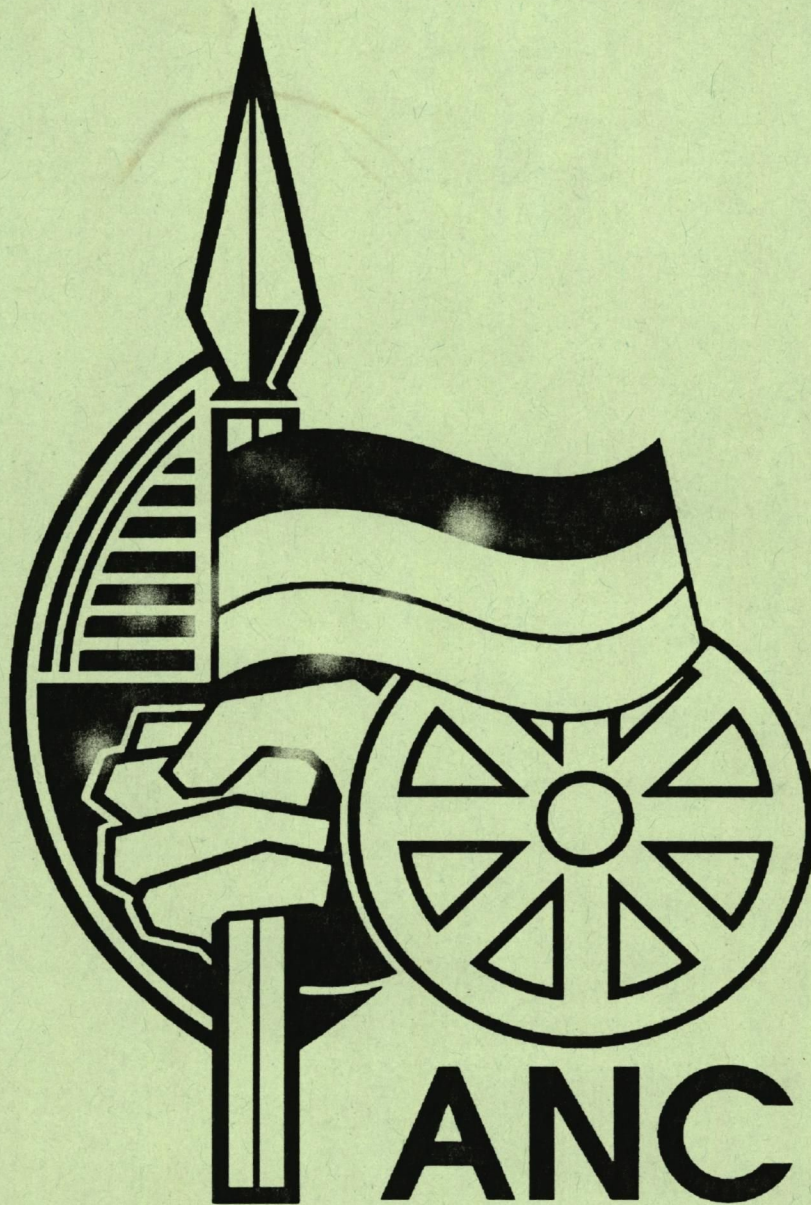


NEGOTIATIONS COMMISSION



**National Negotiations Consultative Forum
Documentation 15 May, 1993**

National Negotiations Consultative Forum
15 May, 1993
Documentation

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NATIONAL NEGOTIATIONS CONSULTATIVE FORUM

15 MAY 1993

AGENDA

1. (10H00 - 10H15) Chairpersons Welcome (Z o l a Skweyiya)
2. (10H15 - 10H30) Overview (Secretary General)
3. (10H30 - 13H00) Report on Multi-Party Negotiations - (Joe Slovo and Mac Maharaj)
4. (14H00 - 15H00) Security Matters (Siphiwe Nyanda and Fink Hayson)
5. (15H00 - 16H00) Constitutional Matters - (Valli Moosa, D. Omar and A. Chaskelson)
6. (16H00 - 16H15) Closure

THE NEGOTIATING FORUM. MEETING ON 1 APRIL 1993

RESOLUTION ON VIOLENCE

We, the participants at the Negotiating Forum meeting at the World Trade Centre on 1 And 2 April 1993:

- | | | |
|------------------|---|---|
| NOTING | * | With revulsion the unacceptable escalation of violence that is engulfing our country; |
| OUTRAGED | * | At the killings particularly of women and children: |
| CONCERNED | * | About the damage violence is inflicting on all aspects of the economy, on relations among people and organisations and the consequent deepening of divisions |
| AWARE | * | That violence poses a threat to the negotiating process which if it continues could wreck the process and plunge our country into an era of unprecedented conflict. |

DO HEREBY UNEQUIVOCALLY

- | | | |
|-------------------------|---|--|
| CONDEMN | * | Without reservation the wanton killing and maiming of the citizens of our country; |
| EXPRESS | * | Our sympathy and condolences to all those who are suffering in consequence; |
| COMMIT OURSELVES | * | To effective joint action by all of us leading to the eradication of violence and to the attainment of peace in our country as soon as possible; |
| | * | To peaceful negotiations as the only way to resolve differences. |

AND THEREFORE RESOLVE TO

1. Identify those issues that cause violence and which threaten the negotiating process and the undermining of the effective implementation of the National Peace Accord
2. Mandate the Negotiating Council to establish what urgent steps and mechanisms are needed to resolve the above issues as a matter of national priority. The Negotiating Council shall report to the next meeting of the Negotiating Forum.

DRAFT MOTION ON VIOLENCE

We, the participants of the Negotiating Council meeting at the World Trade Centre on 26 April 1993:

NOTING

- * The Resolution on Violence taken by the Negotiating Forum on 1 April 1993;
- * The tragic events of the past weeks and the escalation of violence in our country;
- * The detrimental effect this can have on the negotiating process and the peaceful settlement of the political problems of our country.

NOTING FURTHER

- * That many leaders and political formations have expressed themselves increasingly and with greater forthrightness and urgency on the need to curb violence;
- * That there is a growing perception amongst the public of the need for a concerted movement for peace.

HEREBY RESOLVE

- * To re-commit ourselves personally and collectively to peace: and undertake effective action, jointly and severally, leading to the eradication of violence and the attainment of peace;
- * To express our sincerest condolences to the families, friends and colleagues of all South Africans who have recently died, irrespective of race, political affiliations or religious beliefs;
- * To instil a sense of all pervasive urgency in the negotiating process;
- * To call on our followers and members to desist from any form of violence or intimidation and to give the negotiating a real chance to bring our country through a peaceful transition to a non-racial and democratic dispensation;
- * To do everything in our power to strengthen the National Peace Accord and its structures.

The Negotiating Council, meeting at the World Trade Centre, Johannesburg on 26 April 1993, is:

- * Outraged and saddened by the cruel assassination of a great son of South Africa, Chris Hani, which has deepened the political crisis in our country;
- * Share in the sorrow, pain and deep loss of his family and extend our heartfelt condolences to Mr Hani's wife, children and family;
- * Believe that Chris Hani's untimely death deprived South Africa of the incisive and constructive contribution of a person so deeply committed to peace, tolerance and above all, to a negotiated transition to a democratic South Africa which he so ably demonstrated in the negotiation and peace process;
- * Strongly condemn this and all other forms of violence, which only serve to deepen tensions and threaten to disrupt the negotiation process to which both Mr Hani and ourselves are fully committed.
- * Participants of the Negotiating Council unequivocally commit ourselves to:
 - to continue the negotiation process effectively and efficiently so that all our people live in peace and harmony in a democratic South Africa as soon as possible;
 - to resolve political differences peacefully and through the negotiation process and distance ourselves from all activities which encourage violence against individuals and people.
- * And resolve to:
 - Condemn all forms of violence and assassinations of political leaders
 - Communicate our sentiments to the Hani family;
 - Do everything in our ability to realise peace and justice in a democratic South Africa.

SECOND DRAFT

DECLARATION OF INTENT ON THE NEGOTIATING PROCESS

This meeting of the Negotiating Council, held on 30 April 1993 at the World Trade Centre

1. Noting That There Is An Urgent Need To:

- 1.1 Inspire confidence in the negotiating process and our ability to resolve our problems peacefully;
- 1.2 Offer a clear vision of the major milestones in the negotiating and transition process;
- 1.3 Create conditions which eliminate violence in South Africa;

2. And recognising wide acceptance of the need for democratic elections in South Africa;

3. Therefore Commit Ourselves:

- 3.1 To reach agreements on binding constitutional principles, the constitutional framework and the constitution-making process in terms of which elections will be held;
- 3.2 To provide for an adequate time-frame for the implementation of decisions on these matters and procedures for elections; and
- 3.3 To ensure that the negotiating process moves forward sufficiently over the next four weeks at which stage to set the exact date for an election that should take place not later than the end of April 1994, subject to 3.1 and 3.2.

MEMORANDUM OF UNDERSTANDING AMONG ALL PARTICIPANTS IN THE
MULTI-PARTY PROCESS RELATING TO PROPOSALS ARISING FROM THE
MULTI-PARTY FORUM RESOLUTION ON THE TRANSITION PROCESS.

1. The Transition 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 transition 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; 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 Transition 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

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.

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.

SECOND REPORT OF THE PLANNING COMMITTEE TO THE NEGOTIATING COUNCIL

1. Introduction

- 1.1 The Resolution on the Transition Process adopted by the Negotiating Forum on 1 April 1993 constitutes the mandate for the course of action being pursued in the Negotiating Council and the Planning Committee.
- 1.2 On 26 April 1993 the Consolidated Document on the CODESA Reports, together with proposals on technical committees relating to a number of issues arising there from, were tabled at the meeting of the Negotiating Council. The focus of those proposals was the preparation for free and fair elections and the creation of a climate for free political activity.
- 1.3 The Sub-Committee report noted that two outstanding issues arising from the CODESA reports namely, the Constitution Making Body/Process and the Transitional/Interim Constitution as well as other constitutional issues listed in the Resolution on the Transition Process of the Negotiating Forum, would be dealt with in a subsequent report.
- 1.4 The Negotiating Council on 26 April 1993, decided that the Sub-Committee submit its report on the outstanding constitutional issues to the Planning Committee on 29 April 1993, in order to ensure that the report is presented at the meeting of the Negotiating Council scheduled for 30 April 1993.
- 1.5 Accompanying the proposals in this Report and the first Report of the Sub-Committee is a draft explanatory memorandum to be accepted by all participants, which underpins these proposals.

2. The Negotiating Forum Resolution

- 2.1 On 1 April 1993 the Negotiating Forum adopted a Resolution on the Transition Process instructing:

"... the Negotiating Council to consider and report on all matters arising from the Consolidated Report, including the following and other constitutional issues:

- * Form of State and Constitutional Principles
- * Constitution Making Body/ Constituent Assembly
- * Transitional/Interim Constitution

- * Transitional Regional/Local Government
- * Fundamental Human Rights during the Transition
- * Transitional Executive Council, its Sub-Councils, the Independent Elections Committee and the Independent Media Committee
- * Future of the TBVC states
- * Self-determination"

2.2 It should be noted that of the above list of constitutional matters, the question of the Transitional Executive Council, its Sub-Councils, the Independent Elections Committee and the Independent Media Committee have already been dealt with in the first set of proposals which were tabled at the Negotiating Council on 26 April 1993.

2.3 The current proposals therefore address the remaining constitutional matters listed in the Resolution of the Negotiating Forum.

3. Approach to the Outstanding Constitutional Matters

3.1 All these constitutional issues have a direct bearing on two specific aspects:

- * Binding Constitutional Principles
- * Constitution Making Process

3.2 The outstanding list of constitutional matters are very much interrelated:

3.2.1 Form of State can be understood in its total dimension. Descriptions of the particular Form of State that might be used in this case, may include *inter alia*, socialist state, democratic republic, Westminster parliamentary government, constitutional state, dictatorship, democracy, union or federation. The term Form of State may also be used to focus on one particular attribute of the overall constitutional form, for example the relationship between central and regional government. Whatever the term entails, the rest of the outstanding matters listed in the Resolution (Transitional Regional/Local Government; Fundamental Human Rights during the Transition; The Future of the TBVC states; and Self-Determination) are all interrelated with the Form of State, whether as determined in a final constitution or in a transitional, an interim or a next constitution. It is accordingly suggested that it may prove unproductive, or even futile, to discuss any one of these items in complete isolation. It is suggested that whenever anyone of these listed matters is the

subject of discussion in the Negotiating Council, participants should be allowed to simultaneously also deal with any or all of the others.

3.2.2

Many appellations are used to describe any particular state or aspect of a particular Form of State. Examples are social democracy, liberal democracy, parliamentary government, federation, union, unitary state, constitutional state and multi-party government. What we seek is a consensus agreement on the political and constitutional arrangements defining the relationship between the State and its constituents. The possibility of reaching understanding and accommodating what at first sight appears to be conflicting aspirations, is enhanced if the content of particular issues and aspects are addressed.

3.2.3

The Consolidated Document on CODESA Reports contains several sections on constitutional matters under the headings: "Constitutional Making Body/Process" and "Transitional/ Interim Constitution". These sections of the report(see Annexures A and B hereof), as well as extracts relating to the Future of the TBVC States (see Annexure C hereof), are attached hereto as they may be useful for focusing discussion on the constitutional matters listed in the Resolution. To cite a few examples:

3.2.3.1

Some of the principles listed stipulate that South Africa shall be a multi-party democracy with regular elections on the basis of universal suffrage on a common voters roll; that there shall be separation of powers between the legislature, executive and judiciary; and that the constitution will be the supreme law.

