

for Maychunga
3/4/92

CODART

Dear Comrade Scratch

I suggest you do the article as follows

1. Print the text verbatim of what was said in the
"Areas of commonality and areas that need further
discussion." The areas of commonality are those
agreed on. The areas needing further discussion are those
being debated. I suggest you get a list of names
is one of the advisors to Working Group 1
head of the Research Department.

2. Below the text, I suggest you add your
commentary by myself:

The impression put forward by the ANC
and the Government have come to some agreement on
two critical areas, namely, power sharing and
government, is misleading. The function of the
is twofold: first, to work out general constitutional
principles which will be enshrined in the new constitution
and second, to define the body which will draft that
constitution. We are having heavy battles on both.

In the beginning, great progress was made in relation
to General Principles. We were able to use the Declaration
of Intent signed at CODESA 1 as the foundation of a document
entitled "Commonalities". These commonalities include such
important principles as that South Africa shall be a united,
non-racial, non-sexist democratic state; that the
constitution will be the supreme law; that there will be a
multi-party democracy; that there will be an entrenched and
justiciable Bill of Rights containing universally recognised
rights and freedoms, including freedom of religion and
expression; and that the language, religious and cultural
diversity of the country will be recognised. These
principles will lie at the heart of the new democratic
constitution for South Africa. They embody the spirit and
the letter of the Freedom Charter, and represent a great
achievement for all those who support democracy in our
country.

A number of other more controversial areas however have
been set aside for detailed argument and discussion. The
first related to what is popularly known as the unitary
state/federalist debate. To the surprise of many of the
participants who imagined that the ANC was only interested
in a highly centralised, bureaucratic and commandist state,

CRU CIAC
Digitise!

for Maychunga
3/4/92

CODART

Dear Comrade Scratch

I suggest you do the article as follows.

1. Print the text verbatim of what Working Group 2 called "Areas of commonality and areas that needed further discussion." The areas of commonality have been fully agreed on. The areas needing further discussion are still being debated. I suggest you get the texts from Frene who is one of the advisors to Working Group 2 and who is also head of the Research Department.

2. Below the text, I suggest you put in the following commentary by myself:

The impression put forward by the press that the ANC and the Government have come to some kind of agreement on two critical areas, namely, power sharing and regional government, is misleading. The function of Working Group 2 is twofold: first, to work out general constitutional principles which will be enshrined in the new constitution and second, to define the body which will draft that constitution. We are having heavy battles on both.

In the beginning, great progress was made in relation to General Principles. We were able to use the Declaration of Intent signed at CODESA 1 as the foundation of a document entitled "Commonalities". These commonalities include such important principles as that South Africa shall be a united, non-racial, non-sexist democratic state; that the constitution will be the supreme law; that there will be a multi-party democracy; that there will be an entrenched and justiciable Bill of Rights containing universally recognised rights and freedoms, including freedom of religion and expression; and that the language, religious and cultural diversity of the country will be recognised. These principles will lie at the heart of the new democratic constitution for South Africa. They embody the spirit and the letter of the Freedom Charter, and represent a great achievement for all those who support democracy in our country.

A number of other more controversial areas however have been set aside for detailed argument and discussion. The first related to what is popularly known as the unitary state/federalist debate. To the surprise of many of the participants who imagined that the ANC was only interested in a highly centralised, bureaucratic and commandist state,

For WCZ
Gadisa
28/3/92

WORK GROUP 2

SECOND ASSIGNMENT

BODY AND PROCEDURES FOR DRAFTING A NEW CONSTITUTION

The ANC proposes that :

1. The Constitution be drafted and adopted by a body to be elected according to the principles of universal franchise.
2. This body (which in this document will be called the Constituent Assembly) be as inclusive as possible.
3. All South Africans over the age of eighteen living within the 1910 borders be entitled to vote.
4. The system of proportional representation be used.
5. The Constituent Assembly consist of four hundred delegates and have a steering committee which will lay down its procedures.
6. The Constituent Assembly elect from its own ranks a representative drafting commission consisting of 40 persons to assist its work.
7. Decisions at the Constituent Assembly be by a two thirds majority.
8. The Constituent Assembly be obliged to enshrine the principles agreed on by CODESA in the new constitution and not to contradict such principles.
9. The Constituent Assembly appoint an independent constitutional council consisting of five respected and competent persons, to hear any disputes submitted to it by members of the Constituent Assembly concerning the application of Clause 8.
10. Functioning within the above framework, the Constituent Assembly be legally entrusted with sovereign powers to draft and put into operation a new and binding constitution for South Africa.

WORK GROUP 2

SECOND ASSIGNMENT

BODY AND PROCEDURES FOR DRAFTING A NEW CONSTITUTION

The ANC proposes that :

PROPOSAL

1. The Constitution be drafted and adopted by a body to be elected according to the principles of universal franchise.

2. All South Africans over the age of eighteen living within the 1910 borders be entitled to vote.

3. The system of proportional representation be used.

4. The body (which in this document will be called the Constituent Assembly) be as inclusive as possible.

5. The Constituent Assembly will have a steering committee which will lay down its procedures.

6. The Constituent Assembly *of 400 members* will elect from its own ranks a drafting commission *of 40 persons* to assist its work.

7. Decisions at the Constituent Assembly will be by a two thirds majority.

8. The Constituent Assembly shall be obliged to enshrine the principles agreed on by CODESA in the new constitution and not contradict such principles.

