoms listed in 2.1.1.5, 2.1.1.9, 2.2.1, 2.2.3, 2.2.7, 2.2.8, 2.2.9, and 2.2.14 of the Committee's Second Report are to be entrenched during the transition;
- 7.4. Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, formulations of all the rights and freedoms listed under the First and Second Categories in the Committee's Second Report, with the exception of those rights and freedoms referred to in 7.3 above;

- 7.5 Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, formulations of those rights and freedoms mentioned in 7.3 above which according to the Council should be entrenched during the transition;
- 7.6 Accepts the general principles laid down for the limitation and suspension of fundamental rights and freedoms during the transition in paragraph 3 of the Committee's Second Report and explicated in paragraph 5 of this Report, and instructs the Committee to submit a formulation of a general limitations and suspension clause to a subsequent meeting of the Negotiating Council;
- 7.7 Requests all Negotiating Council participants to make submissions to the Committee with regard to the matters raised by this Committee in paragraph 6.2 of this Report before 12h00 on 1 June 1993;
- 7.8. Instructs the Committee to submit to a subsequent meeting of the Negotiating Council, recommendations with regard to the means and mechanisms for the adjudication of fundamental rights and freedoms during the transition after considering the submissions made in terms of 7.7 above.

Prof. H. Corder
Prof. L. du Plessis (C)
Mr. G. Grove
Ms. S. Nene
Adv. Z. Yacoob

D. TRANSITIONAL EXECUTIVE COUNCIL (TEC)

CONFIDENTIAL
THIS REPORT IS EMBARGOED UNTIL 12H00
ON FRIDAY 28 MAY 1993

**FOURTH REPORT OF THE TECHNICAL COMMITTEE ON
THE TRANSITIONAL EXECUTIVE COUNCIL / 28 MAY 1993**

1. INTRODUCTION

Having thus far produced three reports which mainly dealt with the composition and functioning of the Transitional Executive Council/Authority and its sub-councils were they to be established, the Technical Committee at this stage deems it advisable to facilitate a debate in the Negotiating Council regarding the need for the establishment of such a Transitional Executive Council. To this end, the Committee proposes to furnish the Negotiating Council with an overview of the positions of various participants as they emerged from submissions at the disposal of the Technical Committee.

The Committee should like to point out that a summary of the 13 submissions received until 13:00 on Wednesday 19 May 1993 is to be found in the second report of the Technical Committee (dated 21 May 1993). Six further submissions had been furnished, a summary of which appears as Addendum A to this report.

2. OVERVIEW OF POSITIONS

Even where a participant did not expressly indicate its attitude on the need or desirability of a transitional executive structure, its position could be inferred from the contents and nature of the submission(s).

The majority of participants expressed themselves in favour of a transitional executive body, albeit not necessarily in the form proposed by Working Group 3 of Codesa. The positions in support of such a body range from acceptance that there will be such a body, and that the only question is what it will look like and how it will function, to support which can hardly be expressed in other terms than overtly enthusiastic and

insisting that it should be established immediately.

In two submissions the need of a transitional executive body was questioned, one indicating that there was neither need nor time for such an institution, the other that if a transitional structure became a *fait accompli*, the right to make further inputs was reserved.

Three submissions did not express principled opposition to the notion of a transitional executive body, but intimated that other matters, such as the form of state, constitutional principles, the boundaries, powers and structures of regions and an interim constitution should first be addressed.

One submission contained an ambivalent position, suggesting on the one hand that there is no objection in principle to the establishment of a transitional executive, stating later on, however, that the powers of such a transitional executive should be exercised through 'established government structures and powers'.

3. CONCLUSION

From the above it would appear that, with the exception of one participant who felt that there was no time for a transitional executive structure, there was no opposition in principle to a transitional executive structure.

ADDENDUM A

SUMMARY OF REMAINING INPUTS RECEIVED BY THE COMMITTEE (FOR THE OTHERS SEE SECOND REPORT OF THE TECHNICAL COMMITTEE DATED 21 MAY 1993)

1. Inkatha Freedom Party

The IFP supports a two phase transitional process on the condition that the following should be agreed upon prior to further negotiations on a Transitional Executive Council: interim constitution; a set of constitutional principles that would be binding on the constitution making body; final and entrenched boundaries, powers and structures of regions; form of state; full agreement on the nature of the political dispensation.

2. Intando Yesizwe

Intando Yesizwe supports the establishment of the Transitional Executive Council and maintains that its decisions should be binding on parliament, departments of state and administrations; that it should be entitled to overrule decisions of any of these bodies; that it should have the power to prescribe to these bodies on matters within its jurisdiction.

3. Inyandza National Movement

Inyandza supports the establishment of a Transitional Executive Council with a multi-party character with effective executive powers. A sub-council on elections is further proposed.

4. KwaZulu Government (in conjunction with Inkatha Freedom Party)

The KwaZulu Government expresses the view that the Transitional Executive Council should not be established until an agreement on the process of transformation and on the form of state has been reached. However, it is also of the opinion that the powers of the Transitional Executive Council could be exercised through existing government structures and powers.

5. Transvaal Indian Congress/Natal Indian Congress

In a further submission, the Transvaal Indian Congress and the Natal Indian Congress

propose the following:

- 5.1 The Transitional Executive Council should be established by mid-1993.
- 5.2 It should have cabinet status and full executive powers.
- 5.3 The State President, ministers and officials (of all administrations) should only act with the prior approval of the Transitional Executive Council in regard to matters falling within the Transitional Executive Council's jurisdiction.
- 5.4 The Transitional Executive Council should have full access to all relevant information and personnel.
- 5.5 The Transitional Executive Council should have specific powers of intervention.
- 5.6 Decisions should be taken by a two-thirds majority.
- 5.7 Disputes should be resolved by the Transitional Executive Council.

6. Venda

Venda supports the fact that the Transitional Executive Council should have effective executive powers, that it should have access to all relevant information, and that it should be able to delegate powers to sub-councils.

7. African National Congress

Two further detailed submissions dealing specifically with the terms of reference of sub-councils were subsequently provided by the African National Congress.

CONFIDENTIAL
THIS REPORT IS EMBARGOED UNTIL 12H00
ON FRIDAY 28 MAY 1993

**THIRD REPORT OF THE TECHNICAL COMMITTEE ON
THE TRANSITIONAL EXECUTIVE COUNCIL / 27 MAY 1993**

1. INTRODUCTION

Since the submission of its previous two reports, the Technical Committee has begun to identify the powers and functions which, in its opinion, should be exercised through the Transitional Executive Council's specialist sub-councils. In the time at its disposal the Committee was able to deal with the powers and functions of the sub-councils on foreign affairs and finance.

Once the Negotiating Council has had occasion to express itself on the proposals that have been and will be made regarding specific powers and functions, the proposals will be appropriately integrated with the rest of the Committee's proposals in its first report.

2. POWERS AND FUNCTIONS

Based on submissions received, the Technical Committee proposes the following terms of reference in relation to foreign affairs and finance. This section of the report has been submitted in a format resembling draft legislation.

2.1 POWERS AND FUNCTIONS IN RELATION TO FOREIGN AFFAIRS

'The Transitional Executive Council will, within its powers of review and other general powers, through its sub-council on foreign affairs, in regard to foreign policy, liaise, monitor, make recommendations and, where it deems necessary, assist with a view to -

- (i) achieving progressively the broadest possible consensus on matters affecting the country's international interests, particularly its long-term interests;

- (ii) securing appropriate agreements with the international community regarding the contribution this community may make to the peaceful transition to democracy;
- (iii) securing such international assistance as the sub-council deems necessary to address the socio-economic needs of the people as a whole and not one or other political grouping;
- (iv) ensuring that foreign policy initiatives benefit the country as a whole and not one or other political grouping;
- (v) promoting such international relations including trade, finance, culture and sport relations, which in the opinion of the sub-council will benefit the country as a whole.'

NOTE: *Access to information by the TEC and its sub-councils will be dealt with separately*

2.2 POWERS AND FUNCTIONS IN RELATION TO FINANCE

- (1) The Transitional Executive Council will, within the scope of its objectives, its powers of review and other general powers, have the following powers to be exercised through its sub-council on finance:
 - (i) to acquaint itself with recent economic developments, economic policy objectives and targets for the medium-term and more particularly, for the ensuing fiscal year (1994/1995);
 - (ii) to be represented on all function and budgeting committees with a view to ensuring that funds are not applied in a manner favouring one or other political grouping participating in the election of a democratic government;
 - (iii) to receive such reports, and in addition such information relating to fiscal transfers, as are reasonably necessary for the sub-council to perform its functions in terms of the empowering legislation;
 - (iv) to approve any measures designed to rationalise treasury functions in the process of realignment of government structures during transition;
 - (v) to make recommendations to the relevant departments concerning the

privatisation or tendering out of functions currently performed by relevant departments of state;

- (vi) to request any auditor-general to investigate allegations of general or specific corruption and inefficiency, and to request such auditor-general to report to the sub-council upon completion of such investigation;
 - (vii) to review the contents of existing public service disciplinary codes and to request disciplinary investigations into the conduct of public servants who fail to perform their tasks within guidelines governing financial discipline and authorised or proper expenditure; and
 - (viii) to make recommendations regarding the prevention of wasteful expenditure.
- (2) In the performance of its functions and exercise of its powers, the sub-council shall -
- (i) have access to all relevant information available from departments of states (including the TBVC states and self-governing territories), the South African Reserve Bank, the Central Economic Advisory Service, the Tax Advisory Committee and the National Economic Forum;
 - (ii) be entitled to conduct such research as it deems necessary.
- (3) The views of the sub-council shall, in the course of the preparation of the 1994/1995 national budgets, be taken into account, and specifically there shall be consultation on -
- (i) the overall level of state expenditure;
 - (ii) the broad composition of security, social, economic and general government expenditure, broken down into capital and recurrent expenditure;
 - (iii) the level and composition of any taxes to be collected;
 - (iv) the financing of budget deficits; and
 - (v) the contingent liabilities of government.