3.2.3.2

Another principle listed deals with the structuring of government at national, regional and local levels.

3.2.3.3

As points of reference the use of the Consolidated Report will enable each of the principles to be looked at, refined and if necessary further elaborated so as to form the basis for the possible accommodation between participants in the Multi-Party talks.

4. The Process Towards Reaching agreement

4.1 It is recommended that technical committees charged with formulating documentation in a systematic fashion under the direction of the Negotiating Council will facilitate discussion at the level of the Negotiating Council and enable participants to make structured inputs aimed at reaching accommodation.

4.2 In spite of the interrelationship of the constitutional matters listed we would suggest two technical committees:

4.2.1 A technical committee to deal with the remaining constitutional items (excluding the question of fundamental rights which is dealt with in 4.2.2. below.) as a package (Form of State and Constitutional Principles; Constitutional Making- Body/Constituent Assembly; Transitional/Interim Constitution; Transitional Regional/Local Government; Future of the TBVC states and Self Determination). This technical committee would (in no specific process order):

- * Take into account discussions in the Negotiating Council on these subjects;
- * Receive written inputs from participants; and
- * From time to time and under the direction of the Negotiating Council prepare documentation on which discussions can proceed.

4.2.2 A technical committee on the question of fundamental human rights during the transition. This technical committee would (in no specific process order):

- * Take note of discussions on this subject in the Negotiating Council; and
- * Receive written inputs on fundamental rights during the transition from any participating party;
- * From time to time and under the direction of the Negotiating Council prepare documentation on which discussions can proceed.

- 4.3 Documentation produced by each of these technical committees would be discussed at the Negotiating Council and sent back to the technical committee for further development. This process would be repeated until agreement is reached on a final document.

*Proposals to the
Negotiating Council on the
appointment of
Technical Sub-Committees
and their Terms of Reference on
certain matters arising from
The Consolidated Document*

*Submitted by the Planning Committee on
26 April 1993*

PROPOSAL ONE : THE INDEPENDENT ELECTION COMMISSION

1. We propose that the Planning Committee discuss the following and approve of the following issues to constitute the Terms of Reference of a Technical Sub-Committee charged with the task of drafting a legislative framework for the Independent Election Commission. Such a framework will constitute the basis for discussion at the Negotiating Council/Forum:

2. Terms of Reference of the Technical Sub-Committee:

2.1 Aims

Proposals for the establishment of an Independent Election Commission (IEC), charged with the responsibility of conducting the elections, monitoring the election process and the elections, and to act as adjudicator and arbitrator on matters related thereto. These proposals are for the national elections. Where regional elections are concerned new formulations will have to be considered.

2.2 The Independent Election Commission

2.2.1 The IEC shall be appointed by the State President upon the recommendation of the Multi-Party Forum.

2.2.2 The IEC shall consist of 7-11 members.

2.2.3 The Chairperson and Deputy Chairperson/s of the IEC shall be appointed by the State President on the recommendation of the Multi-Party Forum.

2.2.4 In order to enable the IEC to act impartially and in a non-partisan way, the following conditions and criteria shall apply:

2.2.4.1 There are three options with regard to membership of the IEC:

- (a) The IEC will consist of respected and suitably qualified persons, drawn from a broad cross section of the population, all of whom shall be eligible voters;
- (b) A specified number of the IEC will be assigned to persons seconded from international organisations. These shall enjoy equal status with those who are drawn from eligible voters;
- (c) The IEC shall have a specified number of seats

assigned to persons seconded from the international community and that such persons shall function in the IEC in a known voting capacity.

2.2.4.2 Members of the IEC shall be appointed in their individual capacities and not as representatives of any political parties, organisations, administrations, governments and/or interest groups.

2.2.4.3 Appointees shall divest themselves of any political office while serving on the IEC.

2.2.4.4 No member of the IEC shall be an office-bearer or official of any political party/organisation or candidate in the election.

2.2.4.5 Members of the IEC shall not hold any other office which may give rise to a conflict of interest while serving on the IEC.

2.2.5 Vacancies in the IEC: Vacancies shall be filled by the State President, on the recommendation of the Multi-Party Forum (MPF) or Transitional Executive Council (TEC) whichever is appropriate at the time.

2.3 **Functioning of the IEC**

2.3.1 Members of the IEC shall serve on a full-time basis for the duration of the term of the IEC.

2.3.2 All decisions of the Commission shall be taken by a means of a vote and a simple majority shall be sufficient to bind the Commission.

2.3.3 In the event of a deadlock, the Chairperson of the Commission shall have a casting vote.

2.4 **Status of the IEC**

2.4.1 The IEC shall be independent of all governmental organisations.

2.4.2 The composition, powers, and functions of the IEC shall be enacted in legislation to be agreed to by the MPF.

2.4.3 The IEC shall be independent of the TEC.

2.4.4 In the event that the TEC decides to establish a Sub-council on Elections, such appointment will not interfere in any way with the

independence or powers of the IEC.

- 2.4.5 The sole obligation of the IEC to any other organ of government shall be to supply written reports to the TEC, on its decision in respect of the organisation and conduct of the elections.

2.5 Accountability and Finance

- 2.5.1 The IEC shall liaise with the TEC and the Independent Media Commission (IMC) on matters pertaining to the work of these bodies.
- 2.5.2 The IEC shall, from time to time, determine a budget to meet the reasonable costs of carrying out its powers, duties and functions in accordance with the enabling legislation.
- 2.5.3 The budget shall be presented to the TEC for approval and action.
- 2.5.4 The South African Government shall provide the funds necessary to cover the budget of the IEC.

2.6 Powers, duties and functions of the IEC

- 2.6.1 The IEC shall have the sole and ultimate responsibility for the organisation, conduct and supervision of the election.
- 2.6.2 In announcing the results of the election, the IEC shall have the responsibility of certifying whether, and to what extent, the elections have been free and fair.
- 2.6.3 In particular the IEC shall:

2.6.3.1 Administer the conduct of the elections.

2.6.3.2 Monitor the election process and the elections in order to: (a) ensure that the process and the elections are free and fair, and (b) enable the IEC to eventually certify the results of the elections.

In the execution of this function, the IEC may make use of, and act in conjunction with, local and international observers.

2.6.3.3 Act as an adjudicator and arbitrator on matters related to the election process and the elections referred to it by political parties, organisations, the public at large and/or the TEC.

In the execution of this function, the IEC may involve

international participation.

2.7 In order to discharge effectively and impartially the functions outlined in paragraph 6 above, the IEC shall supervise and establish separate and independent structures to execute each of the three tasks contained in paragraphs 6.3.1, 6.3.2 and 6.3.3 above. Each of these structures shall be accountable to, and coordinated by, the IEC. Provision can be made for the UN, EEC, Commonwealth and OAU to second four suitably qualified persons to serve in each of these three structures, depending on the option chosen under 2.4.1 above.

2.8 Provision shall be made for the promulgation of rules and regulations necessary for the discharge of the functions of the IEC.

2.9 **Eligibility of voters**

All South African citizens 18 (eighteen) years and above. This will include citizens of the TBVC states. The MPF/TEC shall look into whether changes are necessary to citizenship laws.

2.10 **Registration of political parties/organisations for purposes of elections**

All parties intending to participate in the elections shall be required to register with the IEC.

NB. There is a need for the MPF to agree upon measures to prevent abuse.

2.11 **Administering the elections**

The IEC shall be empowered, inter alia, to:

2.11.1 Make provisions for the identification of eligible voters.

2.11.2 Formulate a Code of Conduct for potential parties and to ensure that each party commits itself to peaceful electioneering and solemnly and publicly commits itself to such a Code of Conduct. Such a Code of Conduct should include suitable penalties for violations of the Code.

2.11.3 Receive and regulate the registration of parties that wish to participate in the elections.

2.11.4 Determine and supervise the campaign funds and election expenditure.

2.11.5 Promulgate laws and regulations for political advertising.

2.11.6 Educate the public about the electoral process through voter

education programs using radio, television and other means.

2.11.7 Set up an appropriate machinery throughout the country and appoint appropriate staff for the purposes of fulfilling its functions.

2.11.8 Make provision for and ensure that no voter votes more than once, that ballot boxes are properly sealed, that counting of votes is conducted in a manner that ensures accuracy and reliability.

2.12 **Monitoring the election process, in order to ensure that the elections are free and fair**

The IEC shall be empowered, inter alia, to:

2.12.1 Set up the necessary structures, countrywide, to observe, monitor and verify the entire process of the elections, before, during and after polling.

2.12.2 Make suitable provision for the international community organisation to participate in this process.

2.12.3 Take steps to prevent any intimidation.

2.12.4 The IEC shall be empowered to take steps to prevent corrupt and illegal practices.

2.13 **Adjudication and arbitration**

The IEC shall be empowered to, inter alia, to:

2.13.1 Serve as a final arbiter of any claims or disputes submitted by persons, political parties, organisations, administrations, governments and the TEC.

2.13.2 Establish appropriate machinery throughout the country for the speedy investigation of complaints concerning electoral irregularities, refusal of access to venues or meetings, and access to voters, intimidation and breaches of a Code of Conduct for political parties.

2.14 **General**

The IEC shall be empowered to make such other arrangements as may be necessary for the proper exercise of its functions.

3. The Technical Sub-Committee should be composed of three to four persons suitably qualified to translate the above mandate into a legislative framework.

PROPOSAL TWO : STATE CONTROLLED/STATUTORILY INSTITUTED MEDIA

1. Paragraph 2 below outlines the Terms of Reference for two institutions, viz the Independent Telecommunications Authority and the Independent Media Commission. Both are inter-related and we propose that a single Technical Sub-Committee be appointed to use the Terms of Reference as a point of departure for drafting the necessary legislative framework.

2. Terms of Reference:

- 2.1 Two mechanisms are involved in this regard:

- 2.1.1 Independent Telecommunications Authority

- 2.1.2 Independent Media Commission

- 2.2 The Independent Telecommunications Authority (ITA)

- 2.2.1 Aim

The creation and establishment of an Independent, neutral body to regulate the telecommunications sector, whose principal tasks are:

- 2.2.1.1 The regulation of the utilization of the electromagnetic spectrum, including the allocation of licenses and the determining of license conditions according to an agreed set of standards.

- 2.2.1.2 The appointment of a suitable structure to monitor the proper exercise of license conditions.

- 2.2.2 The report of Working Group 1 on this matter is sufficiently detailed to enable a technical sub-committee to prepare a draft legislative framework.

- 2.2.3 From the point of view of structure we propose the following:

- 2.2.3.1 An executive type of structure made up of respected and suitably qualified persons drawn from the broad cross-section of the population and representatives of the technical committees.

- 2.2.3.2 Technical committees dealing with:

- * Electronic media

* Telecommunications

2.2.4 The ITA and IMC as well as boards of broadcasters will operate in accordance with the following guidelines:

2.2.4.1 An Act of Parliament which sets out broad principles.

2.2.4.2 Code(s) of Conduct broadly set out in the Multi-Party Negotiations and finalized by the ITA and the IMC themselves.

2.3 The Independent Media Commission (IMC)

2.3.1 **Aim**

The aim of an IMC is the levelling of the media playing fields in the period leading up to the elections, in respect of:

2.3.1.1 The monitoring of the electronic media, to ensure the impartiality, fairness and compliance with licensing conditions and fair access to such media.

2.3.1.2 The monitoring of state controlled/statutorily controlled media, including those in the TBVC states, to ensure their neutrality and impartiality.

2.3.2 **Composition**

2.3.2.1 The IMC shall consist of 7 - 11 members, appointed by the State President in consultation with the Multi-Party Forum (MPF)/Transitional Executive Council (TEC), whichever is appropriate at the time.

2.3.2.2 The MPF/TEC shall decide on the mechanisms for the appointment of the IMC, including public nominations, by political parties/organisations and interest groups, as well as a representative and transparent process.

2.3.2.3 **Criteria for appointment of the IMC**

2.3.2.3.1 Appointees shall be South Africans of merit and high standing.

2.3.2.3.2 They shall perform their duties in the public interest.

2.3.2.3.3 Appointees shall divest themselves of any political office while serving on the

IMC.

- 2.3.2.3.4 Appointees shall not be office-bearers of any political party/organisation or have a vested interest in the media industry.
- 2.3.2.3.5 The IMC shall collectively reflect the cross-section of the South African population.
- 2.3.2.3.6 The IMC shall have within its ranks individuals with the necessary legal expertise.

2.3.3 A Member of the IMC

- 2.3.3.1 Shall hold office for such a term as designated for the IMC.
- 2.3.3.2 May vacate his/her office for reasons pertaining to the criteria mentioned in 3.2 above and/or accepted by the TEC.
- 2.3.3.3 May, in the case of 3.3.2 above, be replaced, in accordance with the procedure for the nomination of the IMC in the first place.

2.3.4 Chairperson

The Chairperson of the IMC, shall be appointed by the State President in consultation with the MPF/TEC, whichever is appropriate at the time.

2.3.5 Powers, functions and duties

- 2.3.5.1 In order to attain the objective set out in paragraph 3.1 above, the IMC shall monitor:
 - 2.3.5.1.1 The programme content of the electronic media for breaches of licensing conditions and the provisions of any Code of Conduct. In this regard, it shall act in cooperation with any similar structure set up for the regulation of the telecommunication sector.
 - 2.3.5.1.2 Governmental media, to ensure that they do not favour or prejudice any political

party/organisation.

2.3.5.2 The IMC shall serve as adjudicator for the hearing of complaints against inaccuracies or partiality, or the denial of fair access on the part of the electronic media, and shall have the power to order the rectification of any offensive conduct.