9. The Constituent Assembly will appoint an independent constitutional council consisting of five respected and competent persons, to hear any disputes submitted to it by members of the Constituent Assembly concerning the application of Clause 8.

10. Functioning within the above framework, the Constituent Assembly will have *should be entrusted with* sovereign *power* to draft and put into operation a new and binding constitution for South Africa.

11. All necessary steps shall be taken by those that have legal authority to bring about the above.

*The basic diff's were twofold:
Issue for CA? Even if - gov't princ,
we wanted*

where all power in the country would be concentrated in the hands of a few people, the ANC came out with principles positions supporting democracy at the levels of national, regional and local government. The full argument has been set out in a document entitled "Ten Proposed Regions in a United South Africa". We favoured regions constituted on a non-ethnic basis with governments elected by and accountable to the people in the region. We agreed to the functions and the powers of the regions being stipulated in the constitution, that is the regions could not be broken up by the centre, nor could their governments be dismissed. At the same time, we made it clear that the last word in legislation should always be with the central government. The central government would be responsible for the basic legislation for the whole country, while the regions could pass ordinances dealing with questions of implementation. In other words, we favoured the idea of concurrent powers in areas such as health, education and roads, bearing in mind that the central government would have the overriding power. The Government and a number of other groups, however, favoured exclusive powers for the regions and also argued for fiscal autonomy. We agreed to disagree. In the first place, we argued that these were questions of detail that properly belonged to the Constituent Assembly. Secondly, we said that in any case we were against the idea of separate, autonomous states, constituting South Africa. The final text, coupled with the note relating to the ANC's position, makes this clear. The issue will be before the CA which will have to make the final determination. There was no reconciling the positions of the ANC and the Government, so the result was rather open language with a number of explanatory notes attached.

The second major area of hard debate has been in relation to power-sharing. The issue is not whether for a certain period there should be joint responsibility for managing the transition and ushering in democratic government. The difference between us has been over whether the constitution making body should be obliged to include principles of enforced power sharing in all future governments. Our position is that coalitions only work if the political will, coupled with perceived mutual interest, is there. The tragic experiences of Cyprus, the Lebanon and, now, Northern Ireland, show that if the will to cooperate does not exist it cannot be imposed by constitutional devices. The many coalition governments to be found in various parts of the world function precisely because the parties to the coalition realise that they stand more to gain by working together in the government than by opposing each other. It is quite clear that in South Africa the concept of

on participation by all parties. For one thing, this does away with the concept of opposition, which is vital to democracy. For another, it establishes rigid and artificial quotas in government which will inevitably lead to friction, paralysis and ungovernability.

The final formulation left the matter open and vague. What we felt had to be guaranteed were the rights of opposition rather than what were called the rights of minority parties. The rights of opposition include the right to campaign for change, to enjoy freedom of expression and of information, and the right to contest regular elections so as to become the majority party. We also acknowledged that the majority party in central government could well be the minority party in a region. Finally, we accepted that minority parties in the parliamentary set-up should have the right to block amendments to the constitution (that is, a high majority would be needed for such amendments) and that they should have the right to representation on parliamentary committees. We made it very clear however, that these rights did not include the right to participate in government against the wishes of the majority. The result here, too, was an open formulation with an explanatory note added by us.

It should be said that the debates were rich and interesting. At the same time, the gulf between us and the Government on what is perhaps the most crucial issue dividing us, is still large. In the phase of Interim Government, there will be a form of prescribed coalition. After that, we want a clean constitution that facilitates natural arrangements that are far more likely to function well than quotas artificially laid down in advance. One example of this, is that the government still refuses to accept that democratic South Africa will have a President. It insists on a collective presidency, obviously because it still cannot come to terms with the fact that De Klerk might have to vacate office for somebody enjoying far more support from the public than he can count on. In their view, this collective, rotating presidency, would be responsible for appointing the Executive on the basis of representation proportional to the number of seats in Parliament.

The third issue where we are still far apart is in relation to the constitution making body (CMB). The government says it would prefer CODESA to convert itself into the CMB, but reluctantly agrees to an elected body performing that function. It insists however that there be a second house made up either of a collapsed Tricameral Parliament or else of a Senate consisting of representatives

from regions and from minority parties. We point out, however, that nowhere in the world has a bi-cameral system been used for drafting what is in effect the original constitution for a new, united country.

We agree that the objective of the Constituent Assembly (the term we prefer for the CMB) should be to function in an as inclusive manner as possible so as to produce a document acceptable to and binding on the whole South African nation. Having what in effect would amount to a House of Winners and a House of Losers, however, each trying to face the other down, would be the worst way of achieving this result.

Accordingly we have been arguing for a single chamber that would take decisions by a two thirds majority; it would be elected by proportional representation with a relatively low threshold, and provision would be made for an independent Constitutional Panel to ensure that the principles agreed on by CODESA were enshrined. At the time of writing, the debate continues. It is not true as one newspaper put it, that there is blood on the floor, but there have been strong differences of opinion.

The Government's immediate reaction to the ANC proposals was not to deal with their merits, but to criticise their tone. In particular, the Government objected to a phrase in the ANC document stating that the concept of bi-cameralism for the CMB was so confused as to be unworthy of a first year law student. We are happy to retract and to place on record that we feel it would be worthy of a first year law student.