NOTE: *The Technical Committee would welcome any inputs regarding the feasibility of the recommendations in this sub-paragraph.*

- (4) The sub-council shall be informed of the creation of new posts in the public services, the filling of vacant posts above the level of director and any deviation from the rules and regulations applicable to retirement.
- (5) The sub-council shall be provided, on a continuous basis, with full particulars, including the intended purposes, concerning any new international financial agreement which is being negotiated with any foreign government or international agency.'

NOTES:

1. *Many of the powers provided for here are intended to create transparency in financial government and administration; it should be noted that the Transitional Executive Council's and its sub-councils' power to act is provided for elsewhere (eg paragraph 5 of the draft 'bill' in the first report).*
2. *The question of secrecy provisions in existing legislation and existing secret accounts has arisen. This matter will be dealt with in a separate provision governing access to information.*

AGENDA AND DOCUMENTATION

for the meeting of the

NEGOTIATING COUNCIL

to be held at 10H00 on Friday

28 MAY 1993

CONFIDENTIAL

STRICTLY EMBARGOED UNTIL FRIDAY 28 MAY 1993 AT 12H00

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**DRAFT AGENDA FOR THE MEETING OF THE NEGOTIATING COUNCIL
TO BE HELD ON FRIDAY 28 MAY 1993 AT 10H00
Chairpersonship - D de Villiers by PJ Gordhan**

1. **Moment of Prayer/Meditation**
2. **Welcome and Attendance**
3. **Ratification of Agenda**
4. **Minutes**
 - 4.1 Adoption of the minutes of the meeting of the Negotiating Council of:
 - 4.1.1 18 May 1993 (see Addendum A1, p2-23)
 - 4.1.2 25 May 1993 (see Addendum A2, p24-29)
 - 4.2 Matters arising out of the minutes of the meeting of the Negotiating Council of 18 May 1993
 - 4.3 Minutes to be noted (see Addendum A3, p30-56)
5. **Substantive Issues**
 - 5.1 Second and Supplementary Reports from the Technical Committees (See separate volumes)
 - 5.1.1 Violence
 - 5.1.2 Constitutional Issues:
 - 5.1.2.1 Report from Technical Committee
 - 5.1.2.2 Proposed composition of the Commission on the Delimitation of Regions/Provinces/States (recommendation from Planning Committee -available at meeting)
 - 5.1.2.3 Terms of Reference of the Commission
 - 5.1.3 Fundamental Human Rights during the Transition
 - 5.1.4 Independent Election Commission
 - 5.1.5 Independent Media Commission
 - 5.1.6 Amendment or repeal of legislation impeding free political activity and discriminatory legislation
 - 5.1.7 TEC and its Sub-Councils
 - 5.2 Election Date
6. **Procedural Issues - Report of the Planning Committee**
 - 6.1 Media Arrangements (Verbal Report available at the meeting)
 - 6.2 New Participants (Verbal Progress Report from Administration)
7. **Administrative Matters**
8. **Meetings Schedule (Available at the meeting)**
9. **Closure**

FRIDENIXON A1

THESE 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 10H40 ON TUESDAY 18 MAY 1993 AT THE WORLD TRADE CENTRE

PRESENT: See Addendum A

1. Moment of Prayer/Meditation

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

2. Welcome and Attendance

The participants were welcomed.

3. Ratification of Agenda

The agenda was ratified with the following amendments:

- 3.1 The addition of an Item 5a to read "Proposed Replacements of Members of the Technical Committees";
- 3.2 The addition of an Item 5.8 to read "Resolution on Intolerance and Assassinations";
- 3.3 The addition of an Item 6.3 to read "The Pace of the Negotiation Process".

4. Minutes

- 4.1 The minutes of the meeting of the Negotiating Council of 7 May 1993 were adopted with the following amendments:
 - 4.1.1 It was agreed that the "Explanatory Memorandum" as amended be appended to the minutes (see Addendum B);
 - 4.1.2 Item 5.2.1 to read "A second draft Declaration of Intent on the Negotiating Process was presented to the meeting";
 - 4.1.3 The addition of an item 6.5.3 to read "It was noted that as per the

2

decision of the Negotiating Forum that the assistants to the Chairpersons will be chosen from amongst the delegates of the Negotiating Council by the Negotiating Council. Furthermore it was noted that the Planning Committee had recommended that this be done in alphabetical order".

4.2 Matters arising out of the minutes of the Negotiating Council of 7 May 1993:

An appeal was made to the media, via the Communications Committee, to report fully on what is decided on in the Negotiating Council.

4.3 The minutes of the Planning Committee of 3 May 1993 and 10 May 1993 were noted.

5. **Substantive Issues - First Reports from the Technical Committees**

5.1 **General Issues:**

5.1.1 A report dealing with proposed replacements of members of the Technical Committees, as recommended by the Planning Committee was agreed to (see Addendum C).

5.1.2 It was noted that all reports to be presented were taken as read.

5.1.3 It agreed that the second reports from all Technical Committees should be received by the Administration not later than 14h00 on Friday 21 May 1993 for submission to the Negotiating Council.

5.1.4 The Administration and the Sub-Committee was requested to ensure that the Gender Advisory Report has been submitted to all the Technical Committees.

5.1.5 Documentation, containing submissions by the AVU, KP and the Transkei, not received by participants was distributed at the meeting.

5.2 **Technical Committee on Violence:**

5.2.1 The members of the Technical Committee on Violence were welcomed.

5.2.2 An overview and issues to be highlighted in the report was presented by a spokesperson of the Technical Committee. Discussion followed.

5.2.3 It was suggested that the Technical Committee examine more background documents such as the Human Rights Commission report on Violence.

- 5.2.4 The Technical Committee was requested to take into account the concerns and views of delegates in formulating its second report.
- 5.2.5 The report was accepted and the Technical Committee requested to carry on with their work and to submit a more substantial report to the next meeting of the Negotiating Council on 25 May 1993.
- 5.2.6 The members of the Technical Committee were thanked for the work so far completed.

5.3 Technical Committee on Constitutional Issues:

- 5.3.1 The members of the Technical Committee on Constitutional Issues were welcomed.
- 5.3.2 An overview and issues to be highlighted or requiring decision/guidance from the Negotiating Council in the report, was presented by a spokesperson of the Technical Committee. Discussion followed.
- 5.3.3 The Negotiating Council commended the Technical Committee and agreed that the Technical Committee had taken a constructive approach to these issues. The first report was noted and the Technical Committee was mandated to specifically:
 - 5.3.3.1 Take into account the concerns and views of delegates in formulating its second report;
 - 5.3.3.2 Provide the Negotiating Council with a report on constitutional principles;
 - 5.3.3.3 Consider and report on the structures, powers and functions of regions/states/provinces;
 - 5.3.3.4 Present proposals on various issues pertaining to the constitution-making process;
 - 5.3.3.5 Provide the Negotiating Council with recommendations on how best the discussions within the Negotiating Council on these issues should be structured;
 - 5.3.3.6 Furthermore, the Technical Committee shall as a matter of urgent priority submit recommendations on the 5.3.3.2, 5.3.3.3 and 5.3.3.4 above to the Negotiating Council.
- 5.3.4 A report from the Planning Committee on regions was presented to the

meeting. It was agreed to adopt the proposed resolution (see Addendum D).

- 5.3.5 The members of the Technical Committee were thanked for the work so far completed.

The meeting adjourned for lunch at 13h00.

The meeting reconvened at 14h15.

5.4 Technical Committee on Fundamental Human Rights during the Transition:

- 5.4.1 The members of the Technical Committee on Fundamental Human Rights During the Transition were welcomed.
- 5.4.2 An overview and issues to be highlighted or requiring decision/guidance from the Negotiating Council in the report was presented by a spokesperson of the Technical Committee. Discussion followed.
- 5.4.3 The Technical Committee was requested to take into account the concerns and views of delegates in formulating its second report.
- 5.4.4 It was suggested that participants submit clear submissions with regard to the issue of the right to private ownership.
- 5.4.5 It was agreed to mandate the Technical Committee to proceed with their work on the basis as proposed by the Technical Committee.
- 5.4.6 The members of the Technical Committee were thanked for the work so far completed.

The meeting adjourned for tea at 15h55.

The meeting reconvened at 16h15.

5.5 Technical Committee on the Independent Election Commission:

- 5.5.1 The members of the Technical Committee on the Independent Elections Commission were welcomed.
- 5.5.2 An overview and issues to be highlighted or requiring



decision/guidance from the Negotiating Council in the report was presented by a spokesperson of the Technical Committee. Discussion followed.

5.5.3 The Technical Committee was requested to take into account the concerns and views of delegates in formulating its second report.