2.3.5.3 The IMC shall oversee the transformation of broadcasting, including the integration of the TBVC broadcasters into the new dispensation, and resolve any disputes that may arise, for instance: between the ITA and Board/s of broadcasters.

2.3.5.4 The IMC shall execute its functions in a manner which ensures the necessary effectiveness. It may:

2.3.5.4.1 Consult any person for the purposes of obtaining expert advice on any matter; and

2.3.5.4.2 Appoint sub-committees to perform such functions and duties as it may determine, from time to time.

2.3.6 Accountability, Finance and Referral

2.3.6.1 The IMC shall operate as an independent body.

2.3.6.2 It shall liaise with the ITA, the Independent Election Commission (IEC) and the TEC on matters pertaining to the work of these bodies.

2.3.6.3 The IMC may, in its discretion, refer any matter involving transgression by a licensee of licensing conditions to the ITA, for such action as may be deemed necessary.

2.3.6.4 The IMC shall be afforded the necessary finance to carry out its functions, and, in this regard, it shall be accountable to the TEC.

2.3.7 Structure

The IMC shall have a Secretariat and such infrastructure as it may deem necessary to carry out its functions.

2.3.8 Term of Office of the IMC

Subject to review by the Interim Parliament.

2.3.9 Code of Conduct

- 2.3.9.1 The IMC shall carry out its functions and exercise its powers in accordance with a Code of Conduct for all licensed broadcasters, as well as one specifically applicable to the national service broadcaster (SABC and public broadcasters of the TBVC territories).
- 2.3.9.2 Such a Code of Conduct would form part of the licensing conditions of the ITA.
- 2.3.9.3 Matters which could be contained in any Code of Conduct will, inter alia cover the following:
 - 2.3.9.3.1 Public media should serve society as a whole and be independent of political parties.
 - 2.3.9.3.2 All parties shall be afforded fair and reasonable access to air their views, including such aspects as the right of reply, prime-time access, public withdrawals by offending parties etc.
 - 2.3.9.3.3 Broadcasters must be impartial in dealing with news, commentary, interviews and current affairs programs.
 - 2.3.9.3.4 Privacy of sources of media workers' information shall be protected.
 - 2.3.9.3.5 Programmes shall take into account cultural and language diversity within society.
 - 2.3.9.3.6 Broadcasters shall promote peace, justice, democracy and freedom of thought, conscience and religion.

2.3.10 Print Media

The IMC shall liaise with the Media Council on election matters pertaining to the print media.

**PROPOSAL THREE : AMENDMENT AND/OR REPEAL OF LAWS MILITATING
AGAINST FREE POLITICAL ACTIVITY, INCLUDING THE ELIMINATION OF
ALL DISCRIMINATORY LEGISLATION**

1. The Terms of Reference should be based on the Report of Working Group 1 (cf page 10 - 17 of the Consolidated Document and of the Gender Advisory Committee of the various reports of the Gender Advisory Committee).
2. In order to move the issue beyond general discussion, we propose the appointment of a Technical Sub-Committee of three to four persons with the necessary expertise and experience.
3. Their task would be at this stage to produce a report which would include the TBVC States, and would contain two schedules:
 - 3.1 A schedule of laws obtaining each of these areas which should be repealed with brief motivation for each of the laws involved.
 - 3.2 A schedule of legislation which should be amended, the specific clauses requiring amendment, the nature of the amendment and a brief motivation.
4. The Technical Sub-Committee may also set up specialised Sub-Committees each to give attention to the relevant legislation in the Transkei, Bophuthatswana, Ciskei and Venda.

PROPOSAL FOUR : THE TEC AND ITS SUB-COUNCILS

1. The Consolidated Document deals with matters relating to the TEC under the Transitional/Interim Constitution (cf 22).
2. We suggest that a Technical Sub-Committee be appointed which would take Terms of Reference the Report appearing in the Consolidated Document.
3. It would draft the above in the form of a systematic and itemised set of proposals to facilitate discussion in the Planning Committee and the Negotiating Council.
4. Its Terms of Reference would exclude those matters arising from the above which have been allocated to other Technical Sub-Committees, e.g. The Independent Election Commission and The Independent Media Commission.

Negotiating Forum: Resolution on Violence

**Proposals submitted to the
Negotiating Council : 26 April 1993**

1. On 1 April 1993 the Negotiating Forum adopted a Resolution on Violence. A copy is attached.
2. In the concluding paragraphs the Forum resolved
 - to identify the issues that cause violence, threaten the negotiating process and undermine the effective implementation of the National Peace Accord;
 - to mandate the Negotiating Council to establish what urgent steps and mechanisms are required to resolve those issues as a matter of national priority.

The Negotiating Council has to report on these issues to the next meeting of the Negotiating Forum.

- 3.1 That the entire question of violence shall be constantly on the agenda of the Negotiating Council and the Planning Committee and that all parties will be afforded the opportunity at all times to bring concrete proposals to be considered as further steps to what is currently being done in order to curb violence.
- 3.2 In the meantime we recommend the following practical steps to be taken immediately in order to enhance the peace process and curb the violence:
 - 3.2.1 That the Negotiating Council adopt a draft declaration on Monday 26 April 1993 further committing all participants to peace and negotiations and calling upon all their supporters and the public at large to take active steps to promote peace.
 - 3.2.2 That the process initiated by the National Peace Accord and its structures be strengthened. In this regard the Consolidated Document contains a number of proposals for the strengthening of the Peace Accord Process. These proposals together with any other proposals emanating from the experience of the National Peace Committee plus any proposals that may be forthcoming from participants should constitute a basis for a Technical Committee to be set up whose task it would be to prepare a systematic set of proposals for the strengthening of the Peace Accord process. Technical Committees' proposals shall be submitted to the Planning Committee, further processed by it and be brought to the Negotiating Council for

finalisation. The Executive Committee of the National Peace Committee shall be asked to nominate three persons to constitute the Technical Sub-Committee.

3.2.3 Security Forces and Armed Formations

This is the question that requires urgent attention, both in its own right and because of its impact on the negotiating process. The Consolidated Document on pages one and two contains the recommendations as they emerge in the CODESA process. We propose that, if the Negotiating Council approves the Technical Committee recommended on the TEC, that this issue should be entrusted to the same Technical Committee with the proviso that the Technical Committee address this question as a matter of priority.

The report of the Technical Committee shall be tabled before the Planning Committee for it to further process the proposals and submit them to the Negotiating Council for finalisation.

3.2.4 Other measures

We propose as an additional and immediate measure that the Negotiating Council appoint a Technical Sub-Committee to conceptualise and work out ways and means to bring about the formation of a peace corps through which especially the young people of our country can become actively involved in bringing about peace in the community, reconstruction, training and reconciliation.

This report shall be tabled and further processed at the Planning Committee with a view to bringing the proposal to the Negotiating Council.

4. All the above recommendations shall be submitted to the Negotiating Council on Monday 26 April 1993 for consideration and decisions. All parties are urged to come forward with additional suggestions on an ongoing basis.

THE COMPOSITION OF THE TECHNICAL COMMITTEES

NB. Each of the Technical Committees should be mandated to consult with experts on any issue they might consider necessary.

1. Violence

In addition to four representatives from the National Peace Committee the following:

- * Mr V Ntsubane
- * Prof PJ Oosthuisen
- * Prof A Seegers
- * Prof H Vilakazi

2. Constitutional Matters:

- * Mr F Cachalia
- * Adv A Chaskalson
- * Prof GE Devenish
- * Adv E Moseneke
- * Adv B Ngoepe
- * Prof W Olivier
- * Dr F Venter
- * Prof M Wiechers

3. Fundamental Rights During the Transition

- * Prof H Corder
- * Prof LM du Plessis
- * Mr G Grové
- * Ms D Nene
- * Adv Z Yacoob

4. Transitional Executive Council

- * Ms Z du Toit
- * Prof F Haysom
- * Dr JC Heunis
- * Mr ME Mapheto
- * Adv J Renene
- * Prof D van Wyk

5. Independent Media Commission and Independent Telecommunications Authority

- * Ms A Armstrong
- * Dr B de Villiers
- * Adv D Dison
- * Mr EJ Mabuza
- * Adv P Pretorius

6. Independent Electoral Commission

- * Prof D Davis
- * Adv L Laubscher
- * Mr SK Ndlovu
- * Mr RB Rosenthal

7. Repeal of Discriminatory Legislation

- * Prof J Dugard
- * Prof MG Erasmus
- * Adv P Langa
- * Adv P Moroka-Motlana
- * Adv J de Bruyn (ex officio, Department of Justice)

Submission by the African National Congress

To the Technical Committee on Constitutional Matters

Date : 12 May, 1993

The African National Congress hereby places before the above Committee the following submissions: (Further submissions in this regard will be made on or before Wednesday the 19th May, 1993)

1. FORM OF STATE AND CONSTITUTIONAL PRINCIPLES

Introduction

It is the view of the African National Congress that the question of the form of state is composed of different elements, all of which are intimately related to the constitutional issues listed in the terms of reference of the Technical Committee. One of the areas for dealing with the critical question of the form of state in the South African context is the constitutional principles in general. A particular aspect of this relates to the constitutional principles which define the parameters of the relationship between the central and regional levels of government. Accordingly, the submissions of the African National Congress on this question focus sharply on the question of national, regional and local levels of government. A resolution of this question would be an important contribution to the debate on the form of state.

The African National Congress therefore submits that:

South Africa shall be a united, non-racial, non-sexist and democratic state. South Africa shall be a sovereign state and must be seen, as recognised by the international community, as a single, non-fragmented entity including Transkei, Bophuthatswana, Venda and Ciskei.

Government in such a united sovereign state shall be structured at national, regional and local levels, in respect of which:

- i) At each level there shall be democratic representation;
- ii) At each level of government there shall be appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively within the context of a united, democratic state. Such powers and functions at central and regional levels shall be entrenched in the constitution.
- iii) In addition to powers and functions entrenched in the constitution, each level of government may delegate powers and functions to lower levels of government.
- iv) Powers and functions may be either exclusive or concurrent.
- v) The national government shall have overriding powers in those matters that are not allocated exclusively in the constitution to the regional level of government.

- vi) The general principles of the constitution, including the terms of the Bill of Rights, shall apply at all levels of government.

The African National Congress proposes that the constitution-making body (the Constituent Assembly) shall draft and adopt a new constitution for South Africa on the basis of and within the framework of the following constitutional principles which shall be binding on it:

- i) South Africa shall be a united, sovereign state in which all persons shall enjoy a common South African citizenship.
- ii) South Africa shall be a democratic, non-racial and non-sexist state.
- iii) The constitution adopted by the Constituent Assembly shall be the supreme law of the land.
- iv) There shall be separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances. This, however, shall not exclude the executive being made accountable to the legislature.
- v) The judiciary shall be independent, non-racial, non-sexist and impartial.
- vi) Provision shall also be made for a Constitutional Court which enjoys the respect of all South Africans and draws on the experience and talents of the entire population.
- vii) All individuals shall enjoy universally accepted human rights, freedoms and civil liberties which shall be guaranteed by an enforceable/justiciable Bill of Rights.
- viii) There shall be representative and accountable government at all levels embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll and, in general, proportional representation.
- ix) There shall be freedom of association, including the right to form, join and maintain organs of civil society, including trade unions, religious, residents, students, social and cultural societies.
- x) The diversity of languages, cultures and religions shall be acknowledged.
- xi) Special provision may be made for the appropriate recognition of traditional institutions at regional and local level.
- xii) The constitution shall develop and maintain a foundation for the emergence of national unity while respecting the linguistic, cultural and religious diversity of the nation.

- xiii) The constitution shall outlaw all forms of racism and discrimination based on race and gender in public and private life, within the principles of the equality clause referred to hereunder.
- xiv) There shall be an equality clause which shall provide that:
 - i) Every individual shall be equal before and under the law and shall have the right to equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on the grounds of "race", colour, language, gender, creed or sexual orientation.
 - ii) Sub-section (i) above shall not preclude any law, programme or activity that has as its object the amelioration of the conditions of the disadvantaged, be they individuals or groups, including those disadvantaged on the grounds of race, colour, or gender.
 - iii) All rights and freedoms contained in the constitution shall be guaranteed equally to all male and female persons.

2. CONSTITUTION-MAKING BODY/CONSTITUENT ASSEMBLY

In view of the historical disfranchisement of all the black people of South Africa and the fact that in South African history thus far, only white people had the opportunity of participating in the process of constitution-making, the African National Congress is firmly of the view that, for the constitution-making process to be legitimate and credible in the eyes of the majority of the people of South Africa, the constitution-making process must involve the people of South Africa as a whole and that the constitution-making body should be an elected one.

Accordingly, the African National Congress proposes that the new constitution for South Africa should be the product of a democratic process. This means that there shall be an elected Constituent Assembly to draw up and adopt a new constitution for South Africa. Such Constituent Assembly shall be sovereign and not be limited in any way except that it shall work within the framework of agreed general constitutional principles.

The Constituent Assembly shall be required to adopt the new constitution within a fixed time-frame. There shall also be appropriate deadlock breaking mechanisms.

It is the view of the African National Congress that the new constitution of South Africa should be adopted as quickly as is reasonably possible so as to ensure that South Africa enters a new historical phase - that of democracy - as quickly as possible. A political solution which involves the democratization of the country will play a major role in restoring peace and stability to the country which are essential for social and economic development and transformation.

The proposal for the setting up of a Constituent Assembly as envisaged by the African National Congress is contained in a document entitled Transition to Democracy Act, which is annexed hereto and marked Annexure "A". The TDA has been prepared by the ANC to facilitate a speedy transition process.