The third issue where we are still far apart is in relation to the constitution making body (CMB). The government says it would prefer CODESA to convert itself into the CMB, but reluctantly agrees to an elected body performing that function. It insists however that there be a second house made up either of a collapsed Tricameral Parliament or else of a Senate consisting of representatives from regions and from minority parties. We point out, however, that nowhere in the world has a bi-cameral system been used for drafting what is in effect the original constitution for a new, united country. We agree that the objective of the Constituent Assembly (the term we prefer for the CMB) should be to function in an as inclusive manner as possible so as to produce a document acceptable to and binding on the whole South African nation. Having what in effect would amount to a House of Winners and a House of Losers trying to face each other down would be the worst way of achieving this result. Accordingly we have been arguing for a single chamber that would take decisions by a two thirds majority; it would be elected by proportional representation with a relatively low threshold, and provision would be made for an independent Constitutional Panel to ensure that the principles agreed on by CODESA were enshrined. At the time of writing, the debate continues. It is not true as one newspaper put it, that there is blood on the floor, but there have been strong differences of opinion.

The Government's immediate reaction to the ANC proposals was not to deal with their merits, but to criticise their tone. In particular, the Government objected to a phrase in the ANC document stating that the concept of bi-cameralism for the CMB was so confused as to be unworthy of a first year law student. We are happy to retract that formulation and to state that we feel it would be worthy of a first year law student.

1st year
Issues - They CDD
Bonds - dem'

Thirdly, there will be certain general principles which will be binding on the Constituent Assembly and which will have to be enshrined in the final Constitution. Our proposal in this respect is that a special panel of respected and competent persons be chosen to ensure that in the case of any dispute in this connection, the Constituent Assembly does not deviate from the agreed principles. This point will be developed more fully below.

In Must be

ALL-INCLUSIVE

In our view, the CA should be as inclusive as possible. Since it will be the constitution for the whole of South Africa, it is important that all South Africans feel that they are represented there, independently of which part of the country they live in, and without regard to their race, language, religion, origin or political affiliation. In order to achieve this all-embracing character, we propose the following.

1. That the delegates to the CA be chosen by proportional representation.
2. That the threshold or minimum percentage required in terms of PR be relatively low.
3. That the whole territory within the 1910 borders of South Africa be covered by the elections.
4. That the CA be on the large rather than on the small side.

1. PR

2. RELATIVELY LOW THRESHOLD

genl. princis
2/3 maj.

On the one hand, it is important that the electoral system encourages parties to have a national rather than a purely local vision; we should discourage an electoral system which promotes extreme parochialism and narrow self-interest. On the other hand, it is important that the views and concerns of all South Africans, in all the regions of the country, majority and minority opinions, be represented. We feel that there has to be some cut-off point to avoid an undue proliferation of tiny parties. It will be important to prevent an undue number of small groups who would be able to auction off their support to the major participants. The experience in Israel, where very small parties indeed have

been able to impose disproportionate conditions for their support, is instructive in a negative way. *sample*

The figure of 5% has frequently been mentioned. If 20 million people voted, this would mean that a party would require the support of 1 million people in order to qualify. There are a number of established political organisations in South Africa with developed approaches to society and government, who might not be able to reach that figure. Keeping them out might reduce the all-inclusive character that the CA should have. To some extent, this problem could be mitigated by the creation of electoral pacts or alliances whereby joint lists are created. We feel however that 5% would be too high and propose a figure of approximately 2 or 3%.

Estimates of the number of potential voters range from 18 to 23 million. We may assume that there will be a very high turnout for the first democratic elections in South Africa, particularly if the vote was to constitute a body of such historic significance as the CA. For purposes of rough calculation we will suggest that the electorate will be 22 million and that 20 million people will vote. This would mean that a 2% threshold would be 400 000 while a 3% cut-off point would require 600 000 votes, *5% 1,100,000.*

3. THE ELECTIONS COVER ALL THE TERRITORY BETWEEN THE 1910 BORDERS

sooner rather than later.

No serious person can doubt that the territorial integrity of South Africa will be restored. The only possible dispute can be over the process whereby reincorporation of the TBVC states is to be achieved. The new constitution will be for all of South Africa. Whatever one's views about the status of the TBVC states, there can be no doubt that the persons living in these areas will be directly affected by the constitution. This will in reality be their future constitution, irrespective of how reincorporation is achieved. They have a right and a responsibility to participate in its elaboration. To exclude the millions of people living in those four zones from participation in the process of constitution-making would be an injustice to them and a disservice to the rest of South Africa.

As far as we in the ANC are concerned, they are and always have been South African citizens. It was the system of grand apartheid that sought to deprive them of their rights as South Africans. It is inconceivable that grand apartheid should rule in relation to the new constitution.

The very purpose of CODESA is to bury grand apartheid and establish the way in which non-racial democracy is to be installed in South Africa. We cannot abolish apartheid by recognising one of the fundamental elements of apartheid.

43 Problems related to the modalities and timing of the reincorporation of the TBVC states, should not in any way impede the participation of persons living in those states in elections for a Constituent Assembly. Once the principle is agreed that all the persons living within the 1910 boundaries are entitled to South African nationality and citizenship, all of them would be entitled to vote in elections for a Constituent Assembly. The appropriate legal mechanisms to achieve this result can be worked out at CODESA by Working Groups 4 and 5. Our group should insist that no-one be deprived of the right to participate in the electoral process.