5.5.4 It was agreed to request the Technical Committee to include a draft bill in their next report. The Technical Committee requested participants for further submissions in this regard.

5.5.5 The members of the Technical Committee were thanked for the work so far completed.

5.6 Technical Committee on the Independent Media Commission:

5.6.1 The Convenor of the Technical Committee on the Independent Media Commission represented the Technical Committee at the meeting and was welcomed by participants. Apologies were noted on behalf of the other members of the Technical Committee.

5.6.2 An overview and issues to be highlighted or requiring decision/guidance from the Negotiating Council in the report was presented to the meeting. Discussion followed.

5.6.3 The Technical Committee was requested to take into account the concerns and views of delegates in formulating its second report.

5.6.4 It was agreed to request the Technical Committee to prepare draft legislation on the basis of discussion and submissions by participants and to proceed with their work.

5.6.5 It was agreed that the Technical Committee should not be briefed to consider the question of the print media and the censorship thereof but that any participant is free to make submissions on this issue if they so wish.

5.6.6 The members of the Technical Committee were thanked for the work so far completed.

5.7 Technical Committee on the Amendment or Repeal of Legislation Impeding Free Political Activity and Discriminatory Legislation:

5.7.1 The members of the Technical Committee on the Amendment or Repeal of Legislation Impeding Free Political Activity and Discriminatory Legislation were welcomed.

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- 5.7.2 An overview and issues to be highlighted or requiring decision/guidance from the Negotiating Council in the report was presented by a spokesperson of the Technical Committee. Discussion followed.
- 5.7.3 The Technical Committee was requested to take into account the concerns and views of delegates in formulating its second report (including the rights of Traditional Leaders).
- 5.7.4 It was agreed to mandate the Technical Committee to:
- * Within the next two weeks identify those laws which are discriminatory and that inhibit free political activity which should be repealed; and report back to the Negotiating Council;
 - * In addition, a the "higher code" spoken of in the report and an implementation mechanism should be suggested by the Technical Committee.
- 5.7.5 It was requested that the various governments/administrations cooperate with the Technical Committee with regard to the identification process.
- 5.7.6 The members of the Technical Committee were thanked for the work so far completed.

5.8 Technical Committee on the TEC and its Sub-Councils:

- 5.8.1 The members of the Technical Committee on the TEC and its Sub-Councils were welcomed.
- 5.8.2 An overview and issues to be highlighted or requiring decision/guidance from the Negotiating Council in the report was presented by a spokesperson of the Technical Committee. Discussion followed.
- 5.8.3 The Technical Committee was requested to take into account the concerns and views of delegates in formulating its second report.
- 5.8.4 It was agreed to not debate the merits or demerits of a TEC, but to request the Technical Committee to continue with its work, its next report and any draft legislation that may be necessary.
- 5.8.5 It was further agreed that the Negotiating Council is not reaching agreement on a TEC and that this could only be done once transition/negotiation process scenarios are before the Negotiating

Council.

5.8.6 The members of the Technical Committee were thanked for the work so far completed.

5.9 **Resolution on Intolerance and Assassinations:**

5.9.1 A Draft Resolution as submitted to the Negotiating Council by the Planning Committee was agreed to as amended (see Addendum E).

5.9.2 It was agreed that the issue of violence remains on the agenda as an ongoing item.

6. **Procedural Issues - Report from the Planning Committee**

6.1 **New Participants:**

It was noted that letters have been sent to new applicants informing them of the criteria and containing a questionnaire. The deadline for responses is 25 May 1993 at 17h00. In addition, a survey of newspapers has been undertaken and by 28 May 1993 a report will be ready for the Negotiating Council to decide on new participants.

6.2 **Media Arrangements:**

A report as presented by Planning Committee was agreed to (see Addendum F).

6.3 **Pace of the Negotiation Process:**

The mover of this issue (the AVU) withdrew their request to speak, as a result of the constructive way in which the negotiating process had proceeded within this meeting.

7. **Administrative Matters**

7.1 **Security:**

7.1.1 A report from the Planning Committee was agreed to (see Addendum G).

7.1.2 A request was made to the media to possibly carry the Guidelines for Demonstrations more prominently in their reports.

7.2 **Couriers and Addresses:**

The Administration requested that all participants furnish the Administration with correct addresses for couriering documents and to advise the Administration immediately if the address for any reason should be amended.

7.3 Lost Property:

It was noted that lost property could be claimed at the media registration.

7.4 Deadlines:

Participants were reminded of the following deadlines:

- * Submissions to all Technical Sub-Committees : Wednesday 19 May 1993 at 12h00;
- * Submissions of names for the possible composition of the Commission on Regions : Friday 21 May 1993 at 12h00;
- * Receipt of the second reports from Technical Sub-Committees : Friday 21 May 1993 at 14h00;
- * All participants should receive their packs from the courier company by 14h00 on Saturday 22 May 1993 for the meeting of the Negotiating Council;
- * Responses from new participants by Tuesday 25 May 1993 at 17h00.

7.5 It was noted that the Administration should look into the complaints of the Traditional Leader Delegations with regard to their office space.

7.6 It was noted that all Administrative complaints should be made/submitted to T Eloff, Head of Administration.

8. Meetings Schedule

The meetings schedule as amended was agreed to (see Addendum H).

9. Closure

9.1 F Mdlalose was thanked for his chairing of the proceedings and the spirit in which the meeting was guided.

9.2 The meeting closed at 18h30.

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

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CHAIRPERSON



Addendum A

The following delegates and advisers were present at the meeting of the Negotiating Council on Tuesday 18 May 1993:

FT Mdlalose : Chairperson
 R Cronje : Assistant to the Chairperson

Organisation	Delegates	Advisers
ANC	C Ramaphosa B Masekela	M Maharaj M Manzini
AVU	CD de Jager J Gouws	JJC Botha MJ Mentz
Bophuthatswana	BE Keilelame R Mangope	SG Mothibe
Cape Trad. Leaders	M Nonkonyana M Moshoeshoe	DM Jongilanga GD Gwadiso
Ciskei	M Webb VT Gqiba	SM Faku TM Bulube
DP	C Eglin M Finnemore	K Andrew P Soal
Dikwankwetla	TJ Mohapi K Ngwenya	SOM Moji JSS Phatang
IFP	VJ Matthews FX Gasas	WS Felgate
IYP	NJ Mahlangu Q Vilankulu	AP Laka
KP	T Langley A Budd	FJ Le Roux CP Mulder
INM	SS Ripinga FS Baloi	MS Gininda PMH Maduna
Kwazulu	BS Ngubane H Ngubane	SH Gumede DRB Madide
Labour Party	L Landers	E Samuels PAC Hendrickse
NIC/TIC	PJ Gordhan JF Hajaij	K Mayet B Pillay

NP	DJ de Villiers MM Gabriels	L Wessels SJ Schoeman
NPP	A Rajbansi VP Ramdhany	AA Koobair S Ismail
OFS Trad. Leaders	MB Mota M Moroke	RH Mopeli AM Molefe
PAC	B Alexander M Molete	J Seroke G Ebrahim
Solidarity	DS Rajah Y Moolla	JN Reddy AS Razak
SACP	J Slovo L Jacobus	E Pahad S Shilowa
SA Government	RP Meyer S Camerer	T Delport SS van der Merwe
Transkei	Z Titus N Jajula	LL Mtshizana M Mphahliwa
TVL Trad. Leaders	LM Mokoena MC Maraba	MA Netshimbupfe NE Ngomane
UPF	MJ Mahlangu A Chabalala	J Maake RJ Dombo
Venda	SE Moeti AJK Masehela	GM Ligege
XPP	EE Ngobeni PT Shilubana	MH Matjokana JC Ackron

T Eloff	:	Administration
G Hutchings	:	Minutes
K Morgan	:	Administration
P Lelaka	:	Administration
M Radebe	:	Administration
G Briggs	:	Administration

EXPLANATORY MEMORANDUM TO BE ACCEPTED BY ALL PARTICIPANTS IN THE MULTI-PARTY PROCESS RELATING TO PROPOSALS ARISING FROM THE MULTI-PARTY FORUM RESOLUTION ON THE NEGOTIATION PROCESS.

1. The Negotiation Process involves reaching agreement on a number of key elements. Discussion around any particular element gives rise to suspicion and fears that agreement on it would lead to that agreement being implemented before agreement has been reached on ALL the key elements that constitute a package around the negotiation process.
2. Such fears were addressed in the CODESA process in Working Group 3 whose report appears in the Consolidated Document on pages 22-29. This Report states that "These agreements (that is, relating to the first stage of the transition, namely the TEC) and their implementation are dependent upon agreement being reached by CODESA in respect of the second stage of the Transition, including an Interim Constitution, and general Constitutional Principles". (cf clause 4 of the Agreement on page 22).
3. Mindful that the above proviso is contained in the CODESA Agreements which are treated in the Multi-Party Forum as points of reference, and not as binding agreements; mindful also that some of the participants in the current Multi-Party Forum have specifically indicated that they consider themselves bound by the agreements reached in CODESA; while there are other participants in the current Multi-Party Forum who have specifically indicated that they do not consider themselves bound by the said agreements; it therefore becomes necessary that participants in the Multi-Party Forum should commit themselves to a similar type of provision so that the proposals based on the Multi-Party Resolution on the Negotiation Process may be addressed in a manner that removes any fears that agreement on any particular proposal necessarily implies agreement on their implementation.
4. The proposals contained in the first report of the Sub-Committee deals with the need for the setting up of technical committees on the following aspects:
 - 4.1 The Independent Elections Commission
 - 4.2 The Independent Media Commission and the Independent Telecommunications Authority
 - 4.3 The Amendment or repeal of legislation impeding free political activity and discriminatory legislation
 - 4.4 On the TEC and its Sub-councils with the proviso that the question of security forces and all armed formations shall be given priority attention.
 - 4.5 On strengthening the National Peace Accord
 - 4.6 On the Peace Corps

5. The second report of the Sub-Committee on other constitutional matters proposes two more technical committees:
 - 5.1 On fundamental rights in the Transition
 - 5.2 On other constitutional matters namely, Form of State and Constitutional Principles, Constitution Making Body/ Constituent Assembly, Transitional/Interim Constitution, Transitional Regional Government, the Future of the TBVC States and Self Determination.