The proposal of the ANC provides for the following:

- (i) There shall be a National Assembly consisting of 400 members who will be elected on a single ballot of whom
 - * 200 shall be elected from the national lists of the participating parties according to proportional representation.
 - * The 200 regional seats will be allocated between the regions in proportion to the number of votes cast in each region.
- (ii) Steps will have to be taken to ensure maximum democratic representation in the National Assembly, but at the same time also to ensure that there will not be an undue proliferation of political parties entering the election.
- (iii) When the National Assembly sits as a Constitution-Making Body, it shall be known as a Constituent Assembly. It will be required to adopt a new constitution for South Africa on the basis of a two-thirds majority of the votes of members present; provided that the constitution to be adopted shall in all respects conform with, and shall not in any respect contradict, the agreed general constitutional principles.
- (iv) The Constituent Assembly shall have the right to set up, and make use of, such specialised committees as it may deem fit to facilitate the process of agreement and adoption of a new constitution.
- (v) The time-frame for the adoption of a new constitution as well as appropriate deadlock-breaking mechanisms are matters which are negotiable. In the Transition to Democracy Act, the ANC proposes that the constitution must be adopted by the Constituent Assembly within a period of nine months, failing which there shall be fresh elections to create a new Constituent Assembly. This provision is an inducement upon members of all parties to agree to a constitution as expeditiously as possible. The second Constituent Assembly will have six months within which to agree to a new constitution which will also have to be adopted by a two-thirds majority. Should this also fail, then a constitution enjoying the support of a simple majority of the Constituent Assembly shall be put to the people of South Africa for approval by way of a referendum at which the constitution must enjoy a majority of 55% to be adopted.

If this constitution also fails to obtain the necessary support, then finally fresh elections should be held for a third Constituent Assembly. Such Constituent Assembly shall have the power to adopt a new Constitution by a simple majority.

The provision for breaking deadlocks is absolutely crucial in the process of constitution-making and this is the objective of the ANC's proposals. However, such a process could be unduly extensive and drawn out. The ANC is therefore prepared to consider any other proposal which will ensure that out of the constitution-making process there shall arise a new constitution within the shortest possible time.

3. TRANSITIONAL CONSTITUTION

In the view of the African National Congress, the issue of the role of the transitional constitution is an important matter and is to be explained in terms of its vision of the transitional process and the crucial importance which the ANC attaches to the need for the process to be legitimate in the eyes of the South African people.

The objective of all transitional arrangements is the following:

- i) The holding of elections based on one person one vote throughout South Africa (including the TBVC territories), such elections to be based on the universal franchise of all persons without regard to "race", colour or creed. The elections would be for a Constituent Assembly, whose task would be to draw up and adopt a new constitution for the country.
- ii) Accordingly, all transitional arrangements must be directed with this objective in mind and also to ensure that mechanisms are in place to guarantee free and fair elections, free political activity and a level political playing field.
- iii) Subject to this objective, mechanisms must also be in place to provide for the governance of the country as from the date of the elections and until a new constitution has been adopted.

In the light of the above, it is necessary for legislative measures to be passed to legalise the entire process up to and including the adoption of the new constitution. The African National Congress proposes that appropriate measures be agreed upon, including a Transition to Democracy Act. The Transition to Democracy Act will be the basic law or transitional constitution which will provide the legal basis for and give legal effect to all the agreements arrived at the multi-party forum, to cover the complete transitional process leading to the adoption of the new constitution by the Constituent Assembly and the installation of the first government in terms of such constitution.

4. TRANSITIONAL, REGIONAL/LOCAL GOVERNMENT

- (i) During the period of transition, the most convenient, effective and least expensive road to follow is to adopt the four provinces, namely Natal, Transvaal, the Cape Province and the Orange Free State with the boundaries as created at the time that the Union of South Africa was formed to be the four regions of South Africa for the purpose of regional administration during the period of transition.
- (ii) Insofar as powers and functions are concerned, the ANC proposes that regional administrations shall exercise concurrent powers with national government in respect of all matters allocated by the national government to the regional level. This shall be subject, however, to the national government retaining overriding powers in all matters.
- (iii) Regional administrations shall be required to implement laws and policies of national government. Alternatively, they shall participate jointly with national government in such implementation.
- (iv) The advantage of the provincial boundaries as proposed is the ready existence of the requisite infrastructure and facilities. The maintenance of stability, law and order will be facilitated by the adoption of the course proposed by the ANC.
- (v) The phasing in of the existing homeland structures into the new constitutional dispensation will be facilitated by this approach. It will mean that an orderly phasing-in process of existing administrations in the TBVC territories as well as self-governing homelands can proceed effectively within the framework of the said provincial boundaries. This will make the process of phasing in any future regions as may be agreed upon all the easier.
- (vi) One of the major objectives of the current process of transition is to rid South Africa of all vestiges of apartheid and racism. The adoption of the course proposed by the ANC will help to facilitate this process.
- (vii) The issue of the division of powers and functions between central government and the transitional regions can easily be resolved. The formula adopted at the time of union with respect to such division of powers and functions was extremely effective and can provide a useful guideline.

(viii) Structures for Regional Administration during the Transition Period

The ANC takes into account that the transition period will be of relatively short duration. The objective of administration during the period of transition will therefore be adequately catered for by providing for an appropriate provincial executive committee as well as an administrator for each region.

5. TRANSKEI, BOPHUTHATSWANA, VENDA AND CISCHEI

The African National Congress points out that not a single one of these entities enjoys international recognition. No state in the world, other than apartheid South Africa, has recognised these territories as independent states. In fact, the international community has consistently condemned the SA Government's homeland policy in terms of which self governing states have been created, including the four so-called independent states.

The African National Congress is firmly of the view that the four so-called independent states should be re-incorporated into a united, non-racial, non-sexist and democratic South Africa.

The African National Congress is also of the view that South African citizenship should immediately be restored to the people of the TBVC territories.

All the inhabitants of the TBVC territories are entitled to participate in all transitional arrangements as well as elections in every way and on the same basis as all other South African citizens. The ANC therefore believes that effect must be given to this position.

FURTHER PROPOSAL

The African National Congress is of the view that the above proposal is in the best interests of South Africa and indeed the various parties presently participating in the negotiation process. At the same time it is mindful of the concerns of the various parties on the issue of regions. Accordingly, the ANC has also considered the feasibility of setting up an Independent Commission on Regions which would have amongst its functions the following tasks:

- (1) that of making recommendations to the Multi-party Negotiating Council on regional boundaries for the purposes of the election of the Constituent Assembly/Constitution-making Body;
- (2) that of making recommendations to the Multi-party Negotiating council on the boundaries, powers, functions and structures for the purposes of regional administration during the period of transition; and
- (3) that of enquiring into, and making recommendations to the Constituent Assembly/Constitution-making Body, on boundaries, constitutional structures, powers and functions of regional government structures to enable the Constituent Assembly to finalise the issue of regionalism.

Though the African National Congress firmly believes that the entire issue of regions should appropriately be addressed and finalised by the elected Constitution-making Body, it is, nonetheless, anxious that the modalities pertaining thereto be resolved in

agreement with all parties concerned. The ANC is therefore prepared to place its proposals on the issues of electoral regions and regional administration during the transition period, as well as its position on the issue of regions in a new constitutional order, before such a Commission. The details of how such Commission should be set up, its composition, powers and time-frames would have to be agreed upon.

LOCAL GOVERNMENT

Insofar as local government is concerned, it is pointed out that there already exists a national negotiating forum on local government at which all interested parties are represented. The issue of local government is crucial and no decisions can, in the view of the ANC, be taken without the participation of all the stake holders. The ANC is of the view, therefore, that the decisions of the said negotiation forum should be taken into account. The guiding principles shall, however, be the need to ensure that there is democratic participation of all the people on the basis of complete equality at local government level as well.

SELF-DETERMINATION IN SOUTH AFRICA

1. Introduction

- 1.1 The African National Congress welcomes the opportunity to present a submission on the vital issue of self-determination in the context of South Africa. The concept of self-determination has provided the inspiration for the struggle of the people of Africa and Asia from alien occupation and foreign rule and has been inextricably bound up with the development of human rights, the right to dignity and political and economic power of previously subjugated peoples. It has been the most important element in the democratization of international society.
- 1.2 Self-determination has moral, political and legal elements. In effect, it identifies two elements of particular relevance to South Africa. Internally, governance must be based on the will of the people, freely expressed. A regime which does not obtain the consent of the governed is illegitimate and has no entitlement to speak on behalf of the people. Secondly, governance must be free of an official policy of discrimination based on race, colour or ethnicity or in breach of basic rules of international law such as a policy of genocide, slavery or aggression against other states.
- 1.3 In its external application, self-determination recognises the right of a people, providing certain conditions are met, to be recognised as an entity, and if necessary, as a sovereign state. As the World Court has said in the *Western Sahara Opinion*, it is for the people to decide the destiny of a territory, and not for the territory to decide the destiny of the people. Such a decision may include closer association with an existing body to form a unitary or a federal state or independence.

1.4 The right to self-determination is clearly a legal right today. It is based on, but not created by, the Charter of the United Nations, which recognised the relationship between peaceful relations among people and stability between states and the freedom of peoples by invoking the principle of equal rights and self-determination of peoples (Articles 1(2) and 55 of the Charter). Subsequent international and regional texts, declarations and treaties re-emphasised the need for respect for the self-determination of peoples, so that it is now possible to speak categorically of a right to self-determination as part of customary law and, hence, as part of international public policy.

1.5 This right was invoked systematically to ensure the movement towards the independence of colonies in Africa and Asia in the great sweep of freedom in the 1960s. The continual point of reference in the General Assembly's decolonization practice was the seminal resolution 1514 of 1960 which built on the Charter and which was subsequently expanded by other declaratory resolutions of the United Nations. This Declaration effectively outlawed colonialism. It also guarded against the strategies that attempted to partition various colonial territories or the manoeuvres at encouraging recession by the colonial powers by laying down in Article 6 that:

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and the principles of the Charter of the United Nations.

1.6 In the area of decolonization, it was relatively easy to identify the "people" who formed the "self" for purposes of deciding on their future. The colonial boundaries were accepted as the unit of self-determination. The United Nations established special structures which assisted in this process and there were only limited areas of controversy, such as Gibraltar and the Malvinas (Falklands), largely because the original inhabitants had been displaced or restrictions had been imposed on the movement of people from contiguous territories which had historic claims.

1.7 Since the effective application of the right to self-determination also depends on the recognition by other states, it is necessary to look at later developments. In 1971, the state of Bangladesh was recognised as an independent State when, following a war of liberation, it seceded from Pakistan. East Pakistan had a separate cultural and linguistic tradition from the rest of Pakistan and, over a period of time, had suffered from national oppression and economic exploitation from the dominant part of West Pakistan. As with the collapse of the Soviet Union and the voluntary separation of the former Czechoslovakia in 1992, there were clearly identifiable "peoples" who occupied distinct territory who could invoke the right to self-determination which was recognised by the international community.

2. The International Community and South Africa

- 2.1 Since various proponents of secession or partition or an independent Afrikaner State base their arguments on international law and practice, it is necessary to look at the international response over the past two decades to the issue of apartheid, especially in its "grand design" manifestations.
- 2.2 The perverted logic of apartheid represented the partition policy of the bantustans as an expression of self-determination. A racially-elected government first identified, through the Population Registration Act, ten African "nations" and then, without the clearly-expressed will of the people and without consultation, imposed independence on four of the "territories" and gave a measure of internal self-government to the remainder. The same regime then systematically denaturalized millions of South African citizens and treated them as aliens.
- 2.3 The response of the international community was rapid and historic. When "independence" was conferred on the Transkei, the General Assembly, by a vote of 134 states in favour with no dissent, condemned the establishment of bantustans as "designed to consolidate the inhuman policies of apartheid, to destroy the territorial integrity of the country, to perpetuate white minority domination and to dispossess the African people of South Africa of their inalienable rights". For the first time in the history of the United Nations, the organised international community rejected a form of "independence" conferred by a member state and declared it to be "invalid". No state, other than apartheid South Africa, has recognised the "independence" of the Transkei or the other three "states".
- 2.4 The reasons for such a historic decision concerning non-recognition of the products of apartheid must be emphasised. They are two-fold:
- 2.5 First, the international community, as part of international public policy, began to intervene in various ways in the affairs of a state where there was a gross and systematic violation of human rights. This was particularly in relation to a state which based its policy on an official policy of racial discrimination, such as apartheid. These developments were so rapid that apartheid was soon designated as a crime against humanity, a special convention was adopted which assimilated apartheid policies to and genocide, the crime of crimes. The result, as evidenced in the judgement of the World Court in 1970, is that the adoption of an official policy of racial discrimination is in breach of fundamental rules of international law and other states are not only obliged not to recognise such a state but are permitted to assist in the removal of such an entity. No state can be set up, therefore, on an ethno-chauvinistic basis with control over migration on racial grounds, with political power based on race or where "norms and standards" and "central values" are code- words for racial separation or superiority.