4. THE CA SHOULD BE ON THE LARGE RATHER THAN ON THE SMALL SIDE

On the basis that there should be one representative for every 50 000 voters, an assembly of 400 persons would be required for a voting population of 20 million. If the potential number of voters is 22 million, then there would have to be 440 seats. This figure is larger than we are used to for the white House of Assembly or for the Tricameral, but would in fact be considerably smaller than if the Tricameral basis of representation were extended to cover the whole population. The House of Commons in the United Kingdom has about 650 members for a population roughly one and a half times that of South Africa.

Whereas an assembly of 400 or over might be unduly large for a future legislature, it is our view that the CA should err on the side of largeness rather than on the side of smallness. This would facilitate the creation of party lists drawing on a wide range of personalities representing an extensive spectrum of interest groups. In other words, a relatively large body would more easily accommodate the diversity of the South African nation than would a small one. We are of the view that it would be of great advantage for people to feel that they are directly represented at the CA through individuals they know and who will be able to report back and explain the proceedings to them.

It would not be necessary for the CA to work all the time in plenary. Our proposals for a drafting commission are set out below. This commission would be relatively small in size and would be responsible for the day-to-day

Bombines reps with efficiency

business of establishing draft terms for the new constitution.

THE DRAFTING COMMISSION

The drafting of the Namibian Constitution was considerably facilitated by the establishment by the CA of a drafting commission from its own ranks, supported by three independent legal advisors from outside. We propose that the CA for South Africa elect a drafting commission of approximately 40 persons from its own ranks. These need not be lawyers or political scientists, but should be persons with competence in drafting and in handling constitutional concepts. The commission should be chosen on the basis of proportional representation, subject to the right of every party represented in the CA having at least one member.

Provision could be made for legal advisors to participate in support of the respective parties as they have done at CODESA.

The answer to the diversity of views and currents in South Africa is not to be found by introducing manifestly undemocratic elements into the constitution. The basic principles of democracy should be observed. They include a whole variety of checks and balances to prevent the overconcentration of power in the hands of too few people. They also include mechanisms to ensure that dissent is not stifled and that views that are in the minority today are not prevented from becoming majority views tomorrow. These are the checks and balances that should be supported. We do not want a system that is all checks and no balances.

How It Should Function

TOWARDS A DEMOCRATIC AND ALL-INCLUSIVE CONSTITUTION-MAKING BODY.

I. THE NAME OF THE CMB

The name ^{of the CMB} in itself is not crucial. We could call it the Congress after the body which drafted the first great modern Constitution, that of the USA. We could refer to it as the South African National Convention [SANCO] or simply ^{the} National Convention [NATCO] in keeping with the name of the body which drafted the constitution for the Union of South Africa. What matters is how it is chosen and how it functions, not who first came up with its name.

We prefer the term Constituent Assembly. This is the one most widely used internationally. It indicates that what we are doing is constituting a new South Africa out of the old, and that we function not as self-appointed individuals but as representatives sitting in solemn assembly with a proper mandate and appropriate procedures.

11. THE BODY MUST BE CREATED AND MUST FUNCTION IN A DEMOCRATIC WAY

Since the objective is to install democracy in South Africa, the body must itself exemplify democracy. At the heart of democracy lies the question of choice and elections. Without elections there can be no democracy.

CODESA has a vital but limited function, namely, to create the conditions for the adoption of a new constitution, not to draft a new constitution itself. The fact that it is self-appointed is appropriate to its function, which is essentially one of negotiating the process of transition from apartheid to democracy. The broad support that it is receiving despite its non-democratic character derives from ~~an acceptance that it sees its role as being that of midwife to democracy.~~ When it has established the ~~democratic~~ foundation for the process of drafting a new constitution its historic task will be completed. Should it attempt to perpetuate itself ~~forever~~ and usurp ~~the~~ role of the body it was set up to create, CODESA will lose its prestige ~~and be seen as a power-loving body of self-protective oligarchs.~~

~~The participants at CODESA have no divine right to continue. It would be a gross dereliction of responsibility and dishonourable in the extreme if any of us were to attempt to manipulate the process of constitution-making purely for the~~

to a means

sake of ensuring future position or office for ourselves. Conversely, each and every one of us has the possibility of ~~behaving in such a way as to be~~ ^{not} counted amongst the generation that brought peace and democracy in a principled and healing way to our country.

No one who genuinely loves democracy should fear elections. Elections after the Anglo-Boer War helped to heal the wounds of conquest and to enable Boer and Briton to live together in the same country. Elections after the 1914 rebellion, after the 1922 strike and after the sabotage of the Second World War, brought peace where before there had been strife.

It was the holding of elections more than anything else that brought peace and stability to Namibia and opened the way for the creation of institutions internally and internationally accepted.

Are we to say that elections are only good for whites in South Africa and blacks in other countries? Are we to back democracy in Zambia or Poland, and deny it in our own land? Once the racial and the colonial myths are destroyed, there can be no justification for denying the principles of democracy.

The dream of the oppressed majority in this country ever since 1910 has been for full participation as ordinary South Africans in the choice of government. The National Convention that preceded the 1910 Constitution was based on whites-only elections for a whites-only convention. That ugly beginning to our constitutional life can only be expunged by non-racial elections for a non-racial convention.

Elections thus have an historically healing role to play in our country. They signify that true citizenship is at last about to be born. For the first time we feel that we have equal worth, that nobody is inherently superior or inferior to anyone else. Like all elections, the first democratic elections will be about power and competing political philosophies. Yet they will mean far, far more to those who are presently disenfranchised and are the sons and daughters and grandsons and granddaughters of the disenfranchised.

elections They will be the proof that we really are in a new South Africa. They will signal a compelling acknowledgement of our common South African-ness. They will open the way to the development of a genuine and generous national vision and encourage a sense of shared responsibility for the country's future.