6. It is expressly understood by all participants that each of the above proposals and the documentation emanating from such technical committees shall be discussed in the Negotiating Council with the view to arriving at an agreement on these matters. Furthermore that as when agreement is reached on each of these matters the Council shall expressly determine when and how the specific agreement shall be implemented. This provision is made so as to ensure participants have a clear understanding of the package of agreements which would constitute the key elements of the transition process.

7. Technical committees are not fora for negotiating substantive issues. They are instruments of the Negotiating Council in order to produce systematic documentation to facilitate discussion and negotiating in the Negotiating Council. Documentation produced by each of these technical committees shall be discussed at the Negotiating Council and on the basis of those discussions sent back to the technical committees for further development. This process would be repeated until agreement is reached in the Negotiating Council on a final document on the issue in question.

**PROPOSED REPLACEMENTS OF
MEMBERS OF THE TECHNICAL COMMITTEES**

Constitutional Issues:

Adv M Olivier (additional)

IEC:

Dr F Ginwala (additional)

IMC:

Prof C Nöffke replacing Dr B de Villiers

**RESOLUTION ON THE DELIMITATION, POWERS AND FUNCTIONS
OF REGIONS**

Whereas there appears to be broad agreement that the most suitable form of government for the future will be one which involves an allocation of powers to central and regional governments, while the differences that exist relate essentially to the boundaries, powers and functions of the regions and the process whereby such differences may be resolved;

Realising that regional boundaries will be relevant to the electoral process, as well as to the structures of the Constitution;

Accepting that the powers and functions of the regions are crucial to issues such as the form of state and self-determination, and will be a fundamental part of the constitution;

Convinced that while the demarcation of boundaries is a task which appropriately should be performed by a broadly based body of suitably qualified people, who will hear representations from the public at large and from different areas of the country, issues regarding the functions and powers of regions can at this stage of the negotiations best be dealt with by a smaller technical committee; and

Determined to ensure that we achieve a peaceful and negotiated agreement on the democratic transformation of our country within the time frames we have set for ourselves.

Hereby resolve:

1. **That** the Technical Committee on Constitutional Issues be charged with formulating as a matter of urgent priority, recommendations on the structures, powers and functions of regions, on constitutional principles and on the constitution making process.
2. **That** a Commission be appointed to make recommendations to the Negotiating Council within six weeks of its appointment, on the delimitation of regions.

3. **That** for the purpose of its recommendation the Commission should be charged to take into consideration, inter alia, the following criteria:
 - 3.1 Historical boundaries, including provincial, magisterial and district boundaries and infrastructures.
 - 3.2 Administrative considerations including the availability or non-availability of infrastructures and nodal points for services.
 - 3.3 The need or otherwise to rationalise existing structures (including the TBVC States, self-governing territories and regional government).
 - 3.4 The necessity of limiting financial and other costs as much as is reasonably possible.
 - 3.5 The need to minimise inconvenience to the people.
 - 3.6 The need to minimise the dislocation of services.
 - 3.7 Demographic considerations.
 - 3.8 Economic viability.
 - 3.9 Developmental potential.
 - 3.10 Cultural and language realities.
4. **That** the Commission should be required to allow interested parties and persons to submit their views and recommendations within a specified period which should not be less than one month after an invitation in this regard has been published; and that the Commission should take these into account for the purposes of formulating its recommendations.
5. **That** the Commission should also be free to take cognisance of any other material it might wish to collect for the purposes of its recommendations.
6. **That** the Commission should also for the purposes of its recommendations take cognisance of any progress made in the Negotiating Council by way of agreements on constitutional matters.
7. **That** this Council shall from time to time review the progress made towards the reaching of agreements regarding the structures, functions and powers of regional governments under the Constitution replacing the present Constitution, and consider

the advisability of a Commission also being required to submit recommendations on such matters.

8. **That** the Commission should be composed of ten members agreed upon in this Council; that the members should be persons of acknowledged personal integrity and suitably qualified specifically or in general for the task assigned to the Commission; that participants be called upon to submit names of candidates to the Administration before 12h00 Friday 21 May 1993 and that the Planning Committee make a recommendation in this regard to this Council.

9. **That** the Planning Committee, with the assistance of the Technical Committee on Constitutional Issues, prepare draft Terms of Reference for the Commission for consideration by this Council.



RESOLUTION ON INTOLERANCE AND ASSASSINATIONS

This Negotiating Council, meeting at the World Trade Centre on 18 May 1993:

1. **Notes with outrage:**

1.1 The rising tide of political intolerance in South Africa;

1.2 The recent increase in actual and threatened political assassinations and violence; and is

2. **Profoundly disturbed:**

By the threats to the lives of certain political leaders, including the recently uncovered plan to assassinate the leader of a delegation in the Negotiating Council:

3. **Believing:**

That a political climate in which there is no violence, assassinations and intolerance is essential to the success of the negotiation process;

4. **Therefore resolves to:**

4.1 Express our sincere solidarity with and concern for the safety of all members of delegations;

4.2 Condemn the use of assassinations and other forms of political violence to resolve political differences;

4.3 Call on all to create the conditions which discourage violent attacks on political opponents and to ensure suitable legal action is taken against those contemplating assassination and similar violent acts.

REPORT BY THE PLANNING COMMITTEE TO
THE NEGOTIATING COUNCIL OF 18 MAY 1993
ON MEDIA ARRANGEMENTS

1. It is recommended that, in line with the recommendations of the Communications Committee, the following facilities be provided for the electronic media (TV) during meetings of the Negotiating Council:
 - 1.1 A sound feed meeting broadcasting quality; and
 - 1.2 Sufficient lighting in the reconstructed chamber meeting the requirements for making video recordings for broadcasting. (This implies that agencies wishing to make video recordings use their own video recording equipment during sessions of the Council).
2. In view of the astronomical cost of supplying a video feed of broadcasting quality on a continuous basis (R500 000) of the deliberations of the Negotiating Council, it is not possible to render such a service.
3. In agreement with a decision by the Planning Committee an overflow room to accommodate media representatives and TC members is being prepared, at this point of time only with a sound feed of the proceedings of the Negotiating Council. Tenders are being called for by the World Trade Centre to provide a video relay of proceedings (not of broadcasting quality) and could be installed within the next week.

**REPORT FROM THE PLANNING COMMITTEE
TO THE NEGOTIATING COUNCIL ON 18 MAY 1993 ON
SECURITY OUTSIDE THE WORLD TRADE CENTRE ENTRANCE**

1. As mandated, by the Planning Committee, the Administration and a representative of Multi-Party Security met with the SAP Officer in charge of demonstrations outside the World Trade Centre Entrance.

2. Out of the discussion with the Officer and five of his colleagues, the following emerged:
 - 2.1 The biggest problem which the SAP encounters is that there is not sufficient space between the existing fence and the road for demonstrators to gather.
 - 2.2 Consequently, there are serious traffic problems, even with small demonstrations.
 - 2.3 A third problem is that demonstrators normally do not know that the political negotiators had taken the decision that demonstrations should take place outside the premises of the World Trade Centre, and perceive the police as restricting their entry. This leads to the SAP's orders not being adhered to.

3. After intensive discussions, the following was agreed to and is recommended by the Planning Committee:
 - 3.1 That, in co-operation with the World Trade Centre Management, the fence at the entrance is moved into the terrain, so as to create more space for demonstrations. In addition, a proper gate should be put up next to where the fence will be moved. The present boom should be moved 50 metres inside the terrain. This should create adequate space for demonstrators to be accommodated.
 - 3.2 That a permanent water point be established for demonstrators to use and that for the duration of demonstrations, mobile public toilets be hired for use by the demonstrators (this has been agreed to by the World Trade Centre Management).
 - 3.3 That the Guidelines for Demonstrations outside the World Trade Centre should be better publicised, not only by political parties/administrations/organisations internally, but also in the media.

- 3.4 That a notice board with a summary of the Guidelines for Demonstrations be put up at the gate, so that demonstrators can be aware of the decisions of the Negotiating Council with regard to demonstrations.
 - 3.5 That, when necessary, members of political parties/administrations/ organisations should be requested to communicate with demonstrators in order to avert any clashes between the SAP and demonstrators. In this regard, the SAP assured the Administration that the utmost restraint will be exercised and that before any drastic measures are employed, the Multi-Party Security and Administration will be consulted.
4. The Planning Committee believes that, with these guidelines and actions, the issue of demonstrations could be handled in a constructive manner.