- 2.6 The second reason for the non-recognition of the TBVC states was that the racist policies of the apartheid state were assimilated to the denial of the right to self-determination of the entire people of South Africa. Over the past twenty-five years, both the General Assembly and the Security Council of the United Nations have identified the nub of the South African problem, namely the denial of the vote and, therefore, the consent of the majority, as vitiating the independent status of South Africa. Although South Africa has been a state since 1910 and a member of the United Nations since 1945, its internal governance violated a fundamental rule of international law: non-discrimination on grounds of race, colour or ethnicity. The legitimacy of the government was therefore challenged.
- 2.7 The most striking insight into the international community's response to apartheid policies and its view about the future is provided by the Security Council, where South Africa's partners, with the power of the veto, sit. Whereas the Third World could be dismissed as providing an automatic majority in the General Assembly, the Security Council's actions could be stopped by the three western powers. Yet, they did not. In 1977, the Security Council passed resolution 417 without dissent. This resolution *affirmed the right to the exercise of self-determination by all the people of South Africa as a whole, irrespective of race, colour or creed*. The unit for self-determination is therefore South Africa within its 1910 frontiers and the "people" are the undifferentiated people of South Africa.
- 2.8 Resolution 417 of 1977 was therefore, in legal terms, a vindication of the Freedom Charter of 1955 with its declaration to South Africa and the world that "South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people".
- 2.9 Further, for the first time in history, an international body which has the authority to apply rules to situations, invalidated elections and declared the proposed Tri-cameral Elections of 1984 to be "null and void". Through Resolution 554 of 1984, the Security Council decided, with no dissentients, that only the "total eradication of apartheid in a united and unfragmented South Africa" could lead to a "just and lasting solution".
- 2.10 The persistent approach of applying the concept of self-determination to South Africa must also be seen in the context of peaceful relations between states. Any entity based on racial or ethnic exclusivism would be a source of tension in the region. This is vividly echoed in Resolution 556 of 1984 by the Security Council - passed at a critical period in the rising struggle against apartheid - where the "legitimacy of the struggle of the oppressed people of South Africa for the *full exercise of the right to self-determination and the establishment of a non-racial democratic society in an unfragmented South Africa*" was reiterated and the demand was made for the "immediate

eradication of apartheid, the dismantling of the bantustans" and the taking of the necessary steps towards the *full exercise of the right to self-determination in an unfragmented South Africa*.

- 2.11 The views of the international community towards partition or secession, as expressed in these resolutions are very clear. There are compelling legal grounds for the assertion that no state would recognise a state which forcibly came into being on the basis of a racial or ethnic basis or which would be identified with exclusivism of the nature proposed recently or in evidence before the Law Commission during 1990 and 1991. Secession by force of arms to set up a "Volkstaat" would, at worst, result in the *cul de sac* of non-recognition. However, is there an obligation in law to negotiate a settlement which would recognise the right of a self-identified "people" in South Africa to self-determination on the ground that they have a right to form an independent state?

3. Negotiated Self-Determination

- 3.1 The evidence given to the Law Commission by various parties and individuals asserts such a right. Expressly in some cases, but implicitly in others, the case for such an assertion rests on the need to protect Afrikaner "identity", "personality", "nation-hood" or the values of the "volk". Such protection, it is further asserted, can only be pursued through statehood based on the international right to self-determination. The response of the African National Congress to these demands is as follows:
- 3.2 The right to self-determination does not automatically mean the right to sovereign, independent status, although a claim may, under appropriate conditions, result in the acquisition of independent sovereign status in international law. On the assumption that the claim to self-determination includes a claim to sovereign independence, there are further conditions that must be met. There must be territory which is occupied by the discrete "people"; there must be a "population". No so-called ethnic group occupies an appreciable area of South Africa; all are dispersed throughout our land. Third, there is the requirement of meeting a state's international obligations. This means that it must be "peace-loving" under the Charter. Such an exclusive State would be inherently unstable and could be created to commit regional aggression, especially against a democratic South Africa, in order to "protect" kith and kin who do not wish to join the "Volkstaat". Finally, there must be a "government". To the extent that such a state would be based on the principles of factual apartheid, this state would be a creature whose existence would not only be the negation of obligations under the Charter of the United Nations, but would effectively be a creature criminalised under the Convention for the Suppression and Punishment of the Crime of Apartheid. Such a creature would comprise, if not radically erode, the international juridical framework within which South Africa's transition is occurring.

- 3.3 Such a claim confuses the rights of a minority to have their human rights respected and have their cultural rights, such as language, religion and culture, protected as is consistent with international obligations. Those who claim rights under the separate state theory are claiming rights to which they cannot aspire, since they are not a "people" in the national liberation and international sense. They are part of a larger group tied to a common history, language and cultural, political and historical baggage. Basic to the right of people to claim independence is that the right claimed must be one enjoyed consistently with the obligations under the UN Charter. There is no right to self-determination to create a state of racial or ethnic supremacy.
- 3.4 The claim is not a claim to self-determination but a claim to secession from an independent and pre-existing state. Those who are making the claim do not represent a people as defined in various international instruments and practice which is mostly to do with matters of alien rule or undemocratic regimes or tyranny. This claim is made by a party or parties whose programmes and platforms are a denial and denigration of international law and the central values of the international order which values co-operation and peaceful relations. This is therefore a secessionist claim transparently presented as self-determination.
- 3.5 Claims to secession, inconsistent with any other internationally-sanctioned right, destabilise society and, if permitted, would reduce the right to self-determination to a meaningless juridical formula since every state on our planet has some kind of minority sub-group. Self-definition, as proposed by some of the claimants, is not an adequate basis for such a claim. In the absence of national oppression, racial or religious persecution or total economic deprivation, sub-groups have no right to secede, as the Law Commission in South Africa has clearly identified in its document on human rights. On the contrary it is the majority in South Africa who have been oppressed and who now seek through the invocation of the right to self-determination, the protection of a new Constitution based on democracy and free participation.
- 3.6 This claim to secession is resisted in the African public order and in the larger world community on the practical basis that it destabilises the nation-state, threatens international peace and security and affirms no valid principles of international law.
- 3.7 The claim confuses the rights a group or sub-group has to the protection validly and legitimately accorded under the regime for the protection of individuals and minorities under international law with self-determination and independence. It is an invalid conflation.
- 3.8 The African National Congress believes that the proper and most satisfactory method of dealing with the claims, aspirations and anxieties of minorities is in the manner identified in the resolution adopted by the Conference on Security

and Co-operation in Europe (CSCE) on 1990. It reflects the internationally accepted principles for the protection of discrete minorities. The opening paragraph of this important resolution stipulates:

The participating States recognise that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary. This framework guarantees full respect for human rights and fundamental freedoms, equal rights and status for all citizens, the free expression of all their legitimate interests and aspirations, the restraints on the abuse of governmental power, political pluralism and social tolerance.

They further reaffirm that respect for the rights of persons belonging to national minorities as part of universally recognised human rights is an essential factor for peace, justice, stability and democracy in the participating States.

The ANC strongly believes in the principle of self-determination as internationally understood. Indeed, our organisation was set up precisely to overcome the national oppression of the African people manifested by the South Africa Act of 1910. For generations we have been ruled as though we were a conquered people. The Native Administration Act of 1927 set up elaborate administrative structures to govern us. We were almost totally excluded from the vote, denied the right to acquire land in nine-tenths of the country, required to carry passes and governed by a dictatorial network of officials accountable only to Pretoria. To this day our President, Nelson Mandela, does not have the vote.

We know what it is like to be dominated and marginalised in the land of our birth, to be discriminated against, to have our languages and beliefs treated with disrespect and to be denied basic human rights because of our national origin. No-one is more sensitive to the importance of true respect for the rights of all groups than we are.

The question is not whether to have self-determination, but how self-determination is to be expressed in a country like ours. All South Africans share a common destiny. We live together in the same cities and on the same farms. We are involved in a single economy. The problem is not how we can separate ourselves out, but how we can live together without domination or subordination.

South Africa is a country peopled by men and women of the most diverse origins. We speak many different languages, have different religions and different customs. At the same time we share the same land have the same problems of health, education, access to economic opportunities and the pursuit of happiness. We all want peace, development, respect and a sense of security and worth.

The ANC has long believed that South Africa belongs to all who live in it. Our country is spacious enough and sufficiently endowed with resources to grant a decent life to everybody. Everyone shall have the right to enjoy fundamental rights and freedoms and to feel comfortable in all parts of the land.

Division has never solved any of our problems. On the contrary it has always brought with it domination, inequality and conflict. We have learned to live together as equals in the same country. If we cannot live together peacefully in the same country, there is no reason to expect we can live together peacefully side by side.

True self-determination in South African conditions can only be achieved by means of acknowledging the reality of our inter-dependence and not by forcing an artificial and unsustainable independence. We have learnt from prolonged and painful experience that self-determination comes from enjoyment of the right to inclusion in, and not from exclusion from, the life of the country. It means the right to full participation in every area of life without having to give up our beliefs, languages and cultures.

The self-determination of one cannot be separated from the self-determination of all. Self-determination is certainly not consistent with baasskap in any shape or form, indeed it is its complete opposite.

Concretely, self-determination in the context of the historical, social and cultural reality of South Africa means the achievement of a voluntarily negotiated constitutional settlement that contains the following basic principles:

1. The right to equal participation in all areas of life, equal protection and the enjoyment of equal benefits under the law;
2. Mechanisms to ensure non-discrimination, either against individuals or against groups;
3. The right to use and develop one's language and culture and respect for the diversity of religious faiths;
4. Principles of good government which ensure that the institutions of state represent the wisdom, skills and life experience of all groups and communities;
5. Guarantees for an active role for organisations of civil society including cultural, religious and linguistic organisations.

All additions to further constitutional devices will help to ensure acknowledgement of the diversity of the country.

The first is an electoral system based on proportional representation, which facilitates the formation of political groupings to represent the most varied interests.

The second is the acceptance of the importance of strong regional and local government, acting within the framework of general constitutional principles and broad national legislative policy. Regional diversity can reflect itself in a non-racial and democratic way without violating the basic unity of the country.

In conclusion, we feel it is no accident that no clarity exists in terms of the territory in which it is claimed that one particular national group, namely the Afrikaners or "Boerevolk", should exercise exclusive sovereignty. If we accept that baasskap is no longer permissible, then no such region exists in the country.

We cannot believe that the majority of Afrikaners would prefer to give up full and guaranteed citizenship and cultural rights in a democratic South Africa, for the illusory dream of undefined rights in a state without boundaries, without a name, without governmental infra-structure and without international recognition.

We cannot believe that the majority of Afrikaners would wish to de-nationalise themselves in South Africa so that they would need residence permits to continue living in Bellville or Algoa Park, that they would wish to register at Stellenbosch University as foreign students or have to show passports in order to attend a rugby game at Ellis Park.

We cannot believe that the majority of Afrikaners would wish to deny themselves any right to be members of the South African Defence Force, the South African Police, or the South African civil service; nor that they would wish to disqualify themselves from working for the South African Broadcasting Corporation or to play in the South Africa rugby, cricket or football teams.

To sum up, the components of self-determination for all groups in South Africa are, firstly, the right not to be oppressed, secondly the right to maintain identity, thirdly the right to cultural development and fourthly the right to political freedom. All these rights can be guaranteed by appropriate constitutional arrangements based on principles of non-racism, democracy and respect for human rights, including cultural rights. None of these will be furthered by dismemberment or balkanisation of our country.

Self-determination for the people of South Africa as a whole, in all our diversity and respecting the multiplicity of our languages, faiths and historical experiences, can only be achieved by means of a constitution and institutions of government and law that guarantee full equal rights for all. As a basic human right, the right to self-determination cannot be seen in isolation from the rest of human rights. Neither can it be exercised and enjoyed by any population group to the exclusion, and at the expense, of any person or persons not belonging to such a group.

Submission by the African National Congress

To the Technical Committee on the question of Fundamental Rights During the Transition

Date : 12 May, 1993

The African National Congress submits that the fundamental rights listed hereunder should be protected and guaranteed in a transitional constitution, the Transition to Democracy Act:¹

- (a) Freedom from racial discrimination and the right of both men and women to enjoy equal rights in all areas of public and private life.
- (b) Freedom of speech and expression which shall include the freedom of the press and other media.
- (c) Freedom of thought, conscience and belief.
- (d) The right to personal freedom including the right not to be detained without trial.
- (e) The right to personal privacy including freedom from arbitrary search and seizure, integrity of the home and the inviolability of personal communications.
- (f) The right to assemble and demonstrate peaceably without arms, including the right to hold public meetings, gatherings and processions and to participate in peaceful political activity intended to influence the composition and policies of governments.
- (g) The right to form trade unions, employer's organisations and to engage in collective bargaining.
- (h) The right to form and join associations and political parties.
- (i) Respect for human dignity.
- (k) The right of a person to use the language and to participate in the cultural life of his/her choice.

Any existing or future legislation during the transition which is contrary to these rights shall be null and void.

It is the ANC's belief that the final Bill of Rights shall be adopted by the Constituent Assembly as part of a future constitution for South Africa.

¹ See the ANC's proposed Transition to Democracy Act annexed hereto and marked "A".

Submission by the African National Congress

To the Technical Committee on the Transitional Executive Council

Date : 12 May, 1993

[Note : Further submissions will be made on or before 19 May, 1993 on the question of the powers, duties and functions of the sub-councils.]

LEGISLATIVE FRAMEWORK FOR A TRANSITIONAL EXECUTIVE COUNCIL

1. A Transitional Executive Council shall be constituted with executive powers for the following purposes:
 - (i) to prepare for and to facilitate the transition to a democratic order in South Africa;
 - (ii) to create a climate for free political participation in which -
 - (a) there will be no impediment to legitimate political activities;
 - (b) there will be no intimidation;
 - (c) political parties and organisations will be free to canvass support from voters, to organise and hold meetings, and to have access to voters for such purposes;
 - (d) the power of government will not be used to favour or prejudice any political party or organisation;
 - (iii) to promote conditions conducive to the holding of free and fair elections in accordance with the provisions of (the Transition to Democracy Act).
2. (a) Notwithstanding the provisions of any other law, including the Republic of South Africa Act, 1983, executive authority, including the making of Proclamations, Ordinances and regulations, and any other discretions vested in the State President, Ministers or any other person by any law, which may have an impact on any of the purposes referred to in section 1, and which relate to -
 - (i) regional and local government;
 - (ii) law, order, stability and security;
 - (iii) defence;
 - (iv) any aspect of finance referred to in section 5(d);
 - (v) any aspect of foreign affairs referred to in section 5(e);

- (vi) any other matter assigned to the Transitional Executive Council by the State President;

shall be exercised by the State President, Minister or person vested with such authority or discretion, in consultation with the Transitional Executive Council, or if such function has been delegated by the Transitional Executive Council to a sub-council, in consultation with such sub-council.

