

MEMORANDUM

To: ANC Negotiations Team  
From: Heinz Klug  
Date: March 14, 1992  
Re: Electoral Commission: summary of issues

1 How may the Commission be structured?

1.1 The structure of the commission will be determined by the functions it is expected to play. If it is seen as having a merely supervisory or observer role then it may be limited to either a few independent figures eg. judges, or to representatives of the various parties registered in the election.

1.1.1 The weakness of this approach lies in the dependence of the Commission on the submission of complaints and its lack of physical presence at all stages of the electoral process.

1.1.2 In the case of a Commission made up of party representatives the problem is exacerbated by the conflicts which will be inherent in it. A professional Commission made up of local individuals may however be unrealistic as most individuals, particularly those holding state office -- such as judges -- will have political preferences.

1.2 An alternative structure would envisage a Commission with representatives at every level of the electoral process, including a large staff with the capacity to run the electoral process and to engage in non-partisan electoral education campaigns. Commission representatives would be in charge of every polling station and would organise and run the electoral process.

1.2.1 One of the advantages of this approach is that as a non-government controlled body it may receive large amounts of foreign aid to ensure a wide-spread electoral education programme. Bodies such as the Washington based National Democratic Institute would no doubt be willing to set up education programmes and other forms of technical assistance to ensure a fair electoral process.

1.2.2 A second advantage would be the ability under this structure to include both professional electoral officers and party representatives. The governing counsel of the Electoral Commission could, for example, be composed of representatives of all participating parties and it could select the professional staff who would then be responsible for the functions of the electoral commission. While ultimate political control would be in the hands of the participating parties, the professional staff would be in control of the functioning and decision making of the commission.

1.2.2.1 An additional benefit in such an arrangement would be the ability to include non-partisan foreign individuals in the professional staff, possibly foreign judges for the highest decision making bodies of the commission and



foreign police investigators for the investigatory arm which would have to investigate complaints of violations of the electoral code.

2. What would be the commission's responsibilities?

2.1 Assuming a separate media commission to deal with the mass media, the electoral commissions role would be limited to the electoral process. In general there are two broad roles that may be adopted. First, the pure observer role with the power to declare whether the elections had been fairly conducted. This would include the necessity of declaring on each stage of the process so as to ensure that undue political pressure does not induce a sudden change of opinion in the last stages of the process, such as when the count indicates that the "wrong" party has won.

2.2 The second and more proactive role conforms with the option of a professionally structured Commission and envisages the commission having a range of functions including to:

- \* organise and conduct elections;
- \* to establish the election calendar;
- \* to serve ( in the case of the highest body of the Commission) as the final arbiter of resolutions enacted by subordinate electoral bodies and of the claims and disputes presented by political parties;
- \* to enact pertinent measures for the development of full guarantees within the electoral processes;
- \* to make the final check of the votes cast in the elections; and,
- \* to require that the existing state structures provide secure conditions for the political parties participating in the elections.

2.2.1 A choice needs to be made here as to whether the Commission is in fact the final arbiter of electoral complaints or whether there may be an appeal to the courts. Appeals may be on either substantive grounds or on the basis of review.

2.2.1.1 Although the temptation may be to limit appeals to review proceedings, this may be a false hope as the courts in reviewing the decision making process are likely to engage in a substantive analysis of the issues. Allowing a general power of appeal to the courts, on either substantive or review grounds would in my opinion work to enhance the credibility of the Commission.

3. Who will fund the activities of the Commission?

3.1 There is a substantive difference in cost between the two suggested models. A purely supervisory Commission would cost much less than a fully proactive body, however the differences in function and effectiveness would in my opinion outweigh the cost differences. In the case of a permanent proactive commission cost may be reduced by retaining a fairly small permanent staff which would be dramatically increased during an election period.



3.1.1 The Commission should receive its basic operational costs as a direct allocation from the legislature and should have the power to control its own finances within the bounds of a regular auditing process.

3.1.1.1 One benefit of its autonomous, non-partisan status is that an Electoral Commission would be in a good position to supplement its budget by attracting foreign funding towards educational and other preparatory activities.

4. What limitations would an Electoral Commission have?

4.1 It must be clearly noted that an Electoral Commission can only provide the conditions to ensure a "fair" election but is in no position to guarantee a "free" election.

4.1.1 This distinction is based on the difference between the actual election process -- the producing and marking of ballots, the counting process and the verification of these procedures -- and the conditions that need to be established to ensure a free election process ie. the conditions creating a free political climate.

4.1.1.1 The activities of death squads, the suppression of alternative information or views and political intolerance in general may severely restrict an election process by limiting the options that may be put before the electorate. The lack of a free political climate would not however prevent the staging of a fair election in that people would be able to freely express their choice between the available candidates and be ensured that there is a correct count of the ballots. In Guatemala in 1990 the election process was transparently fair however candidates standing for election were limited to a personality contest as any reference to the issues of direct concern to the electorate -- including human rights abuses and land reform -- resulted in rather swift retribution in the form of death squad killings of candidates who made such references. The result is a "fair" but not "free" election.

4.2 An Electoral Commission performs a very important role in relation to the inevitable host of foreign observers in that it provides a non-partisan focus for the observer missions and is able to facilitate their observing function. The danger however is that electoral observers focus on the procedural aspects of the process and as a result the electoral commission with its emphasis on fair counting procedures, participation of party representatives at polling stations, security of ballot boxes etc. gives an appearance of a democratic process while concealing the lack of a genuinely free political climate.