PROPOSED SCHEDULE OF MEETINGS

Planning Committee	Monday 24 May 1993	10h00 - 18h00
Negotiating Council	Tuesday 25 May 1993	10h00 - 18h00 or until the completion of the agenda
Planning Committee	Tuesday 25 May 1993	18h00 - 20h00 or after the completion of the meeting of the Negotiating Council
Negotiating Council	Friday 28 May 1993	10h00 - 18h00 or until the completion of the agenda
Planning Committee	Tuesday 1 June 1993	10h00 - 13h00
Negotiating Council	Tuesday 1 June 1993	14h00 - 18h00 or until the completion of the agenda
NEGOTIATING FORUM	Thursday 3 June 1993	10h00 - 18h00

THESE 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 12H30 ON TUESDAY 25 MAY 1993 AT THE WORLD TRADE CENTRE

PRESENT: See Addendum A

1. Moment of Prayer/Meditation

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

2. Welcome and Attendance

2.1 The participants were welcomed.

2.2 On behalf of Planning Committee apologies were extended for the delay of the start of the meeting.

2.3 Before the meeting proceeded any further it was agreed to allow G Ebrahim of the PAC to address the meeting.

3. The Events Around the Arrests of PAC Members

After the PAC had concluded its address, and before discussion followed, PJ Gordan, on behalf of the Planning Committee, gave the following report:

3.1 That the Planning Committee had discussed this issue prior to this meeting;

3.2 That the Planning Committee agreed that nothing should be done to harm or delay the negotiating process or the work of the Negotiating Council in anyway whatsoever by any participant negotiating.

3.3 Furthermore, that the Planning Committee agreed that the negotiation process should be protected from any negativeness and a constructive spirit should be maintained.

3.4 In light of the above, the Planning Committee proposed the following:

3.4.1 That the Negotiating Council agree to the request of the PAC to

adjourn the day's proceedings;

3.4.2 That a special session of the Negotiating Council be held on Thursday 27 May at 19h00 to give specific attention to this matter;

3.4.3 That the meeting of the Negotiating Council on Friday 28 May 1993 at 10h00 proceed as per the agenda.

It was noted that the Planning Committee did not want to pre-empt the debate or discussion. Furthermore, the Negotiating Council was requested to structure debate/discussion around the proposal. Discussion followed.

3.5 At the close of discussion three draft resolutions were proposed and seconded. It was agreed that the Planning Committee meet over lunch to draft a resolution that would find the maximum agreement in the Council and that the Negotiating Council would meet briefly after lunch to receive the proposed draft resolution.

The meeting adjourned for lunch at 13h55.

The meeting reconvened at 14h55.

2.6 The proposed draft resolution, as recommended by the Planning Committee was adopted by sufficient consensus (it was noted that R Meyer in the Planning Committee had reserved his position, see Addendum B). In this regard the following was noted:

- * The South African Government reserved their position;
- * The National Party reserved their position;
- * The Bophuthatswana Government reserved their position;
- * The AVU reserved their position; and
- * The KP did not support the resolution.

3. Closure

3.1 It was noted that the Negotiating Council would meet on Thursday 27 May 1993 at 19h00 for a special session of the Council.

3.2 The next meeting of the Negotiating Council would take place on Friday 28 May 1993 from 10h00 until the completion of the agenda (but aiming for 18h00) as previously agreed.

3.3 The meeting was closed at 15h15.

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

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CHAIRPERSON

Addendum A

The following delegates and advisers were present at the meeting of the Negotiating Council on Tuesday 25 May 1993:

R Cronje : Chairperson
D de Villiers : Assistant to the Chairperson

Organisation	Delegates	Advisers
ANC	C Ramaphosa B Kgosisile	M Maharaj M Manzini
AVU	CD de Jager J Gouws	JJC Botha MJ Mentz
Bophuthatswana	BE Keilelame R Mangope	SG Mothibe
Cape Trad. Leaders	M Nonkonyana SN Sigcau	SM Burns-Noamashe GD Gwadiso
Ciskei	M Webb VT Gqiba	SM Faku TM Bulube
DP	C Eglin D Smuts	K Andrew P Soal
Dikwankwetla	TJ Mohapi K Ngwenya	SOM Moji JSS Phatang
IFP	FT Mdlalose FX Gasa	WS Felgate
IYP	NJ Mahlangu N Mtshweni	AP Laka Q Vilankulu
KP	T Langley A Budd	FJ Le Roux CP Mulder
INM	SS Ripinga NV Nelani	MS Gininda PMH Maduna
Kwazulu	BS Ngubane H Ngubane	SH Gumede DRB Madide
Labour Party	L Landers P Lategan	E Samuels PAC Hendrickse
NIC/TIC	PJ Gordhan	K Mayet C Salojee

NP	DJ de Villiers MM Gabriels	L Wessels SJ Schoeman
NPP	A Rajbansi A Rambarran	N sewchuran S Ismail
OFS Trad. Leaders	MB Mota M Moroکه	RH Mopeli
PAC	G Ebrahim M Molete	E Mothopeng
Solidarity	JN Reddy	Y Moolla AS Razak
SACP	J Slovo L Jacobus	E Pahad S Shilowa
SA Government	RP Meyer GP Williams	T Delpport SS van der Merwe
Transkei	Z Titus N Jajula	LL Mtshizana M Mphahlwa
TVL Trad. Leaders	LM Mokoena	MA Netshimbupfe NE Ngomane
UPF	MJ Mahlangu A Chabalala	J Maake RJ Dombo
Venda	SE Moeti	GM Ligege S Makhuvha
XPP	EE Ngobeni PT Shilubana	MH Matjokana

T Eloff	:	Administration
G Hutchings	:	Minutes
K Morgan	:	Administration
P Lelaka	:	Administration
G Briggs	:	Administration

RESOLUTION

This Negotiating Council meeting on Tuesday 25 May 1993 at the World Trade Centre:

Notes with Concern and Condemns:

1. The insensitive manner in which the recent actions and arrests against the Leadership of the PAC were undertaken;

Is Appalled At:

1. The possible negative impact of these events on the Negotiation Process and unnecessary delay in the proceedings of the Negotiating Council;

Call on the South African Government To:

1. Immediately charge or release those that have been arrested;
2. Return all materials seized from the PAC;
3. Take all necessary steps to remedy this unfortunate situation and undo the damage done to the Negotiation Process;

And Resolves To:

1. Meet on Thursday 27 May 1993 at 19h00 to examine matters arising from this issue in greater detail.

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

MINUTES OF THE MEETING OF THE PLANNING COMMITTEE HELD ON FRIDAY 14 MAY 1993 AT 09H30 AT THE WORLD TRADE CENTRE

PRESENT: B Alexander
R Cronje
C Eglin (Chairperson by rotation)
PJ Gordhan
FT Mdlalose
RP Meyer
MC Ramaphosa
J Slovo
M Webb

T Eloff (Administration)
G Hutchings (Minutes)

1. **Moment of Prayer/Meditation**

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

2. **Welcome and Attendance**

2.1 All members were welcomed.

2.2 Apologies were noted for Z Titus.

3. **Ratification of Agenda**

The agenda was ratified with the following amendment:

- * The addition of an Item 6.4 to read "To give consideration in the Planning Committee to the events surrounding J Slovo - the attempt upon his life and subsequent events".

4. Minutes

4.1 The minutes of the meeting of 10 May 1993 were adopted with the following amendments:

4.1.1 Item 5.1.9. the addition of a further sentence to read "It was agreed to request members of Technical Committees to keep in mind the concept of socially responsible fees";

4.1.2 Item 5.1.13 to read "It was agreed to defer the resubmission of the Draft Resolution on Violence to the Negotiating Council to a later date at an appropriate time".

4.2 Matters arising out of the minutes of the meeting of 10 May 1993:

The ad hoc sub-committee (consisting of FT Mdlalose, R Meyer, C Ramaphosa and M Webb) reported on the meeting held with J Hall and A Gildenhuys from the National Peace Committee and the National Peace Secretariat. The following was noted:

- * It was agreed that W Felgate, P Hatty, S Mafumadi and G Myburg would represent the peace structures (i.e. the National Peace Committee and the National Peace Secretariat) on the Technical Committee on Violence;
- * That submissions to the Technical Committee on Violence would be received from the National Peace Committee and the National Peace Secretariat; and
- * That the Technical Committee may not always be able to report back to their parent structures in detail.

5. Substantive Issues

5.1 Technical Committees - Receipt of first reports:

5.1.1 The Sub-Committee (consisting of M Maharaj, B Ngubane and SS van der Merwe) presented an overview of the Technical Committee reports which encompassed items such as attendance in the Technical Committees, any problems experienced by the Technical Committee, items requiring action/attention by the Negotiating Council, etc. It was further noted that all the Technical Committees had all had at least two meetings;

5.1.2 Technical Committee on Violence:

It was noted that the first report from the Technical Committee on Violence was not substantive but that the second report would be. It was agreed that the Sub-Committee, in consultation with the Technical Committee, establish a date as to when a substantive report will be received.

5.1.3 Technical Committee on the TEC and its Sub-Councils:

5.1.3.1 It was noted that the initial report from the Technical Committee on the TEC and its Sub-Councils was too pro-active in its stated view of the desirability of a TEC. It was agreed that the Sub-Committee should have an informal discussion with the Technical Committee, recommending that the introduction to the report be amended accordingly.