When we say that it is elections that give the constitution-making proceedings legitimacy, we refer not just to formal international and internal legitimacy, but to subjective legitimacy in the hearts and souls of our people. It might be difficult for those who take elections for granted to understand what it will mean to those who have been permanently excluded from the electoral process to at last have a chance to stand up and drop their ballot slip in the ballot box. The Constitution will stand because the whole population will have participated directly in the process of achieving it.

It is elections that ensure that the issues are put before the people as a whole and that the people feel involved through their freely chosen representatives in the ultimate outcome. What the voters will be deciding on is who they wish to represent them at the body which drafts the constitution. There will be a direct nexus through the elected representatives between each voter and the final product. In this way the electorate identifies with the body that drafts the constitution and with the outcome of its deliberations.

Furthermore, elections will take away the sense of distance and incomprehension which unfortunately at present and almost inevitably separates the general South African public from CODESA. It might be that the character of CODESA as a negotiating forum encourages a certain degree of quiet diplomacy in order to move the process forward. In that sense CODESA is essentially procedural and confidence-building in character. The same cannot be said of the CMB.

The Constitution will deal directly with substantive rights of the people of South Africa. They will be entitled to know at each step exactly what is being done in their name. Compromises openly struck, honestly agreed for purposes of mutual advantage and frankly explained, have a much greater chance of being accepted than those negotiated in terms of secret agreements behind closed doors. The electoral process encourages open-ness and accountability. It places the issues before the people, who take an interest in them because they know that their opinions can make a difference when

An 'after-the-event' ratification by referendum bears no comparison in terms of active involvement of the population and its identification with the constitution. While a case can be made out for a post-Constituent Assembly referendum to underline public approval of the final product [or give it one last chance to throw it out], a referendum introduced as an alternative to having an elected CMB will be seen as a

pseudo-democratic means of introducing popular participation at a time when it can really make little difference. Far from legitimising the process, it will ensure that the Constitution is born in an atmosphere of cynicism and indifference.

The public is placed in the invidious position of giving a simple 'yes' or 'no' to a lengthy document, much of which will inevitably be in technical language, without the option of influencing its individual parts. A referendum is a useful means of testing public opinion in relation to issues where a simple yes or no would be appropriate. It is a grotesque device for ensuring that a lengthy and complicated document corresponds to what the populace thinks is correct.

There is the added problem of persons being compelled to vote in favour of a constitution with which they ~~did~~ not agree simply for fear of the greater evil of reopening the whole matter and postponing the day when democratic institutions finally come into place. It is also difficult to see what kind of majority would be appropriate for a referendum of this kind. If a two-thirds majority were held to be sufficient, would the third who voted 'no' be able to say that they were not bound by the constitution because they had neither authorised the procedure for its adoption in advance nor ratified its content after its drafting? *might*

All the practical problems and inconveniences said to relate to elections for a Constituent Assembly would apply to the holding of a referendum. Sooner or later we will all have to accept elections as a normal part of South African life, just as we will all have to get used to the fact that the Head of State will more likely than not be black. Let it be sooner rather than later. Some problems go away if you postpone them. In our view, however, democracy is not a problem, but the solution.

THE ARGUMENTS AGAINST THE CMB BEING ELECTED

The case for elections in the modern world is so strong that only someone very brave and very cut-off from contemporary thinking would argue against it. As we understand it, none of the participants in Working Group 2 are actually against elections in principle. Certain participants have, however, raised queries about the feasibility of elections in current conditions, or about the desirability of granting what they call a 'blank cheque' to an elected assembly. It would be ungracious to suggest that they are opposed to elections because they fear that they themselves will not fare well if they lose their base in apartheid structures and are left to

the mercies of ^{the} electoral ^{to} support. We ^{accordingly} treat the arguments on their merits.

Essentially, two points are made.

The first is that there is too much violence in the country for free elections to be held, and that elections would only encourage further violence [one assumes that this is meant to express a fear and not to convey a threat].

The danger of this argument is that if the existence of violence is a reason for not holding elections, then those who are fearful of losing an election will have a stake in maintaining the level of violence.

We are in fact convinced that far from contributing to violence, the holding of elections will provide an orderly and publicly supervised manner in which the contest for political leadership can be conducted. It will serve not as a source of violence but as an alternative to it.

The turning point in Namibia from a state of severe internal conflict to a state of peace was the holding of elections for the Constituent Assembly. The way in which the CA there conducted its business, based on extensive give-and-take, promoted national unity and has until now virtually eliminated political violence. We have no doubt that the same process would have the same beneficial results in South Africa.

We need to have confidence in democracy. Our objective should not be to undermine the basic principles of democracy but to ensure that they are accepted by the whole population and that they operate in a manner that is manifestly fair and non-oppressive to everybody. What we should be concerned about is not the fact of holding elections, but how to ensure that voters are free in the exercise their choice and that they are well-informed when doing so.

Elections are held precisely because different ideas compete. The fiercer the competition, the greater the need for elections. Thus, what we should be talking about is not whether or not to have elections - the need to do so is self-evident - but how to ensure that they are properly conducted.