- (b) All Proclamations, regulations and government notices dealing with matters referred to in sub-section (a) shall be signed by the State President, Minister or other person concerned, and countersigned by a member of the Transitional Executive Council duly authorised thereto.

3. In addition to the executive power referred to in section 2, and the other powers referred to in this Act, the Transitional Executive Council will have the following powers:

- (a) to request information from, and to have access to all records of, any government, administration or organisation participating in the Transitional Executive Council, insofar as such information or access to such record, is reasonably required by it for the purpose of exercising its functions;
- (b) to exercise all or any of the functions and powers referred to in section 6, or powers necessary for the achievement of the purposes referred to in Section 6, and to delegate the exercise of any of its powers and functions to its sub-councils;
- (c) to receive reports from and to confirm or amend decisions made by any of its sub-councils;
- (d) to initiate or participate in negotiations with any government, administration, persons or bodies of persons in relation to any matter which in its opinion may be relevant to any of the purposes referred to in section 1;
- (e) to appoint a secretary and such other officers and employees as may be required for the proper performance of its functions, and to fix the remuneration and terms of employment of such officers and employees;
- (f) to request officers in the Public Service to be seconded to it in terms of section 13(6) of the Public Service Act, 1957 (Act No 54 of 1957) in order to assist it in the performance of its functions;
- (g) any other power reasonably needed by it to enable it to achieve its purposes and to carry out its functions.

4. (a) All governments will keep the Transitional Executive Council informed of, and will provide it with copies of all proposed legislation, including proclamations, bills and regulations of governments or administrations that may be relevant to the purposes referred to in section 1.
- (b) If the Transitional Executive Council has reason to believe that any proposed legislation, including bills, ordinances, proclamations, or regulations, other than those dealt with in section 2(a), will have an adverse impact upon any of the purposes referred to in section 1, it may, after taking into account the necessity for such legislation, require the government or administration concerned not to proceed therewith.
5. (a) All governments, administrations and participants will keep the Transitional Executive Council informed and the Transitional Executive Council will be entitled to ask for and to receive from them, information in regard to proposed executive actions by any government or administration, or contemplated actions on the part of any other participant in the Transitional Executive Council, that may have an impact on any of the matters referred to in section 1.
- (b) If the Transitional Executive Council has reason to believe that the implementation of such executive or other action will have an adverse impact upon the purposes referred to in section 1 it may, after taking into account the necessity for such action as far as such government, administration or participant is concerned, require the government, administration or participant not to proceed therewith.
6. Without limiting in any way the powers vested in it by section 2, the Transitional Executive Council will have the following sub-councils which will report to it in such manner and at such times as it may determine:
 - (a) A sub-council on regional and local government which will have the following purposes -
 - (i) to acquaint itself with developments in regional and local government;
 - (ii) to identify and, in accordance with powers delegated to it, to take action in respect of aspects of regional and local government that may have an impact on the purposes referred to in section 1;
 - (iii) to attend to matters delegated to it by the Transitional Executive Council.

- (b) A sub-council on law and order, stability and security which will have the purposes and powers as set out in annexure A.
- (c) A sub-council on defence which shall have the purposes and powers as set out in annexure B.
- (d) A sub-council on finance which shall have the following purposes:
 - (i) to acquaint itself with developments in government finance at all levels of government, including all existing governmental authorities, be they on the central, regional or local government level;
 - (ii) to identify and, in accordance with powers delegated to it, to take action in respect of aspects of governmental finance at all levels which may have an impact on any of the purposes referred to in section 1;
 - (iii) to acquaint itself with any matter relevant to intergovernmental financing, and to make recommendations to the Transitional Executive Council in regard thereto;
 - (iv) to monitor and, in accordance with powers delegated to it, to prevent any attempt by any governmental body to favour directly or indirectly any political party or organisation above others;
 - (v) to monitor and, in accordance with powers delegated to it, to prevent any attempt by any government body, directly or indirectly, to prejudice any political party or organisation.
 - (vi) to deal with any other matter delegated to it by the Transitional Executive Council.
- (e) A sub-council on foreign affairs, which shall have the purposes and powers set out in annexure C.
- (f) Sub-council of elections which shall have the purposes and powers set out in annexure D.
- (g) Save where the terms of the delegation of powers to a sub-council by the Transitional Executive Council otherwise provide, all decisions of sub-councils will be subject to confirmation by the Transitional Executive Council which if it decides to confirm a decision, may do so unconditionally or subject to amendments required by it.

7. For the purposes of carrying out their functions in terms of this Act, the sub-councils shall have the same powers, including the right to request and be furnished with information, and to have access to records, as the Transitional Executive Council would have had, if such functions had been carried out by it.
8. All participants in the Transitional Executive Council, and all governments and administrations will be required to comply with requests made to them in terms of the provisions of this Act, by the Transitional Executive Council, and all decisions made in terms of this Act by the Transitional Executive Council, or a sub-council having delegated authority to do so, will be binding on and will be implemented by such governments, administrations and participants: Provided that-
 - (a) If in relation to a requirement of the Transitional Executive Council made in terms of section 4(b), the government or administration concerned contends that the necessity for the proposed legislation outweighs its adverse impact, it may refer such issue to the Independent Election Commission for a decision thereon, and may only proceed with such legislation if the Independent Election Commission upholds its contention.
 - (b) If in relation to a requirement of the Transitional Executive Council made in terms of section 5(b), the government, administration or participant concerned contends that the necessity for the proposed action outweighs its adverse impact, it may refer such issue to the Independent Election Commission for a decision thereon, and may only proceed with such action if the Independent Election Commission upholds its contention.
9. Any differences as to whether or not in any particular instance a matter falls within the scope of the powers of the Transitional Executive Council, or one of its sub-councils, as provided for in sections 4(a), 5(a) or 6(a) to (e) or whether any proposed action or legislation including Proclamations, Ordinances or regulations will have an adverse impact on any of the purposes referred to in section 1, such difference may be referred by any government, administration or participant to the Independent Election Commission for its decision.
10. If any issue is referred by any government administration or participant to the Independent Election Commission for a decision, in accordance with the provisions of this Act, the Independent Election Commission shall as soon as possible, and after consideration of:
 - (i) the disputed issue;

- (ii) the views expressed thereon by the members of the Transitional Executive Council; and
- (iii) any other matter considered by the Independent Election Commission to be relevant to its decision

determine the difference and give its decision thereon.

11. Any decision of the Independent Election Commission made in respect of any matter referred to it in terms of this Act shall be final and binding and not subject to appeal or review in any court.
12. A request to the Transitional Executive Council or to a sub-council thereof to procure information or to inspect records, pursuant to the powers which it has in terms of this Act, which is supported by at least one-third of the members of the Transitional Executive Council, shall be given effect to by the Transitional Executive Council or the sub-council, as the case may be, and the information gathered in consequence of such request or inspection, shall be made available to all members of the Transitional Executive Council.
13.
 - (a) The Transitional Executive Council shall consist of a representative of each of the governments, administrations and organisations which constitute Codesa, which commit themselves to the achievement of the purposes set out in section 1 and which undertake to co-operate with and implement the decisions of the Transitional Executive Council.
 - (b) Appointments to the Transitional Executive Council shall be made by the State President by proclamation in the Gazette: provided that in making such appointments, the State President shall act on the recommendations of the government, administration or organisation concerned.
 - (c) If a member of the Transitional Executive Council loses the confidence of the government, administration or organisation which recommended his or her appointment, the State President, on being advised thereof by such government, administration or organisation shall, by proclamation in the Gazette, remove such person from the Transitional Executive Council.
 - (d) If a member of the Transitional Executive Council dies, resigns from office, or is removed from office in terms of sub-section (c) hereof, the government, administration or organisation previously represented by such member shall be entitled to a new representative on the Transitional Executive Council, and such appointment shall be made by the State President in accordance with the provisions of sub-section (b) hereof.

- (e) Members of the Transitional Executive Council will be fulltime executives. (It will be necessary here to specify the procedures for determining the salaries and benefits of such executives, by whom their salaries will be paid, and what the terms and conditions of their service will be).
- 14.
- (a) The first meeting of the Transitional Executive Council shall be held at a date and a place to be determined by the Chairpersons of Codesa, which shall be a date not later than seven days after the Transitional Executive Council has been appointed in accordance with the provisions of this Act.
 - (b) The notice in the Gazette announcing the appointment of the first members of the Transitional Executive Council, shall also specify the date and place of its first meeting.
 - (c) The Transitional Executive Council shall thereafter meet at least once in every week, and on such other occasions as it may from time to time determine.
 - (d) The Chairpersons of Codesa shall preside at the first meeting the Transitional Executive Council. At this meeting the Transitional Executive Council shall appoint a secretary, who shall be a fulltime official of the Council, and shall decide upon the procedures to be followed in convening and conducting its meetings until rules governing such procedures have been made in terms of section 15.
 - (e) The secretary shall -
 - (i) carry out all duties assigned to him or her by the Transitional Executive Council;
 - (ii) convene special meetings of the Transitional Executive Council if required to do so in writing by not less than one third of its members;
 - (iii) fix a time, date and venue for any meeting called in terms of subparagraph (ii) hereof which, save in the case of urgency, shall be convened on not less than three days notice to the members of the Transitional Executive Council: provided that an urgent meeting may be called on short notice if the calling of the meeting on short notice is ratified by the Transitional Executive Council at such meeting.
 - (f) One-third of the members of the Transitional Executive Council shall constitute a quorum for any meeting.

15. The Transitional Executive Council shall be entitled to make rules not inconsistent with this Act, governing the convening and conduct of its meetings and those of its sub-councils, and the manner in which its business and affairs will be conducted.
16. (a) The Transitional Executive Council and its sub-councils will endeavour to take decisions on a consensus basis.
- (b) If, notwithstanding attempts to reach consensus, such consensus has not been achieved, a decision which has the support of at least 80% of the members of the Transitional Executive Council shall be deemed to be a decision of the Council.
- (c) If any government, administration or participant in the Transitional Executive Council wishes to refer a decision made in terms of sub-section (b) to the Independent Election Commission to be dealt with in accordance with the provisions of this Act, it shall refer such matter in writing to the such Commission not later than three days after such decision has been made.
- (d) If a decision taken in terms of sub-section (b) hereof, is not referred to the Independent Election Commission in terms of sub-section (c) hereof, it shall, after the expiry of the period of three days, become final and binding, and shall not be subject to appeal or review in any court.
17. (a) Meetings of the Transitional Executive Council may be attended by all members of sub-councils.
- (b) The Transitional Executive Council may invite any other person to attend its meetings, and at its discretion allow any person present at its meetings to speak.
- (c) Decisions of the Transitional Executive Council shall be taken only by the members thereof, and persons who are present at meetings, but are not members of the Transitional Executive Council, shall have no right to vote on any decision.
18. (a) Sub-councils will have a multi-party character, and unless the Transitional Executive Council considers that good cause exists therefor, shall consist of not more than six members.
- (b) Appointments to sub-councils, the removal and replacement of members of sub-councils, and the temporary appointment of a person as a substitute

for a member who is absent or unable to perform his or her duties, will be made by the State President by proclamation in the Gazette: provided that such appointment, removal, replacement, or temporary appointment will be made by the State President in accordance with the recommendations of the Transitional Executive Council.

- (c) Members of sub-councils will be fulltime executives. (Provision will have to be made for salaries, by whom the salaries will be paid, and the conditions of service.)
19. (a) The State President, in consultation with the Transitional Executive Council, shall be entitled by way of Proclamation in the Gazette, and for the purposes referred to in section 1, to repeal or amend any of the provisions of this Act, or notwithstanding the provisions of any other law, to introduce new provisions into this Act, which shall take precedence over any other law that may conflict with such provisions.
- (b) Such Proclamation shall have the same force and effect as an Act of Parliament, and shall not be subject to appeal or review in any court.
20. This Act and any Proclamation made under section 19, shall, notwithstanding the Self-governing Territories Constitution Act, 1977 (Act No 21 of 1977), apply mutatis mutandis in every Self-governing Territory as defined in section 38(1) of that Act.
21. (a) The Transitional Executive council shall from time to time determine a budget to meet the reasonable costs of carrying out its powers and functions in accordance with the provisions of this Act.
- (b) If there is a dispute between the members of the Transitional Executive Council concerning the budgetary requirements of the Council, then pursuant to a request supported by at least one third of the members of the Council, such dispute shall be referred to the Independent Election Commission for a decision.
- (c) Any decision made by the Independent Election Commission in terms of sub-section (b) shall be final and binding and not subject to appeal or review in any court.
- (d) The South African Government shall provide the funds necessary to cover the budget of the Transitional Executive Council determined in accordance with sub-section (b) or (c).

- (e) A Revenue Account shall be established by the Transitional Executive Council, and all funds made over to it shall be paid into such account, and all expenses and disbursements incurred by it shall be paid out of such account.
 - (f) The books and accounts of the Transitional Executive Council shall be subject to audit by the Auditor-General.
22. The Transitional Executive Council and its sub-councils shall be entitled to exercise the powers and functions conferred on them by this Act in Transkei, Bophuthatswana, Venda and Ciskei.