5.1.3.2 It was further noted that only the Negotiating Council could decide on whether a TEC is needed or not and that the Technical Committee should therefore not be perceived to be pre-empting this decision of the Negotiating Council.

5.1.4 Technical Committee on the Independent Media Commission:

5.1.4.1 It was agreed to notify participants that whoever wished to submit inputs concerning the responsibility and objectivity of the print media (not only the electronic media), could do so.

5.1.4.2 It was agreed that the Sub-Committee is to submit a recommendation with regard to the possible substituting of C Nöffke for B De Villiers in the IMC Technical Committee to the next meeting of the Planning Committee on Monday 17 May 1993.

5.1.5 Technical Committee on the Amendment or Repeal of Legislation impeding free political activity and Discriminatory Legislation:

It was agreed to recommend to this Technical Committee (via the Sub-Committee) to use the direct route as recommended in the first report (Option 1.1 of the first report). The Technical Committee would be assisted in this regard by the seconded members from the relevant justice departments, i.e. from the South African and TBVC States Department of Justice.

5.1.6 Technical Committee on Constitutional Issues:

5.1.6.1 It was agreed that with regard to the report on the advisability of a regional committee/commission, the Sub-Committee submit a recommendation to the next meeting of the Planning Committee on Monday 17 May 1993. The possible composition of such a committee/commission should be included within the proposed recommendation. This report would facilitate the Planning Committee to make a recommendation to the meeting of the Negotiating Council on 18 May 1993. This issue should be dealt with in the Negotiating Council after the report from the Technical Committee on Constitutional Issues.

5.1.6.2 It was suggested that the Sub-Committee or the Technical Committee on Constitutional Issues present to the Planning Committee an overall picture of the differing scenarios with regard to the Phases of the Transition/Negotiation Process emerging from the reports of the Technical Committees.

5.1.7 Other issues with regard to the Technical Committees:

5.1.7.1 It was agreed that on the issue of gender in the Technical Committees, the Sub-Committee is to submit a recommendation with regard to the Technical Committees which do not have women in their composition (i.e. Constitutional Issues and IEC) to the next meeting of the Planning Committee on Monday 17 May 1993.

5.1.7.2 It was agreed that if, for any reason, it was necessary to add further members to any Technical Committees, it should be stressed that the addition of another member must not delay the work of the Technical Committee. New members should be allowed to express their views within the Technical Committee, but when reporting to the Negotiating Council, the Technical Committee should present a united view.

5.1.7.3 The Technical Committees should identify all the views and issues contained in submissions from participants that should be debated in the Negotiating Council. All Technical Committees should be mindful of the fact that they are not negotiating fora and that their reports are the basis for discussion in the Negotiating Council.

5.1.7.4 It was noted that due to time constraints, not all submissions had been considered for the initial reports, but would be considered for the second reports.

5.1.7.5 It was agreed that after this meeting, the Planning Committee meet with the Technical Committee members to thank them for their work so far and inform them of the process for structuring the presentation and discussion of the reports in the meeting of the Negotiating Council.

5.2 Structuring of the discussion of Reports from the Technical Committees in the meeting of the Negotiating Council:

5.2.1 The following process was agreed to:

- * The reports and submissions will be couriered to all participants to reach them not later than the evening of 15 May 1993;
- * The reports will be tabled in the meeting of the Negotiating Council and taken as read;
- * Each Technical Committee will have one spokesperson who would highlight issues and/or present an overview of the report; the entire Technical Committee and the Secretary would be present when the report was presented and discussed in the Negotiating Council;
- * The other Technical Committee members would be able to view the proceedings of the Negotiating Council from the media overflow room;
- * Inputs and questions of clarity would be invited from the floor. Technical Committee members would not be required to participate in the general debate.

5.2.2 It was agreed that the Sub-Committee be mandated to prepare a document highlighting issues that require decision or guidance from the Negotiating Council as arising from the reports of the Technical Committees.

5.2.3 It was agreed that for all subsequent reports of the Technical Committees, an executive summary of the report should be attached.

6. **Procedural Issues**

6.1 **New Participants:**

- 6.1.1 It was agreed that only International Organisations and Embassies be granted observer status to meetings of the Negotiating Forum.
- 6.1.2 It was noted that letters had been sent to all new applicants. It was agreed that the responses to these letters should be processed by the Administration, forwarded to the Sub-Committee, who in turn would submit recommendations to the Planning Committee.
- 6.1.3 It was agreed to defer the issue of Administrations/Governments to a future meeting of the Planning Committee.

6.2 **Media Arrangements:**

- 6.2.1 The report as presented was agreed to and would be presented to the Negotiating Council.
- 6.2.2 It was agreed that media representatives should pay for copies of the official papers of this process. The Administration was mandated to work out the cost of the relevant documentation and make the necessary arrangements.
- 6.2.3 It was noted that if media representatives require copies of submissions by participants, they should contact the relevant participant.

6.3 **Events surrounding J Slovo - the attempt upon his life and subsequent events:**

- 6.3.1 It was agreed that PJ Gordhan draft a resolution for discussion at the next meeting of the Planning Committee on Monday 17 May 1993, encompassing the following issues:
 - * Political Tolerance;
 - * Discouraging assassinations in any way;
 - * Specifically expressing solidarity with J Slovo and others in this regard;
 - * To call on the authorities to do whatever is necessary to protect the lives of political leaders;
 - * To have those known to have this intention acted against within the legal framework of South Africa;

6.3.2 With regard to the dispute about J Slovo not having been informed by the SAP about the plot to take his life, it was noted that R Meyer will make contact with the Minister of Law and Order and this issue should remain in abeyance until a meeting had been held between Mr Kriel and Mr Slovo.

7. **Administrative and Financial Matters**

7.1 Report on the meeting with the SAP:

The report as presented was agreed to.

7.2 The correspondence was noted.

7.3 It was agreed that documents for delegates and advisers be couriered to the delegates, and that delegates be requested to forward the documentation to their advisers.

7.4 It was agreed that all documentation for the meeting of the Negotiating Council be embargoed until 12h00 on Tuesday 18 May 1993.

8. **Report to and Agenda of Negotiating Council**

8.1 The agenda as amended was agreed to (see Addendum A).

8.2 It was agreed that the current Chairperson report back to the Negotiating Council on behalf of the Planning Committee where necessary.

9. **Meetings Schedule**

The schedule as amended was agreed to (see Addendum B).

10. **Closure**

The meeting closed at 19h10.

These minutes were ratified at the meeting of the Planning Committee of 1993 and the amended versions signed by the Chairperson of this meeting on 1993.

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CHAIRPERSON

**DRAFT AGENDA FOR THE MEETING OF THE NEGOTIATING COUNCIL
TO BE HELD ON TUESDAY 18 MAY 1993 AT 10H30**

Chairpersonship - FT Mdlalose assisted by R Cronje

1. **Moment of Prayer/Meditation**
2. **Welcome and Attendance**
3. **Ratification of Agenda**
4. **Minutes**
 - 4.1 Adoption of the minutes of the meeting of the Negotiating Council of 7 May 1993
 - 4.2 Matters arising out of the minutes of the meeting of the Negotiating Council of 7 May 1993
 - 4.3 Other minutes to be noted:
 - 4.3.1 Planning Committee of 3 May
 - 4.3.2 Planning Committee of 10 May
5. **Substantive Issues - First Reports from the Technical Committees**
 - 5.1 Violence
 - 5.2 Constitutional Issues:
 - 5.2.1 Report from Technical Committee
 - 5.2.2 Report on the advisability of a commission/committee on regions (recommendation from Planning Committee)
 - 5.3 Fundamental Human Rights during the Transition
 - 5.4 Independent Election Commission
 - 5.5 Independent Media Commission
 - 5.6 Amendment or repeal of legislation impeding free political activity and discriminatory legislation
 - 5.7 TEC and its Sub-Councils
6. **Procedural Issues - Report of the Planning Committee**
 - 6.1 New Participants
 - 6.2 Media Arrangements
7. **Administrative Matters**
8. **Meetings Schedule**
9. **Closure**

PROPOSED SCHEDULE OF MEETINGS

Planning Committee	Friday 14 May 1993	09h00 - 13h30
Planning Committee	Monday 17 May 1993	17h00 - 19h00
Planning Committee	Tuesday 18 May 1993	Time still to be decided upon
Negotiating Council	Tuesday 18 May 1993	10h30 - 18h00 or until the completion of the agenda
Planning Committee	Tuesday 18 May 1993	After completion of the meeting of the Negotiating Council
Planning Committee	Monday 24 May 1993	10h00 - 18h00
Negotiating Council	Tuesday 25 May 1993	10h00 - 18h00
Planning Committee	Tuesday 25 May 1993	18h00 - 20h00
Negotiating Council	Friday 28 May 1993	10h00 - 18h00
Planning Committee	Tuesday 1 June 1993	10h00 - 18h00
NEGOTIATING FORUM	Thursday 3 June 1993	10h00 - 18h00

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

MINUTES OF THE MEETING OF THE PLANNING COMMITTEE HELD ON MONDAY 17 MAY 1993 AT 17H00 AT THE WORLD TRADE CENTRE

PRESENT: R Cronje
C Eglin (Chairperson by rotation)
PJ Gordhan
FT Mdlalose
RP Meyer
MC Ramaphosa
J Slovo
Z Titus
M Webb

T Eloff (Administration)
G Hutchings (Minutes)

1. Moment of Prayer/Meditation

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

2. Welcome and Attendance

2.1 All members were welcomed.

2.2 An apology was noted by B Alexander.

3. Ratification of Agenda

The agenda was ratified.