The second argument against having the constitution drafted by an elected assembly is that this would amount to giving a blank cheque to an electoral majority without respecting the rights and interests of minorities. The term

'majoritarianism' is used as though somehow it is inherently evil. Its allegedly diabolical character is compounded by coupling it with the adjective 'simple'. Thus 'simple majoritarianism' is presented as being the very antithesis of everything we are aiming at in CODESA.

to believe
This approach comes badly from people who hold office on the basis either of no elections at all or of elections based on principles of simple majoritarianism. If the present government were to resign because it was chosen by means of simple majoritarianism [times three], then its moral position as an opponent of majority rule would indeed be powerful. The same would apply if it were to impugn the validity of the recent referendum on the basis of its simple majoritarian nature, or to deny the validity of all legislation passed since Union in 1910; with one exception, such laws were always based on the approval of a simple majority of Members of Parliament who in turn had been elected on the basis of a simple majority [or less] of voters.

The Presidents of France and the USA as well as the Prime Ministers of the United Kingdom and India were elected on the basis of 'simple majoritarianism'. One cannot escape the conclusion that the arguments against majority rule are being advanced with fervor not because of the principle involved but because of dissatisfaction with whom the majority will be. Put simply, 'simple majoritarianism' was good enough for the whites for 82 years, but will not be good enough for the blacks today, unless they promise to vote for the right party.

The irony of the situation is that while we in the ANC have no doubt that the principle of free elections and majority rule lies at the heart of democracy, we do not support what has been called simple majoritarianism for South Africa. We, who have never benefitted from the Westminster system of government in the past, in fact have a much stronger claim to opt for a different system than those who for decades have been advantaged by it.

More than 15 months ago, the Constitutional Committee of the ANC organised a conference which opted for the system of proportional representation. We did so for two basic reasons (in addition to the usual arguments in favour of PR). One, it enabled the diverse range of currents in South African society to be accommodated without reference to group rights and, two, it avoided the problems of delimiting constituencies in a country divided by group areas.

The system of PR lends itself to alliances and joint election lists. In this way relatively small parties or parties with support limited to a particular region are able to secure representation by linking up with other parties in a similar situation. Furthermore, there are very few countries that use PR that have governments based on one party only. PR thus tends to encourage coalition governments. Applied to the election of the CA, this would suggest a majority that was complex rather than one that was simple.

Secondly, ~~in relation to decision-making at the CMB~~ ^{for} we propose a qualified rather than a simple majority. Our proposal is that bearing in mind the special nature of the Constitution, the majority be two-thirds. This is the figure that was used in Namibia, where the procedure turned out to be so satisfactory that final constitution was adopted unanimously.

It is a realistic figure for South Africa. No single party is likely to achieve two thirds of the representatives in a Constituent Assembly. The figure means that in the case of a dispute, the party with the most seats would be compelled to seek support from groups it had opposed in the elections. At the same time, the figure would not be so high as to place the CA under ransom to small groups lacking significant popular support. The higher the majority, the more bargaining power is given to groups with a tiny base ~~in the community.~~ ^{required} A near veto power for very small groups would encourage fanaticism on the one hand, and pork-barrelling or even worse, outright corruption and buying of votes on the other. The pressure should be on to get consensus based on principled points of common ground and a reasonable measure of give-and-take, and not to obtain support by means of threats, bribes or promises.

Thirdly, there will be certain general principles which will be binding on the Constituent Assembly and which will have to be enshrined in the final Constitution, whatever the majority might say. These are the general principles that Working Group 2 is debating. Whatever formulation CODESA finally agrees upon, it is clear that these principles will be such as to establish the basic democratic character of the Constitution, its supremacy as the fundamental law of the country, and the inclusion within it of a Bill of Rights guaranteeing universally recognised rights and freedoms.

Our proposal in this respect is that a special panel of respected and competent persons be chosen to ensure that in the case of any dispute in this connection, the Constituent

Assembly does not deviate from the agreed principles. This point will be developed more fully below.

111. THE BODY MUST BE ALL-INCLUSIVE

We feel that a constitution is a very special document that is intended to bind the whole nation and be accepted by all South Africans. Accordingly every attempt should be made to achieve consensus in its elaboration.

In our view, the CA should be as inclusive as possible. Since it will be the constitution for the whole of South Africa, it is important that all South Africans feel that they are represented there, independently of which part of the country they live in and without regard to their race, language, religion, origin or political affiliation. In order to achieve this all-embracing character, we propose the following.

1. That the delegates to the CA be chosen by proportional representation. *This issue has already been discussed.*
2. That the threshold or minimum percentage required in terms of PR be relatively low.
3. That the whole territory within the 1910 borders of South Africa be covered by the elections.
4. That the CA be ~~on the large rather than on the small side.~~

1. ~~PR~~

2. RELATIVELY LOW THRESHOLD

On the one hand, it is important that the electoral system encourages parties to have a national rather than a purely local vision; we should discourage an electoral system which promotes extreme parochialism and narrow self-interest. On the other hand, it is important that the views and concerns of all South Africans, in all the regions of the country, and reflecting both majority and minority opinions, be represented.

We feel that there has to be some cut-off point to avoid an undue proliferation of tiny parties. It will be important to the appearance of small groups whose aim it would be to auction off their support to the major participants. The experience in Israel, where very small parties have been

*to discourage opportunists
(highest bidder)*

able to extort disproportionate advantages for ~~giving their support~~, ^{themselves} is instructive in respect of what we should avoid.