Submission by the African National Congress

To the Technical Committee the Independent Media Commission and the Independent Telecommunications Authority

Date : 12 May, 1993

Introductory note

The submissions contained herein relate to the Independent Media Commission. In this regard, we would like to give notice that a more comprehensive submission in legislative form will be delivered by Wednesday 19 May, 1993.

With regard to the Independent Telecommunications Authority we generally support the proposals that emerged from the CODESA process as a sufficient basis for the preparation of draft legislation. Further proposals from us dealing with specific aspects will be filed by 19 May, 1993.

Independent Media Commission

1. Appointment and Term of Office

An Independent Media Commission shall be established by Act of Parliament.

- 1.1 After nominations from the public to the Multi Party Forum, the final selection by the Multi Party Forum of seven commissioners, including that of the chairperson and vice-chairperson, shall be confirmed by the State President by notice in the Gazette.
- 1.2 The term of office of the IMC will be subject to review by the Constituent Assembly/Interim Parliament.

2. Objects of the IMC

The main objects of the Commission shall be:

- 2.1 the promotion of freedom of expression in order to assist the creation of a climate favourable to free and fair elections;
- 2.2 the promotion of fair and equitable access to broadcasting services by political parties organisations or movements
- 2.3 the monitoring of broadcasting services to ensure compliance with fairness guidelines on the coverage of issues with regard to elections and political parties, organisations or movements; and issues related thereto;
- 2.4 the monitoring of broadcasting services to ensure compliance by broadcasting services and political parties, organisations or movements with provisions on

political broadcasts and political advertising;

- 2.5 the monitoring and review of all government information services and government-funded publications to ensure their impartiality;

3. Powers of the IMC

The Commission shall have the power to:

- 3.1 mediate and adjudicate disputes between broadcasting services and political parties, organisations and movements;
- 3.2 require broadcasting services to broadcast a counter-version of a particular programme or facts and opinions expressed within a particular programme.
- 3.3 impose financial penalties on broadcasting services for non-compliance with provisions of the Act.
- 3.4 recommend the suspension, cancellation or revocation of a broadcast licence should the licence holder consistently and purposively contravene the provisions of this Act.
- 3.5 suspend the publication of a government-funded publication should that publication contravene guidelines in the Act;

4. Functions of the IMC

In the promotion of its objects the Commission shall -

- 4.1 establish committees, which shall include a Political Communications Committee, a Fairness Guidelines Committee, a State Media Committee and a Monitoring Committee;
- 4.2 ensure fair implementation of rules on party political broadcasts and political advertising, fairness, and government information services and government-funded publications; such rules should be negotiated and agreed to before-hand;
- 4.3 hold inquiries;
- 4.4 monitor broadcasting services;
- 4.5 audit, monitor and review government-funded publications;
- 4.6 make recommendations to the TEC with regard to government information

services;

- 4.7 inform both the Electoral Commission and the TEC should the Commission become aware of any matter that may have an adverse impact upon the maintenance of a climate in which free and fair elections can be conducted;
- 4.8 act as the guarantor of the independence of the SABC Board and the Independent Broadcasting Authority by holding inquiries into and publishing findings on any alleged undue political or economic interference with the activities of both the Board and the Authority.
- 4.9 perform such other functions as may be assigned to the Commission by or under this Act or any other law.

5. Jurisdiction of IMC

The following shall not be within the jurisdiction of the IMC:

- 5.1 the printed media (the IMC will merely liaise with the Press Council, if and when necessary);
- 5.2 programme content of broadcasting services insofar as it does not relate to political developments, party political broadcasts, political advertising and the coverage of issues with regard to elections, political parties, organisations or movements.

Submission by the African National Congress

To the Technical Committee on the Independent Electoral Commission

Date : 12 May, 1993

ELECTORAL (CONSTITUENT ASSEMBLY) BILL, 1993

To establish an independent electoral commission to conduct and supervise elections, to provide for a code of conduct of political parties and to regulate the voting of voters and the election of members of the Constituent Assembly and to provide for incidental matters.

1. Application of Act

- 1.1 The provisions of this Act shall apply in respect of the Constituent Assembly elections and incidental matters thereto.
- 1.2 In the event of any conflict between this Act and earlier legislation regulating elections, this Act and the regulations made thereunder shall prevail.
- 1.3 Save where the context otherwise provides, the provisions of this Act shall apply to the national territory as identified and designated in 1910.

2. Independent Electoral Commission

- 2.1. An Independent Electoral Commission shall be nominated by the Multi Party Forum [or the Transitional Executive Council] and formally appointed by the State President.
- 2.2. The Commission shall consist of
 - 2.2.1 not less than seven and no more than eleven members of integrity and suitable qualification all of whom shall be eligible voters.
 - 2.2.2 four persons from the international community who shall be appointed by the State President upon the recommendation of the Multi Party Forum. [Transitional Executive Council]
- 2.3. All decisions of the Commission shall be taken by means of a vote and a simple majority shall be sufficient to bind the Commission. In the event of a deadlock, the President of the Commission who shall be appointed by the members of the Commission and who shall be a member of the Commission, shall have a casting vote.
- 2.4. No person shall serve as a Commissioner if such person:
 - 2.4.1 remains an official or office bearer of any political party or political organisation; or
 - 2.4.2 appears on a party list as a candidate for the election.

3. Status of Independent Electoral Commission

- 3.1. The Commission shall have the sole responsibility for the organisation, conduct and supervision of the election in terms of the provisions of this Act.
- 3.2. The Commission shall be independent of all governmental structures. Its sole responsibility to any other organ of government shall be to provide written reports to the Transitional Executive Authority on its decisions in respect of the organisation and conduct of an election.
- 3.3. The Commission shall be the supreme body in respect of the elections and shall have exclusive jurisdiction to apply and interpret this law. Its decisions shall be final.
- 3.4. The South African Government shall provide the funds necessary to finance the expenditure of the Commission, which funds shall be made over to the Commission from the Central Revenue Fund.
- 3.5. A revenue account shall be established by the Commission and all funds made over to it shall be paid into such account and all expenses and disbursements incurred by it shall be drawn from such account.
- 3.6. The Auditor General shall audit the books and accounts of the Commission.

4. Powers and Functions of the Independent Electoral Commission

- 4.1. The Commission shall have the sole responsibility to organise and conduct the elections and to make such arrangements as are necessary to ensure that the elections are conducted honestly and fairly.
- 4.2.1 The Commission shall certify to the TEC the fairness and freeness of the election. The Commission shall, in addition to such certification, be empowered to decide on such measures as it may deem necessary to correct or rectify substantial or material irregularities or unfairness in the elections.
- 4.2.2 The Commission shall, in addition to the certification, decide on the measures that it considers necessary for the parties to follow where, in its opinion, the election was partly or wholly unfair.
- 4.3. All powers of Ministers of State, governmental and local authorities in respect of the organisation, conduct and supervision of an election shall be derived solely from the Commission and shall be transferred to the Commission.

- 4.4. In particular and without limiting the general powers of the Commission as contained in paragraph 4.1 of this clause, the Commission shall:
- 4.4.1 apply the electoral system agreed to by the parties at the Multi Party Forum;
 - 4.4.2 identify the criteria for voter identification;
 - 4.4.3 designate the applicable voting areas and polling stations; including mobile polling stations;
 - 4.4.4 determine where voters may cast their votes;
 - 4.4.5 promulgate regulations governing procedures for the casting of postal votes where the voter is incapable of voting in person because of his or her illness or physical infirmity or physical disability or advanced age or because of her pregnancy;
 - 4.4.6 endeavour to ensure that each qualified voter be identified in advance of such election; but each qualified voter who produces his or her ID document or passport shall be entitled to vote whether or not he or she has been identified in advance;
ALTERNATIVELY:
ensure that, save for the production of an ID document or a passport at the actual vote, each qualified voter shall be identified in advance of such election;
 - 4.4.7 determine the extent to which existing law restricts free political activity, including access to voters, and shall promulgate regulations repealing or amending these;
 - 4.4.8 establish boards or appropriate machinery which shall have the power to hear a dispute concerning electoral irregularities, provision of venues for meetings, access to voters, intimidation and the breaches of the conduct for political parties or any other matter referred to the Commission, subject to a decision of such board or mechanism being referred to the Commission which shall act as an appeal tribunal.
 - 4.4.9 have the power to direct any governmental authority, including the police and the Defence Force or any other body or person to perform and execute tasks necessary for the implementation and conduct of the election;
 - 4.4.10 work in collaboration with the Independent Media Commission to ensure that all political parties participating in the election be given reasonable and fair access to all public broadcasting and television networks by means of an applicable code of broadcasting conduct, provided that the Commission shall be the final arbiter in the application of the provisions of such code;
 - 4.4.11 determine the extent, if any, of party political advertising in the electronic media;
 - 4.4.12 formulate and publish a code of conduct with which every political party and each participant in the election shall comply together with applicable sanctions for breach of such code;
 - 4.4.13 formulate and publish binding guidelines for the financing of the political campaigns of political parties. Such guidelines shall include a requirement of public disclosure of each contribution in excess of R10 000,00 to a

- political party and the identity of the contributor;
- 4.4.14 prepare, develop, initiate and implement educational programmes for voters in the election. Such programmes shall be designed to ensure that all eligible voters understand the voting procedures and know about the secrecy of the ballot. The Commission shall prepare as soon as is practicably possible after its constitution a budget for the financing of such programmes to be tabled before the Transitional Executive Authority which, subject to its approval, shall make the necessary funds available to the Commission;
- 4.4.15 administer such funds as may be allocated by the Commission for the purposes of assisting political parties in the organisation of their respective political campaigns. Such funds shall be allocated to political parties by means of retrospective reimbursement of expenditure properly proved and further in the ratio of the percentage of votes cast for each such party in the election. Such money shall be allocated in advance to the Commission by the Government;
- 4.4.16 enrol monitors nominated by international bodies as official observers, be responsible for their deployment in monitoring the elections and receive reports from such observers as to the conduct of such elections; in this regard we would propose the appointment of an observer agency to co-ordinate the monitoring work, preferably the United Nations or a combination of international bodies.
- 4.4.17 appoint subcommittees and regional councils which will perform such tasks as the Commission deems necessary to achieve the objective of the Commission. Such subcommittees shall be solely accountable to the Commission and such decisions as are taken by a subcommittee will be subject to appeal to the Commission;
- 4.4.18 act as an adjudicator and arbitrator on any matter related to the election process and the election referred to it by political parties, political organisations and the public including disputes referred to it by the Transitional Executive Council in terms of the procedures laid down in the Transition to Democracy Act;
- 4.4.19 appoint electoral officers and other officials as it deems fit;
- 4.4.20 make any other arrangements and promulgate any regulations which it, in its sole discretion, deems necessary for the attainment of its functions and purposes.

5. Persons entitled to vote

- 5.1 All South African citizens who have attained the age of 18 years shall be eligible to vote for the purposes of this clause.
- 5.1.1 Citizens, for the purpose of this clause, shall include all citizens of Transkei, Venda, Bophuthatswana and Ciskei.

5.2 A person shall be deemed to be a citizen by reason of any one of the following grounds:

5.2.1 Birth in South Africa;

5.2.2 At least one of such a person's parents was a South African citizen;

5.2.3 Marriage to a South African citizen;

5.2.4 Residence in South Africa for a continuous period of at least five years immediately prior to the registration of this Act.

5.3. Any person so entitled to vote as provided in paragraphs 5.1 and 5.2 shall exercise his/her vote in the area determined by the Commission.

6. **Persons not entitled to vote**

No person shall be entitled to vote if he or she:

6.1. has been convicted of any corrupt or illegal practice under this Act;

6.2. is subject to an order of court declaring him or her to be of unsound mind or mentally disordered or mentally defective;

6.3. is detained as a mentally ill person under the Mental Health Act (Act 18 of 1973) or similar statute in the case of a person resident in an independent state so defined.

7. **Voter Identification**

7.1 The Commission shall draw up regulations concerning the identification of voters. If it considers it necessary, it may provide for a system of voter identification cards.

7.2 In establishing proof of voting age, place of birth and citizenship, all appropriate methods of proof of identity shall be taken into account, including inter alia, passports, identity documents, birth certificates, baptismal certificates, school reports and affidavits.

8. **Party Lists for Election to Constituent Assembly**

8.1. No person shall be eligible for inclusion on a party list unless such person is eligible to vote and is not serving a current term of imprisonment.

8.2. Each person nominated on a party list shall confirm in writing his/her consent to such nomination and his or her confirmation that he or she is

legally competent to become a member of the Constituent Assembly by virtue of being an eligible voter.

- 8.3. If a person whose name appears on a party list dies before the election takes place or withdraws consent or is withdrawn by a political party for any reason, the political party on whose list the person's name appeared may nominate a person to replace the candidate.
- 8.4. Each party shall furnish to the Commission a list of persons in respect of each region as defined in the Transition to Democracy Act in which it intends to contest the election and shall furnish a second list to the Commission in respect of candidates nominated for election on the national list as provided for in the Transition to Democracy Act.