4. Substantive Issues

4.1 Recommendation on the advisability of a commission/committee on regions and the possible composition of such a commission/committee - report from the Sub-Committee:

4.1.1 A report was presented by the Sub-Committee outlining three

proposals for consideration by the Planning Committee (one written proposal and two verbal).

4.1.2 After discussion it was agreed to submit the written report and accompanying resolution with amendments to the Negotiating Council as the recommendation from the Planning Committee. It was agreed that the Planning Committee would meet on Tuesday morning at 09h30 before the meeting of the Negotiating Council to approve the amended report and resolution.

4.1.3 It was agreed that participants should submit proposals with regard to the possible composition of the Commission on Regions by Thursday 17h00. The Sub-Committee would process the proposals and report back to the Planning Committee at its meeting on Monday 24 May 1993.

4.2 Recommendations with regard to the composition of the Technical Committees on Constitutional Issues and the IEC with regard to gender:

It was agreed to recommend to the Negotiating Council that Adv M Olivier be added to the Technical Committee on Constitutional Issues and that Dr F Ginwala be added to the Technical Committee on the Independent Electoral Commission.

4.3 Recommendation with regard to the possible substitution of B de Villiers by C Nöffke:

It was agreed to replace B de Villiers with C Nöffke in the Technical Committee on the Independent Media Commission.

4.4 New Members for Technical Committees:

It was reiterated that if, for any reason, it was necessary to add further members to any Technical Committees, it should be stressed that the addition of another member must not delay the work of the Technical Committee. New members should be allowed to express their views within the Technical Committee, but when reporting to the Negotiating Council, the Technical Committee should present a united view. Furthermore, new members in Technical Committees are not able to revisit issues in the reports of Technical Committees that have been decided upon in the Negotiating Council.

4.5 Issues arising out of the Technical Committee reports that require decisions, guidelines or referrals by the Negotiating Council:

4.5.1 A report on the issues arising out of the Technical Committee reports requiring decision, guidelines or referrals by the Negotiating Council was presented by the Sub-Committee.

4.5.2 It was suggested that the second reports of the Technical Committees be received by Friday 21 May at 09h00 .

4.5.3 It was agreed that the Technical Committee on Constitutional Issues, as a priority, look at the different scenarios emerging from submissions of participants on the constitution-making process.

4.6 **Draft Resolution on Death Threats:**

Due to time constraints it was agreed that the Planning Committee meet on Tuesday 18 May 1993 at 09h30 before the meeting of the Negotiating Council to deal with this issue.

5. **Possible Meeting - Tuesday 18 May 1993**

It was agreed that the Planning Committee meet on Tuesday 18 May 1993 at 09h30 before the meeting of the Negotiating Council to deal with any unfinished business.

6. **Closure**

The meeting closed at 19h15.

These minutes were ratified at the meeting of the Planning Committee of 1993 and the amended versions signed by the Chairperson of this meeting on 1993.

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CHAIRPERSON

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

MINUTES OF THE MEETING OF THE PLANNING COMMITTEE HELD ON TUESDAY 18 MAY 1993 AT 09H30 AT THE WORLD TRADE CENTRE

PRESENT: B Alexander
R Cronje
C Eglin (Chairperson by rotation)
PJ Gordhan
FT Mdlalose
RP Meyer
MC Ramaphosa
J Slovo
Z Titus
M Webb

T Eloff (Administration)
G Hutchings (Minutes)

1. **Moment of Prayer/Meditation**

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

2. **Welcome and Attendance**

All members were welcomed.

3. **Ratification of Agenda**

There was no agenda for the meeting. It was noted that the four items to be dealt with in this meeting were:

- * The Amended Report on a commission/committee for regions;
- * The place on the Negotiating Councils agenda for recommendations with regard to the Composition of Technical Committees;
- * The proposed resolution on Intolerance and Assassinations; and

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- * The presentation of the Technical Committees Reports to the Negotiating Council

4. Substantive Issues

4.1 Amended report on the advisability of a commission/committee on regions from the Planning Committee to the Negotiating Council:

4.1.1 An amended report was presented by the Sub-Committee to the Planning Committee.

4.1.2 After discussion the document as amended was agreed to (see Addendum A).

4.2 Recommendations with regard to the composition of the Technical Committees on Constitutional Issues and the IEC with regard to gender:

It was agreed to recommend to the Negotiating Council that under ratification of the agenda, that these recommendations appear as an agenda item.

4.3 Draft Resolution on Intolerance and Assassinations:

It was agreed to submit the draft resolution to the Negotiating Council as a proposal from the Planning Committee (see Addendum B).

4.4 Presentation of Technical Committee reports in the Negotiating Council:

4.4.1 It was agreed to table and deal with each Technical Committee Report completely before moving onto the next report.

4.4.2 It was agreed that the order that the Technical Committees present their reports remain as is.

4.4.3 Participants should be made aware that, due to time constraints, not all submissions had been taken into consideration in the first reports of the Technical Committees but would be for the second reports. Furthermore, discussions in the meeting of the Negotiating Council would be preliminary discussions facilitated by the reports of the Technical Committees.

5. Closure

The meeting closed at 10h40.

These minutes were ratified at the meeting of the Planning Committee of 1993 and the amended versions signed by the Chairperson of this meeting on 1993.

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CHAIRPERSON

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**PLANNING COMMITTEE REPORT ON REGIONS
TO THE MEETING OF THE NEGOTIATING COUNCIL ON 18 MAY 1993**

1. On 7 May 1993 the Negotiating Council agreed that the Planning Committee would submit to it recommendations on the appointment, terms of reference and time frames of either a commission or a committee on regions (boundaries and functions of regions/states). The Planning Committee asked the Technical Committee on Constitutional Issues for recommendations in this regard. The recommendations of the Technical Committee were received on 14 May 1993. A copy is attached.
2. The Technical Committee, in its Interim Report based on submissions received to date, reported that there appeared to be broad agreement that the most suitable form of state for the future will be one which involves an allocation of powers to a central government and regional governments. The differences that exist relate essentially to the boundaries, powers and functions of the regions and the process whereby such differences may be resolved. Boundaries will be relevant to the electoral process, as well as to the structures of the Constitution. The powers and functions of regions are crucial to issues such as the form of state and self determination, and will be a fundamental part of the constitution.
3. The Technical Committee considered that as far as demarcation of boundaries is concerned, there seems to be a clear role for a commission, because the task is one which appropriately should be performed by a broadly based body of suitably qualified people, who will hear representations and possibly conduct public hearings. As far as powers and functions of regions are concerned, the issue could be dealt with by the Technical Committee itself, or another committee, but because of the centrality of the issue, it felt that there may be an advantage in having this issue allocated to the Commission as well.
4. From a broad overall perspective, three distinguishable alternative approaches to the process that will lead to a new democratic constitutional dispensation, seem to have emerged from the constitution making process:
 - a) The election, as soon as possible, of a constituent assembly that will write and enact a new constitution.
 - b) The seeking of agreements within the MPNP on a new constitution and the enactment of that constitution by the present Parliament.
 - c) That seeking of agreement within the MPNP on a transitional/interim constitution, the enactment by the present Parliament of that constitution, the election of a legislature under that constitution, and the formulation and enactment of a new constitution by that legislature according to predetermined constitutional principles.

5. Having considered and discussed the recommendations of the Technical Committee: having taken into account the way in which the negotiating process has progressed up to now and the needs of the negotiating process on the way forward: and being aware of the need for any new constitutional dispensation to be accepted as legitimate by the broadest possible spectrum of the population: the Planning Committee is of the opinion that a Commission can be of invaluable assistance to the negotiating process, irrespective of which of the three roads to a new constitution is taken. It is however recommended that at this stage of the process, a commission will be of maximum help as far as the boundaries of regions are concerned, while the more technical aspects, like powers and functions are attended to by the Technical Committee on Constitutional Matters.

REGIONAL DEMARCATION AND RELATED ISSUES

Report to the Planning Committee: 13 May 1993

1. Instructions

The Planning Committee has requested this Technical Committee to give priority to considering to the best way of addressing the issue of the demarcation of borders, functions and powers of Regions, the following alternatives being suggested as possible mechanisms for handling the matter:

- the Technical Committee on Constitutional Issues;
- an additional technical committee specially appointed for the purpose;
- a special commission on regional government.

2. Introductory considerations

2.1 There appears to be broad agreement that the most suitable form of government for the future will be one which involves an allocation of powers to a central government and regional governments. The differences that exist relate essentially to the boundaries, powers and functions of the regions and the process whereby such differences may be resolved. Boundaries will be relevant to the electoral process, as well as the structures of the Constitution. The powers and functions of the regions are crucial to issues such as the form of state and selfdetermination, and will be a fundamental part of the Constitution.

2.2 As far as demarcation of boundaries is concerned, there seems to us to be a clear role for a commission. The task is one which appropriately should be performed by a body of suitably qualified people, who will hear representations and possibly conduct public hearings. We will have our hands full in this Committee in dealing with the many issues referred to us. But apart from that, we are of the opinion that demarcation issues are more appropriately dealt with by a broadly based commission than a small technical committee.

