

THE PREPARATORY PHASE AS AGREED TO IN WORKING GROUP 3

1. Working group 3 reached agreement that there should be two stages in the transition to democracy. The first, a preparatory phase during which steps would be taken to "level the playing fields" and achieve "a climate favourable to free political participation and the holding of free and fair elections."¹ The second, a phase of interim government, which would come into existence with the election of a constitution making body with sovereign powers.² It was contemplated that the elected constitution making body would replace the tri-cameral parliament, appoint an interim executive and interim head of state, and exercise legislative powers while the terms of the new constitution were being settled. Interim government would commence with the election of the constitution making body and would continue until the constitution making body had completed its work and a new constitution had been adopted.³ The details of the interim government and the way it would function were not discussed in working group 3, partly because there was no time to do so (agreement on the preparatory phase was only reached a few days before Codesa 2 was to be held), and partly because these issues were dependent upon discussions in working group 2 which had to consider the structure and powers of the constitution making body. It was contemplated that joint meetings would be held between working groups 2 and 3 to resolve this issue, but that stage was not reached, and was overtaken by the breakdown in the negotiations.

2. During the debate in working group 3 the elected constitution making body was referred to by the Patriotic Front as a

¹ Para. 10 of WG3's report.

² Para. 9 of WG3's report.

³ Para. 9 of WG3's report.

constituent assembly, and by the National Party and its allies as an interim parliament. The difference in terminology in fact reflects the differences that led to the breakdown in negotiations at Codesa 2. The Patriotic Front saw the primary task of the constituent assembly as being the adoption of a new constitution. It contemplated that this task would be completed in a comparatively short space of time and that interim government would be of brief duration. The legislative structures necessary to provide the framework for the interim government should therefore be no more than was necessary for this purpose. The National Party contemplated that there would be an indefinite period of interim government and that a detailed interim constitution should be adopted by Codesa which would make provision for regional government, a consociational legislature and executive, and an interim bill of rights. It resisted all attempts to discuss time frames in working group 3, saying that it was premature to do so. The issue concerning the extent of the majorities necessary to adopt the new constitution was related to these differences. The insistence by the National Party on high majorities for the adoption of a new constitution, and its refusal to accept the principle of a deadlock breaking mechanism if such majorities could not be achieved, were clearly motivated by the goal of securing an "interim constitution", consistent with its own constitutional proposals, which would continue for an indefinite period and would require its consent in order to be changed.

3. The agreement reached at working group 3 concerning the preparatory phase was that there should be a transitional executive structure, which would function in conjunction with existing executive and legislative structures "to prepare for and ... facilitate the transition to a democratic constitution

to which Codesa is committed." ⁴ The agreement was specifically made dependent upon "agreement being reached in respect of the second stage of the transition, including an interim constitution, and general constitutional principles." ⁵

As agreement was not reached on these issues there is in fact no agreement, even at working group level, in regard to the preparatory phase. Working group agreements were in any event subject to debate at and confirmation by Codesa 2.

4. This is important because the transitional executive structure proposed by working group 3 has validity only for a brief preparatory phase in a scheme of transition that involves an elected constituent assembly with sovereign powers. Because a brief preparatory phase is contemplated, there is no need for elaborate structures that would have to be changed as soon as an elected interim government assumes power. If there is to be a different form of transition, different structures will be needed.

5. The agreements reached in working group 3 would curtail the existing powers of the state president and his cabinet, but would not involve a transfer of power from them to a new structure. The transitional executive structure is therefore not, and should not be seen as, an interim government. In fact during the negotiations the National Party negotiators consistently referred to the first phase of the transition as a preparatory phase because they wanted to maintain the position that the existing governments/ administrations would retain executive and legislative powers until an interim government had been elected. Since the phrase interim government has implications both internally and

⁴ Para. 10 of WG3's report.

⁵ Para 12 of WG3's report.

internationally, the distinction between the preparatory phase and the phase of interim government should be maintained. It is important, therefore, that the preparatory phase should be referred to as such, and not as interim government, or as the first stage of interim government.