9. Registration of Political Parties

- 9.1. The Independent Electoral Commission shall register as a political party any organisation which wishes to contest the elections for the Constituent Assembly if:
 - 9.1.1 It is satisfied that it is an object of such organisation to propose a list of persons to contest the election to the Constituent Assembly;
 - 9.1.2 the organisation provides a deposit of R100 000,00 with the Independent Electoral Commission, such deposit being forfeited in the event of the organisation failing to obtain 3% (percent) of the votes cast in the elections;
 - 9.1.3 The organisation provides the Independent Electoral Commission with an original copy of its constitution together with the signatures of 20 000 persons qualified to vote;
 - 9.1.4 The organisation provides a written undertaking that it will abide by the Code of conduct for parties and will accept the decisions of the Commission and the result of the election;
 - 9.1.5 the organisation provides the Independent Electoral Commission with
 - 9.1.5.1 the name of the organisation;
 - 9.1.5.2 the full names and signatures of the national officers;
 - 9.1.5.3 the business address and postal address of the head office of the organisation and postal addresses of its provincial or regional offices.
- 9.2. Upon registration the Independent Electoral Commission shall issue such an organisation with a certificate of registration.
- 9.3. Two or more political parties which have mutually agreed thereto may be registered for the purposes of the election as one political party and may assume for the purposes of the elections any name which such parties

deem appropriate.

9.4. Upon the date set by the Independent Electoral Commission as nomination day each political party shall submit to the duly designated officer of the Commission a list of persons proposed by such party for its lists for election to the Constituent Assembly.

9.5 The Commission shall register the symbol or logo of each party.

10. Polling Districts and Polling Stations

The Independent Electoral Commission shall in its sole discretion as soon as practicable after its establishment but after consultation with duly authorised representatives of registered political parties divide South Africa into as many polling areas as it deems appropriate for the fair and efficient conduct of an election. All polling venues should be accessible to all voters.

11. Hours of Poll

The poll shall commence at 06:00 and shall close at 22:00. There shall be 3 days for polling one of which shall not be a working day. The officer duly appointed by the Independent Electoral Commission to preside at the polling station shall be entitled to permit voters to remit a vote in the event that such voter is in the perimeter of the polling station by 9:00 p.m (21H00).

12. Appointment and Powers of Presiding Officers

The Independent Electoral Commission shall appoint presiding officers for each polling district and where applicable for each polling station.

13. Where persons vote

13.1. Save in the case of postal votes recorded in terms of duly promulgated regulations issued by the Independent Electoral Commission, a voter shall vote in the region in which he or she resides or works.

13.2. Notwithstanding paragraphs 13.1, the Independent Electoral Commission may promulgate regulations authorising that persons may vote in another area if it deems it suitable for the fair and efficient conduct of the election.

14. No voter to vote more than once

- 14.1. A voter shall, whether or not his or her name appears on more than one voters list or more than once on the same list, be entitled to vote once only for the election of candidates to the Constituent Assembly and subject to paragraph 14.2 a voter shall not be entitled to vote unless such person produces an identity document or a voter identification card.
- 14.2. In the event that a voter fails to establish his or her identity as provided for in paragraph 7. the voter shall be required to make an affidavit to the effect that he or she is eligible to vote and that he or she has not voted in another district.
- 14.3. Such votes as are cast in terms of paragraph 14.2 must be verified by the Independent Electoral Commission during the counting of such votes.
- 14.4. A person who makes a false affidavit shall be guilty of an offence and liable to conviction and penalties as prescribed hereunder.
- 14.5 The Commission shall draw up regulations to ensure that means are identified to ensure that persons do not vote more than once.

15. Manner of Voting

The voting at the election shall be by secret ballot which shall in substance be conducted in accordance with procedures promulgated by the Independent Electoral Commission, which shall inter alia make provision for illiterate, blind and physically incapacitated persons to cast their vote. The ballot form should be single-columned and in alphabetical order.

16. Counting of Votes

The Independent Electoral Commission shall appoint a returning officer for each polling district.

17. The Chief Returning Officer

The Independent Electoral Commission shall appoint a chief returning officer who shall not be an office bearer of or member of any political party or a candidate for election.

18. Offences

- 18.1. The Independent Electoral Commission shall promulgate regulations as soon as is practicable after its constitution prohibiting corrupt practices relating to the election campaign and voting, undue influence, bribery, illegal persuasion, or intimidation of voters.
- 18.2. The Commission shall be empowered to provide for appropriate punishment in the event of a person being convicted by the appropriate court of law for the commission of one or more offences specified in paragraph 18.1. Such punishment may include the imposition of a fine, a term of imprisonment, prevention from voting or being a candidate for election or campaigning for any other candidate for elections.
- 18.3 The Commission shall ensure that the taking of public opinion polls and the publication of the results of such polls shall be restricted in the two weeks prior to the election. No such poll shall be published in the period of fourteen days before the election. In addition, the Commission shall ensure that persons and agencies taking such polls clearly identify the conditions and procedure for the taking of such polls and which political party, organisation or person has requested or paid for the poll.

19. Procedure for complaints in respect of electoral irregularity

- 19.1. Any duly authorised representative of a political party or eligible voter shall be entitled to make application to the Independent Electoral Commission in the manner prescribed by regulation by such body in respect of any electoral irregularity being a breach of any of the provisions of this Act and on any of the provisions of such regulations which the Commission publishes from time to time.
- 19.2. The Commission shall as soon as it is practicable have the application considered in terms of the procedures laid down by it and shall make its decision known by means of a written ruling, a copy of which shall be provided to the applicant or his or her duly authorised representative. The decision of the Commission shall be final.

**EXPLANATORY MEMORANDUM ON THE ELECTORAL (CONSTITUENT ASSEMBLY) BILL
1993**

1. The African National Congress submits its proposals on the establishment of the machinery for the conduct of elections to the Constituent Assembly in the form of a Bill. Although the language used in the proposed measure may not be exactly that of a parliamentary drafter's version, the sense it attempts to convey could form the basis for such legislation.
2. The preamble provides in general terms, for the purpose of the Bill. It is now agreed that the first elections should be conducted by a body which enjoys the confidence of all sectors of our society and that it should be authorised to act independently and have adequate powers.
3. The definitions clause will be inserted when there is agreement on the text of the proposed legislation.
4. Section 1 refers to the matters. Firstly, the context for the Bill is the election for the Constituent Assembly. Second, as there must be uniform legislation for an election throughout South Africa, the Bill stipulates that its area of application is the national territory as established in 1910. The agreement of the "TBVC states" to the election process for the Constituent Assembly will entail acceptance of the provisions of this measure. Third, the law must provide for resolving any conflict between this Act and earlier legislation, which is basically the Electoral Act 45 of 1979 as amended and added to. The Independent Electoral Commission may wish to substitute its own rules for the existing ones or to amend them and therefore to continue some of the earlier provisions. But for the avoidance of doubt, it is made clear that this Act and the regulations made by the Commission shall have precedence.
5. Section 2 constitutes the Independent Electoral Commission. Because of the importance of its role, it is proposed that it be neither too small nor too unwieldy in composition. Members shall serve in a full-time capacity and shall be persons who enjoy the confidence of South Africans. Therefore, it is suggested that a Commissioner should divest herself or himself of any office in a political party for the duration of the Commission's terms and must not play a direct role in the election as a candidate. In addition to South African citizens, it is proposed that four "External Commissioners" be appointed, to provide expertise to the Commission and a measure of impartiality and external supervision.
6. Decisions of the Commission must be taken expeditiously. The addition of external appointees therefore makes it possible that such decisions can be taken by a simple majority of the Commission. As such, Commissioners will provide the element of detachment and impartiality.

7. Section 3, dealing with the status of the Commission, is the heart of the proposal. Section 3.1 provides for the Commission to have sole control over the whole election. It provides for the Commission's independence and, in order to ensure speed of decision-making, for the finality of its decisions.
8. Section 4 refers to the powers of the Commission. In a transitional situation, a body which acts as a referee must have the authority to determine whether the election was "free and fair". This the Commission is entitled to do and it will report to the Transitional Executive Council. In addition, Section 4 authorises the Commission to propose or to take corrective action, including putting parties on notice where it considers that the behaviour of a party, its officials or members, is not consistent with the demands of a free and fair election.
9. The electoral system decides the method by which the electors will vote. Whether the election should be conducted on the first-past-the-post system or by proportional representation on a list system is a matter for the Multi-Party Process to determine and not the Commission (Section 4.4.1).
10. The Commission is given the discretion to determine the criteria for identifying voters. It may decide whether a voter's register is necessary or whether the issuing of voters' cards to eligible voters will suffice. In any event, the production of a passport or identification document at the actual voting station is sufficient evidence of citizenship and entitlement to vote. Identification of voters must take into account a multiplicity of methods of proof (Section 7.2).
11. Entitlement to vote has to be distinguished from identification. In common with other countries, entitlement to vote is determined by citizenship. It takes into account that racial and gender factors or practices are echoed in present laws and, to that extent, amends existing citizenship rules.
12. Voting must be in person, on one of the three designated days set aside for the elections in the area determined by the Commission (Section 5.3). The only exception to personal voting is the proposal for postal voting by persons incapable of voting in person because of illness or physical infirmity or physical disability or age or pregnancy (Section 4.4.5). No other provision for postal voting is made to ensure that there is no abuse and, at the same time, fairness for all parties.
13. The Commission is authorised to set up sub-committees and councils to enable it to perform its functions. It may therefore devise the best method for the efficient pursuit of its tasks. In addition, it can establish mechanisms for the investigation and hearing of complaints.
14. If the Commission is to perform its functions satisfactorily as the guardian of the electoral process, it must be able to instruct in the last resort any person (including departments and security personnel) to perform necessary tasks (Section 4.4.9), have the ultimate authority where it shares a function with

another body (Section 4.4.10) and enforce rules and procedures such as a Code of Conduct for Political Parties on the parties, officials and participants in the election (Section 4.4.12).

15. Provision is made for binding guidelines for the financing of political campaigns (Section 4.4.13), assistance towards the election expenditure of parties (Section 4.4.15), regulation of political advertising in the electronic media (Section 4.4.11) and the regulation of public opinion polls (Section 18.3).
16. Section 19 deals with the requirements covering the registration of political parties. In addition to the requirements laid down in this section, the Commission will have the standard power to refuse registration if the name or the symbol of a party is similar to or identical with the name of another party; the organisation of the ballot, including the arrangements for the ballot paper; and the security of the electoral process.
17. The Commission will liaise with international (including regional) official observers and monitors and in co-operation with these bodies will be responsible for their deployment in monitoring the elections. These monitors will report to the Commission which shall take their observations into account, together with its own assessment, in coming to a decision on any matter (Section 4.4.16).
18. The provisions relating to party lists for elections to the Constituent Assembly (Section 8 and Section 9.3 and 9.4) are based on the assumption that the electoral system will be by way of the List System based on proportional representation. Under this system, a party obtains a number of seats in proportion to the total number of votes it wins. Hence, the treatment of irregularities and breaches of electoral rules, etc., are not based on a constituency-type election as in the Tricameral System but on the responsibility of parties and those who must account on behalf of the party.
19. It is necessary, in our view, to lay down in the parent act the number of days as well as hours of voting in which the election is held (Section 3). These are matters of great significance and cannot be left to the Commission. This provision takes into account geographical, employment and social conditions in our country.
20. The other provisions are common form features of any electoral law. The African National Congress will be pleased to provide to the Technical Committee supplementary documentation to explain the reasons for and justification of specific proposals or to expand on this memorandum.

Submission by the African National Congress

To the Technical Committee on the Repeal of Discriminatory Legislation

Date : 12 May, 1993

[Note : Further submissions on this question will be filed by 19 May, 1993]

The African National Congress submits that it is crucial for all laws that impede free political activity in South Africa, including the TBVC states, should be amended or, as the case may be, repealed, in order to

1. ensure the creation of a climate for the exercise of free political activity, and
2. ensure that laws which may abridge or inhibit the objective of free and fair elections for a Constituent Assembly are removed.

We therefore propose that the laws listed in the schedule attached hereto be dealt with as indicated in the said schedule.

Repressive legislation prohibiting free political activity.

Schedule 1.

No. and year of law	Title of law	Extent to which repealed or amended
Act. no 44 of 1950 of the Parliament of the republic of South Africa	Internal Security Act, 1950	The repeal of the whole
Act no. 3 of 1953 of the Parliament of the Republic of South Africa	Public Safety Act, 1953	The Repeal of the whole
Act no. 17 of 1956 of the Parliament of the RSA	Riotous Assemblies Act, 1956	(a) The repeal of section 2;
		(b) the amendment of section 4 by the deletion of expression "section 2(4) or";
		(c) the amendment of section 5 by the deletion of the expression "2 or";
		(d) the repeal of section 6; and
		(e) the repeal of Chapter VIII;
		(f) the repeal of Chapter IX, except in so far as it relates to the payment of salaries, pay and allowances and allowances of auxiliary services who are such members immediately before the commencement of this Proclamation;
		(g) the repeal of sections 103bis, 103ter and 103quat; and
		(h) the amendment of section 118 by the deletion of paragraph (b) of subsection (1).
Act no. 44 of 1958 of the Parliament of the RSA	Post Office Act, 1958	All sections that enable the State or government or any of its agencies to, in any manner whatsoever, interfere with the privacy of the citizens of this country
Act no. 34 of 1960 of the Parliament of the RSA	Unlawful Organisations Act, 1960	The repeal of the whole
Act no. 76 of 1962 of the Parliament of the RS	General Law Amendment Act 1962	The repeal of the whole
Act no. 1 of 1963 of the Parliament of the RSA	General Law Amendment Act, 1963	The repeal of sections 3, 4, 5, 6, 7, 14, 15, 16 and 17
Act no. 62 of 1966 of the Parliament of the RSA	General Law Amendment Act, 1966	The repeal of sections 3, 4, 5, 6, 22 and 23

Act no. 83 of 1967 of the Parliament of the RSA	Terrorism Act, 1967	The repeal of the whole
Act no. 21 of 1975 of the Parliament of the RSA	Publications Act, 1975	The amendment of section 47 by the deletion in paragraph (e) of subsection (2) of the words "safety of the State"