- 2.3 As far as powers and functions of regions are concerned, the issues could be dealt with by ourselves or another technical committee, but because of the centrality of the issue, there may be an advantage in having this issue allocated to the Commission as well.
- 2.4 The precise terms of reference of the Commission will be influenced by the views of the Negotiating Council in regard to the process of constitution making, the constitutional principle on regions, and the electoral system.
- 2.5 A constitutional principle on regions was developed at Codesa, but it has not yet been adopted by the Negotiating Council, and it seems to us that the principle could usefully be expanded to accord greater security to all involved, and in particular to those that have regional interests at heart. We suggest that consideration be given to whether the Codesa principle could therefore be elaborated to include the following:
- The idea of a special role for regions in the formal amendment procedure of the Constitution, especially on matters affecting regions;
 - The concept of regional representation possibly in a Senate in the central legislature; and
 - A list of justiciable criteria conditioning conflicts between central and regional governments to guard against the possibility that the party or parties at the centre might exercise governmental powers for the purpose of penalising regional opponents.
- 2.6 It is clear from the Codesa documents that there is substantial support for an electoral system based on proportional representation, with a regional component. This, however, has not yet been debated in the Negotiating Council.
- 2.7 We suggest that the issues that we have raised be debated in the Negotiating Council as a matter of urgency so that the terms of reference of the Commission in so far as demarcation is concerned can be formulated, and a final decision be taken in regard to the desirability of including the issue of powers and functions of regions in the terms of reference of the Commission.

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2.3 If decisions are taken on these issues we would be able to formulate terms of reference of a Commission for consideration by the Negotiating Council. Because of the urgency of the matter, we have addressed some of the considerations that may have to be taken into account in the appointment and functioning of the Commission. These are set out below.

3 A Commission on Regional Government

3.1 Appointment

The Negotiating Council should seek agreement on the membership and the terms of reference of a Commission for Regional Government. Regarding the establishment of the Commission, the following alternatives may be considered:

- formal appointment and instruction by proclamation in the *Government Gazette*; or
- appointment and instruction by the Negotiating Council.

3.2 Composition of the Commission

The Commission should in our view consist of ten members. The members should be persons suitably qualified for the various tasks of the Commission and be persons whose personal integrity is generally acknowledged.

The Negotiating Council could either appoint from among the members of the Commission a chairperson and vice-chairperson or such appointments could be left to the members of the Commission itself.

The Commission may, within its discretion, divide into committees for the purposes of performing its functions regarding the various elements of its terms of reference.

3.3 The Commission's Suggested Terms of Reference

3.3.1 The Commission should be required, as a matter of urgency, to make recommendations to the Negotiating Council on the delimitation of regions

for the purposes of elections. For this purpose the Commission may be required to take into consideration the following criteria:

- 3.3.1.1 historical boundaries, including provincial, magisterial and district boundaries and infrastructures
 - 3.3.1.2 administrative considerations including the availability or non-availability of infrastructures and nodal points for services
 - 3.3.1.3 the need to rationalise existing regional structures (including the TBVC states, self-governing territories and regional governments)
 - 3.3.1.4 the necessity of limiting financial and other costs as much as is reasonably possible
 - 3.3.1.5 the need to minimize inconvenience to the people
 - 3.3.1.6 the need to minimize the dislocation of services
 - 3.3.1.7 demographic considerations
 - 3.3.1.8 economic viability
 - 3.3.1.9 developmental potential
 - 3.3.1.10 cultural and language realities
- 3.3.2 **The Commission should be required to invite all interested parties and persons to submit their views and recommendations regarding the delimitation of regions either in writing or orally on or before a date determined by the Commission.**
- 3.3.3 **The Commission should be instructed to submit its recommendations regarding the delimitation of regions to the Negotiating Council not later than one month after its appointment.**

- 3.3.4 Depending upon the progress made in the Negotiating Council on reaching agreements regarding the structures, procedures, functions and powers of regional governments under the Constitution replacing the present constitutional dispensation, the Commission might be required, within a specified period, to submit recommendations to the Negotiating Council on such matters.
- 3.3.5 In the performance of all of its functions the Commission should be required to take cognizance of the progress made in the Negotiating Council in the formulation of agreements on constitutional matters.
- 3.3.6 The Constitution replacing the present constitutional dispensation should make special provision for the continuation, appointment, composition and terms of reference of the Commission or a similar commission, as well as for the procedures regarding the acceptance, rejection or referral of its recommendations by a constitution making body.
- 3.3.7 The terms of reference of the Commission should in terms of the Constitution replacing the present constitutional dispensation include inquiry into and the making of recommendations to a constitution making body regarding the final boundaries, powers, functions and constitutional structures of regions in the future constitutional dispensation.

4 Functioning of the Commission

- 4.1. The Commission should be allowed to determine its own procedures for gathering and considering evidence, provided that evidence and representations must be gathered from all parts of the country, and that cognizance must be taken of ongoing negotiations in the Negotiating Council, which should continue notwithstanding the appointment of the Commission.
- 4.2. The Commission should be provided with sufficient and suitably qualified staff and resources to perform its task as expeditiously and impartially as possible.

RESOLUTION

Whereas there appears to be broad agreement that the most suitable form of government for the future will be one which involves an allocation of powers to central and regional governments, while the differences that exist relate essentially to the boundaries, powers and functions of the regions and the process whereby such differences may be resolved:

Realising that regional boundaries will be relevant to the electoral process, as well as to the structures of the Constitution:

Accepting that the powers and functions of the regions are crucial to issues such as the form of state and self-determination, and will be a fundamental part of the constitution:

Convinced that while the demarcation of boundaries is a task which appropriately should be performed by a broadly based body of suitably qualified people, who will hear representatives from the public at large and from different areas of the country, issues regarding the functions and powers of regions can at this stage of the negotiations best be dealt with by a smaller technical committee: and

Determined to ensure that we achieve a peaceful and negotiated agreement on the democratic transformation of our country within the time frames we have set for ourselves.

Hereby resolve:

1. **That** the Technical Committee on Constitutional Issues be charged with formulating as a matter of urgent priority, recommendations on the structures, powers and functions of regions, on constitutional principles and on the constitution making process.
2. **That** a Commission be appointed to make recommendations to the Negotiating Council within six weeks of its appointment, on the delimitation of regions.
3. **That** for the purpose of its recommendation the Commission should be charged to take into consideration, inter alia, the following criteria:

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- 3.1 Historical boundaries, including provincial, magisterial and district boundaries and infrastructures.
 - 3.2 Administrative considerations including the availability or non-availability of infrastructures and nodal points for services.
 - 3.3 The need or otherwise to rationalise existing structures (including the TBVC States, self-governing territories and regional government).
 - 3.4 The necessity of limiting financial and other costs as much as is reasonably possible.
 - 3.5 The need to minimise inconvenience to the people.
 - 3.6 The need to minimise the dislocation of services.
 - 3.7 Demographic considerations.
 - 3.8 Economic viability.
 - 3.9 Developmental potential.
 - 3.10 Cultural and language realities.
4. **That** the Commission should be required to allow interested parties and persons to submit their views and recommendations within a specified period which should not be less than one month after an invitation in this regard has been published; and that the Commission should take these into account for the purposes of formulating its recommendations.
 5. **That** the Commission should also be free to take cognisance of any other material it might wish to collect for the purposes of its recommendations.
 6. **That** the Commission should also for the purposes of its recommendations take cognisance of any progress made in the Negotiating Council by way of agreements on constitutional matters.
 7. **That** this Council shall from time to time review the progress made towards the reaching of agreements regarding the structures, functions and powers of regional governments under the Constitution replacing the present Constitution, and consider the advisability of a Commission also being required to submit recommendations on such matters.

8. **That** the Commission should be composed of ten members agreed upon in this Council; that the members should be persons of acknowledged personal integrity and suitably qualified specifically or in general for the task assigned to the Commission; that participants be called upon to submit names of candidates to the Administration before 12h00 Friday 21 May 1993 and that the Planning Committee make a recommendation in this regard to this Council.

9. **That** the Planning Committee, with the assistance of the Technical Committee on Constitutional Issues, prepare draft Terms of Reference for the Commission for consideration by this Council.



SECOND DRAFT

PROPOSED RESOLUTION ON INTOLERANCE AND ASSASSINATIONS

This Negotiating Council, meeting at the World Trade Centre on 18 May 1993:

1. **Notes with outrage:**

1.1 The rising tide of political intolerance in South Africa:

1.2 The recent increase in actual and threatened political assassinations and violence: and is

2. **Profoundly disturbed:**

By the threats to the lives of certain political leaders taking part in the Negotiating Process, including the recently uncovered plan to assassinate the leader of a delegation in the Negotiating Council:

3. **Believing:**

That a political climate in which there is no violence, assassinations and intolerance is essential to the success of the negotiation process:

4. **Therefore resolves to:**

4.1 Express our sincere solidarity with and concern for the safety of all members of delegations;

4.2 Condemn the use of assassinations and other forms of political violence to resolve political differences;

4.3 Call on all to create the conditions which discourage violent attacks on political opponents and to ensure suitable legal action is taken against those contemplating assassination and similar violent acts.