6. The agreement in working group 3 concerning the establishment of a transitional executive structure, called for the appointment of a transitional executive council (TEC) which would be an overarching body vested with a number of functions relating to the transition, and would have various sub-councils charged with specific functions. A distinction was drawn between certain defined functions of government, which were seen as having a direct impact on the levelling of the playing fields, and the creation of a climate in which free and fair elections could be held, and other functions of government. In regard to the former, it was agreed that decisions should be taken jointly by the governments/administrations concerned and the TEC; in regard to the latter, the governments/administrations would retain their powers, but could be required by the TEC to refrain from taking particular action if such action could have an adverse impact on the "climate" or the "levelling of the playing fields."
7. Responsibility for the running of the elections was to be vested in an Independent Election Commission. The powers of the Commission were to be determined by Codesa, and would include the power to resolve deadlocks which might arise in the TEC. This was important because it was agreed that decisions would be taken in the TEC by an 80 per cent majority. Bearing in mind the composition of Codesa there was clearly a need for a deadlock breaking mechanism.
8. The areas of defined responsibility of the TEC and its sub-

councils were to be regional and local government, aspects of government finance, law and order, stability and security, defence and foreign affairs, and possibly the provision of services to the Independent Election Commission in connection with the running of the elections.

9. There was also to be an Independent Media Commission. The details of the functioning of this commission were not determined, because they were thought to depend upon decisions that would be taken in working group 1. In the result, working group 1 in its report referred this issue back to working group 3.
10. The details of the way the TEC and its sub-councils would function and the powers that they would have appear from the report of working group 3. What may be important to note in regard to these provisions is that:

- 10.1 Existing government/administrative and executive structures will remain in place during the preparatory phase. This means that the tri-cameral parliament, the TBVC legislative structures, and the homeland parliaments, and the executive structures answerable to them, will retain their powers, but in certain respects these will be subject to the powers of the TEC.⁶

- 10.2 The TEC will have only limited powers. Importantly, they will include access to information and government/administration records, participation in the taking of executive decisions in the defined areas of government/administration, and a say over legislative and executive

⁶ Para. 10 of WG3's report.

policies applicable in such areas.⁷ Because of the 80 per cent requirement for decisions, there will be greater power to block executive action that is seen as objectionable, than to require particular legislative or executive action to be taken, or to prevent particular legislation from being passed.

10.3 The TEC will also have access to information and records of other participants in the TEC in so far as they relate to action or contemplated action that may impact upon the levelling of the playing fields or the climate.⁸ The 80 per cent requirement will apply to decisions to ask for such information.

10.4 The Independent Election Commission is a key structure. Not only will it have control over the running of the elections, but because of its deadlock breaking powers it will be in a position to influence the taking and implementation of executive action, and political action by any of the parties in the TEC, during the preparatory phase. It is important that its powers should include the power to determine the date for the holding of the elections.

10.5 The TEC will have no control over political or executive action taken by governments, administrations or political formations who decide not to participate in the TEC. Some form of control may be capable of being exercised through the Independent Election Commission over homeland administrations that stay out of the TEC, but this will not be possible in the case of any of the TBVC states

⁷ Paras. 20,24,26,28 and 29 of WG3's report.

⁸ Para. 25 of WG3's report.

that refuse to participate and to enact the legislation necessary to empower the TEC in their areas of legislative competence. This is a weakness in the structure which may have to be addressed if the negotiations are continued on the basis of the working group agreements.

- 10.6 The TEC was to be vested by legislation agreed to by Codesa with the powers necessary to enable it to carry out its functions.⁹ If Codesa is to be reconstituted, or replaced by another negotiating forum, these provisions will have to be reformulated.
- 10.7 Agreement was not reached on the functions of the Independent Media Commission, the mandate of the sub-council on law and order, stability and security, and the mandate of the sub-council on defence (both mandates being subject to decisions in working group 1 that were not taken), or on the functions of the sub-council on foreign affairs.
- 10.8 The precise relationship between the TEC and the various legislatures and executives, and the precise powers of the two independent commissions, have to be spelt out in legislation to be agreed upon.
- 10.9 Time frames have to be determined.

A.C.

23.8.92.2

⁹ Para. 19 Of WG3's report.