The figure of 5% has frequently been mentioned. If 20 million people voted, this would mean that a party would require the support of 1 million people in order to qualify. There are a number of established political organisations in South Africa with developed approaches to society and government, who might not be able to reach that figure. Keeping them out might reduce the all-inclusive character that the CA should have. To some extent, this problem could be mitigated by the creation of electoral pacts or alliances whereby joint lists are created. We feel however that 5% would be too high and propose a figure of approximately 2 or 3%.

Estimates of the number of potential voters range from 18 to 23 million. We may assume that there will be a high turnout for the first democratic elections in South Africa, particularly if the vote was to constitute a body of such ~~historic~~ significance as the CA. For purposes of rough calculation we will suggest that the electorate will be 22 million and that 20 million people will vote. This would mean that a 2% threshold would be 400 000 while a 3% cut-off point would require 600 000 votes.

10 000 000 votes, which could keep out parties
3. THE ELECTIONS COVER ALL THE TERRITORY BETWEEN THE 1910 BORDERS

No serious person can doubt that the territorial integrity of South Africa will be restored. The only possible dispute can be over the process whereby reincorporation of the TBVC states is to be achieved. The new constitution will be for all of South Africa. Whatever one's views about the status of the TBVC states, there can be no doubt that the persons living in these areas will be directly affected by the constitution. This will in reality be their future constitution, irrespective of how reincorporation is achieved. They have a right and a responsibility to participate in its elaboration. To exclude the millions of people living in those four zones from participation in the process of constitution-making would be an injustice to them and a disservice to the rest of South Africa.

As far as we in the ANC are concerned, they are and always have been South African citizens. It was the system of grand apartheid that sought to deprive them of their rights as South Africans. It is inconceivable that grand apartheid should rule in relation to the new constitution.

The very purpose of CODESA is to bury grand apartheid and establish the way in which non-racial democracy is to be installed in South Africa. We cannot abolish apartheid by recognising one of the fundamental elements of apartheid.

Problems related to the modalities and timing of the reincorporation of the TBVC states, should not in any way impede the participation of persons living in those states in elections for a Constituent Assembly. Once the principle is agreed that all the persons living within the 1910 boundaries are entitled to South African nationality and citizenship, all of them would be entitled to vote in elections for a Constituent Assembly. The appropriate legal mechanisms to achieve this result can be worked out at CODESA by Working Groups 4 and 5. Our group should insist that no-one be deprived of the right to participate in the electoral process.

4. THE CA SHOULD BE ON THE LARGE RATHER THAN ON THE SMALL SIDE

On the basis that there should be one representative for every 50 000 voters, an assembly of 400 persons would be required for a voting population of 20 million. If the potential number of voters is 22 million, then there would have to be 440 seats. This figure is larger than we are used to for the white House of Assembly or for the Tricameral, but would in fact be considerably smaller than if the Tricameral basis of representation were extended to cover the whole population. The House of Commons in the United Kingdom has about 650 members for a population roughly one and a half times that of South Africa.

Whereas an assembly of 400 or over might be unduly large for a future legislature, it is our view that the CA should err of the side of largeness rather than on the side of smallness. This would facilitate the creation of party lists drawing on a wide range of personalities representing an extensive spectrum of interest groups. In other words, a relatively large body would more easily accommodate the diversity of the South African nation than would a small one. We are of the view that it would be of great advantage for people to feel that they are directly represented at the CA through individuals they know and who will be able to report back and explain the proceedings to them.

relatively extensive going well beyond the top leadership and

It would not be necessary for the CA to work all the time in plenary. Our proposals for a drafting commission are set out below. This commission would be relatively small in size and would be responsible for the day-to-day

method & Comm.

business of establishing draft terms for the new constitution.

THE DRAFTING COMMISSION

The drafting of the Namibian Constitution was considerably facilitated by the establishment by the CA of a drafting commission from its own ranks, supported by three independent legal advisors from outside. We propose that the CA for South Africa elect a drafting commission of approximately 40 persons from its own ranks. These need not be lawyers or political scientists, but should be persons with competence in drafting and in handling constitutional concepts. The commission should be chosen on the basis of proportional representation, subject to the right of every party represented in the CA ~~having~~ at least one member.

Provision could be made for legal advisors to participate in support of the respective parties as they have done at CODESA.

The answer to the diversity of views and currents in South Africa is not to be found by introducing manifestly undemocratic elements into the constitution. The basic principles of democracy should be observed. They include a whole variety of checks and balances to prevent the overconcentration of power in the hands of too few people. They also include mechanisms to ensure that dissent is not stifled and that views that are in the minority today are not prevented from becoming majority views tomorrow. These are the checks and balances that should be supported. We do not want a system that is all checks and no balances.

FUNCTIONING
IN PROGRESS OF CA

In Park Bldg. at C-Town,

In each of the above cases, the transfer of power results in the creation of a new state recognised as such by the international community. Power is transferred not only from one government or regime or class or party or ethnic group to another, but from one state to another. A new state entity comes into being where none existed before. It receives international recognition, is admitted to the UN, exchanges ambassadors for the first time. The birth of the state is precisely chronicled: *at zero hours, on such and such a date.*

the Rep of Nam. came into being
In the case of South Africa, we are not envisaging secession from a colonial empire and the creation of a new sovereignty. At the same time, we contemplate something far more profound than simply the handing over of the reins of office from one political group to another [such as when Labour gives way to the Conservatives or vice versa]; Similarly, the process will go beyond a mere extension of the vote, such as when women or other previously disenfranchised groups were granted the vote within a particular country.]

What is envisaged is the de-colonisation of the South African state itself, the removal of an internal rather than an external mode of colonial domination. It implies that there is no alteration of state boundaries; the colonisers remain, but lose their status as colonisers. At the same time, the colonised also remain, but their status too has changed. They cease to be treated as a colonised people, and for the first time share in the sovereignty which was granted to the whites in 1910.

Independence for Africans accordingly does not mean establishing separate frontiers, as happened with the Bantustans, but, rather, destroying the internal legal and physical boundaries created by colonial domination and apartheid. *In the words of the Freedom Charter*, for the first time South Africa belongs to all who live in it.

gives way to be based on
The territorial dimension of South Africa remains the same. The inhabitants are the same. What has changed is the relationship between different sections of the inhabitants, from being that of colonial domination and subordination, to one of equal rights and non-discrimination.

We may sum up the situation in South Africa as follows: the essence of the process is self-determination, the means is national liberation, the form is democracy and the result is *universal franchise and a Bill of Rights guaranteeing fundamental rights and freedoms for all.*

Non-racial, non-sexist democracy is our equivalent of independence. It would not be inappropriate to establish a day, such as, say, December 10, on which the Republic of New South Africa is declared and which would be our Foundation or Independence Day. This could be the day on which the first non-racial, non-sexist government, elected in free and fair elections, is sworn in to office. It could also be the day when the credentials of non-racial, non-sexist representatives

One can envisage

of South Africa are formally recognised by international institutions.

Have again
The phrase transfer of power thus has in the case of South Africa to be seen as something internal rather than external. It has two different meanings which sometimes get confused.

is a kind of continuing process involving the state & the people
The first one affects the character of sovereignty and the nature of the state. It is the removal of internal colonial-type barriers, and the transfer of power from a racial minority to the people as a whole. It represents the completion of the process of decolonisation that started with the creation of the white-dominated Union of South Africa in 1910, so that for the first time territorial sovereignty and population are co-extensive in our country.

The second is the transfer of power from the National Party government to whatever government is elected to office in the new sovereignty. In popular language, this is what transfer of power means to many people. Yet the change of government is the consequence of the transfer of power, the visible, physical form, not the legal essence.

Of course
It is even theoretically possible that the transfer of power from a racial minority to the people as a whole could take place with the Nationalist Party transferring power to itself! The difference would be that in the first case, the NP would be representing a minority in terms of the Tricameral set-up, in the second, it would have won the elections on the basis of universal franchise and a common voters' roll.

The arg. of this stage is to not offer whether we still have a Mas of an ANC-led govt, but over the const framework in which the people of this country may decide what questions
It is for this very reason that we must insist that the Nationalist Party should not be player and referee at the same time. ~~In this sense~~, the departing colonial powers might have had their preferences and tried to influence the composition of post-colonial governments, but at least they were not direct contenders for power themselves.

Our historic task, going beyond any immediate political goal, is precisely to complete the transfer of power from a racial minority to the people as a whole. This is what the Freedom Charter is essentially about. We wish to give the people of South Africa as a whole the chance, in conditions of freedom, to elect the government they want.

Naturally, we hope that, as a result of our long struggle and principled positions over the years, the people will give a massive vote to the ANC. We are not claiming, however, that the ANC should enjoy any special constitutional status, as, say, did FRELIMO and SWAPO at certain stages when they were recognised as the sole and authentic representatives of their respective peoples struggling for sovereignty.

Nor are we arguing that there should be a transfer of power from a white government to a black government, or from the whites to the blacks. We wish instead completely to de-racialise government and for ~~the~~ whites to exercise their

black all

rights and assume their civic responsibilities, ~~like everybody else.~~

The electorate will decide who should be in the government. One can predict with certainty that the days of whites-only governments are over. Apart from that, no-one can foretell the outcome of elections - that is why they are held - although there is every indication that all future governments will draw on persons from all the different communities in the country. [In struggling for democracy, we fight for the principle that the government shall be accountable to the electorate, and that the party or parties that get the most votes shall have the right to form that government.

An important distinction needs to be made here. Minority rule, such as we have always had and have now, is inevitably and by its very nature oppressive. Majority rule might or might not be oppressive, that is, the majority might or might not oppress the minority. Whereas minority rule can never be adapted so as to avoid oppression, majority rule can have safeguards built in to prevent abuse of the minority. The answer is not to attack the fundamentally democratic principle of majority rule, but to ensure that there are adequate protections in the constitution against any form of oppression, whether of minorities, or majorities, or individuals or groups; *hence, the sep of powers a acct, PA, space for NSOs,*

The transfer of power from the minority to the people as a whole therefore ~~requires the adoption~~ of a constitution which simultaneously recognises the principles of non-racialism, universal suffrage, majority rule and safeguards against any form of privilege or any form of oppression.

In this context, IG has a meaning that corresponds in some way to the classical forms of IG in the decolonisation process, but also has important particularities of its own. What it shares with the classic IGs is:

it is intended to bridge the gap between one arrangement of sovereignty and another;

it is designed to prepare the people of the country concerned and of the world at large for a change in the nature of the state and of its administration;

it has the goal of ~~preparing~~ *amblyphete* people hitherto excluded from office, ~~for~~ the tasks and responsibilities of government;

it sets out to establish a form of joint responsibility for government in the intervening period so as to reduce unnecessary conflict and encourage as smooth a transition as possible.

The differences, however, are also important, all of them flowing from the fact that the minority which exercises colonial-type power now is not going to withdraw, but, on the contrary, will remain as an active part of political and social life. Thus,