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CONSTITUTIONAL COMMITTEE'S PROPOSALS TO NEGOTIATIONS COMMISSION

(Meeting of 9 November 1992)

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ELECTIONS

- 1 We were asked to consider the date of the elections, voter identification and registration, voter eligibility, the establishment of an independent electoral commission, the powers, duties and functions of the IEC, the role of the international community and the administration of the electoral process.
- 2 We recommend that the matter of the election should be a two-stage affair.
 - 2.1 The establishment of an independent electoral commission (IEC) either as a chapter in the Transition to Democracy Act or a separate Act passed by the tri-cameral parliament setting forth the powers, duties and functions of the commission and briefly stated general principles such as that the elections will be free and fair, conducted on a proportional representation basis, candidates to be on party lists, etc.
 - 2.2 The IEC itself once established will, by proclamation, promulgate an electoral law setting forth precisely when, where and in what manner an election will be held. It will be able to amend the proclamation from time to time if circumstances make it necessary. A detailed electoral law passed by the tri-cameral parliament will not be able to be as easily amended to suit the prevailing circumstances.

3 COMPOSITION OF THE IEC

3.1 It should consist of seven persons whose integrity is beyond question. They should have a proven record of service in public life and imbued with a spirit of independence. Although they may have had party political affiliations, they will not represent their political parties on the commission nor be answerable to them. Political party representation on the commission will make it difficult for it to function properly if, as is probable, some of the parties will insist that it should operate on the basis of consensus. It is suggested that the commission should decide by majority vote of the seven members.

3.2 International participation in the commission should be secured by providing that it shall have four additional non-voting members appointed by the secretaries general of the UN, OAU, the Commonwealth and EEC.

3.3 The identity of the seven members of the commission should be agreed upon and named in the legislation appointing the commission. Vacancies on the commission should be filled by the remaining members of the commission from amongst those nominated by political parties.

4 THE POWERS, DUTIES AND FUNCTIONS OF THE IEC

4.1 In relation to the first election it shall the power to legislate by

proclamation in the gazette an electoral law embodying provisions consistent with internationally accepted standards and generally promulgate laws in relation to the conduct of the election which shall be deemed to be original legislation and not subject to any appeal or review. Its legislation and decision shall be final and binding on all parties.

- 4.2 By proclamation determine the manner in which its meetings will be called, the quorum that will be required to be present before decisions can be made, the manner in which it will receive submissions and recommendations whenever practicable for political parties on matters upon which it has to decide. The appointment of its secretariat, sub-committees and generally making provision how its work should be done.
- 4.3 To determine the date of the election and have the power, if the need arises, to alter such date, to register the participating parties in the election, any alliances that may be formed, the symbols of such parties or alliances.
- 4.4 To receive and publish the list of parties' candidates.
- 4.5 To appoint a national director and regional and local directors with powers to determine where voting stations will be established.

- 4.6 To provide the manner in which voters will be identified and control will be exercised to avoid electoral irregularities.
- 4.7 The manner in which irregularities and complaints will be dealt with.
- 4.8 Promulgate a code of conduct to be observed by all parties and individuals participating in the electoral process. Regulate and appointment of supervisors, monitors and parties' agents.
- 4.9 Provide for criminal and other sanctions for breaches of the code of conduct by parties and all other persons for breaches of the code of conduct and call on the parties to distance themselves from the conduct of any individual not in accordance with the code of conduct. To appoint a secretariat, other employees and employ independent contractors to perform any function that it may assign to them.
- 4.10 To have the general powers usually conferred upon boards of commissions to enable it to carry out its main object.
- 4.11 To announce the result of the election and apportion the number of seats in the constituent assembly that each of the participating parties is entitled having regard to the cut-off point to be agreed upon and forming part of the act constituting the IEC.

5 FINANCES OF THE IEC

5.1 An estimated cost of the election should be determined and the Act establishing the IEC should vote that sum to be available to the IEC to spend in its discretion for the proper conduct of the election. Should more funds be required, the same Act should authorise the government to pay to the IEC from the general revenue fund such sums as are required by the commission in order to carry out its work.

5.2 A determined sum should also be voted to assist political parties to take part in the election with a provision that no payments will be made until after the election results are known. Each party shall receive a sum from that fund proportionate to the number of votes cast in its favour.

6 THE ELECTORAL LAW

6.1 If it is agreed that the electoral law should be promulgated by the IEC, many of the details provisions can be left to be decided by the commission. This does not mean that we do not have to make detailed recommendations or even a draft for the purposes of submitting it to the IEC. There are however certain fundamental matters that may have to be agreed to beforehand and presented as accepted principles to the IEC. Some of them have been referred to above, but the minimum voting age, provision for persons living in the TBVC states to vote even though incorporation may not have yet taken place, etc., may

have to be provided in the Act establishing the IEC. The Central for Applied Legal Studies has agreed to assist in the formulation of the draft electoral law. A meeting between the ANC's electoral commission, the constitutions committee and such other persons as may be thought to be necessary has to be held as soon as possible in order to identify the matters requiring policy decisions before drafting the detailed electoral law.

LAND AND PROPERTY RIGHTS

- 7 During the discussion it emerged that a number of factors have to be borne in mind. It was emphasised that it would be a mistake to identify land or property rights as the concern of only the haves. The concerns of the have nots are as important. For this reason, the original 'property clause' in the first draft Bill of Rights was amended. The new land provisions are to be found in Articles 12 and 13 read together with Article 14 dealing with affirmative action. We believe that the criticisms levelled against these clauses are generally unfounded, but it is nevertheless necessary to bear in mind that 'just compensation' means market value. The view was expressed that the expressions 'just and equitable' and possibly only 'equitable' may enable the courts of the future to take into consideration factors such as the manner in which the land was acquired, the purpose for which it has been used, what taxable revenue has been declared balanced against the purpose for which the central government, regional or local authority wants to use it. General purposes and concerns are set on pages 8, 9 and 29 of the printed policy

document adopted at the policy conference.

- 8 Attention was drawn to the fact that 'property' has a wider meaning and does not include only land and buildings and care should be taken that alleged deprivation of 'interests' in land should not have to be compensated because the value of the interest has been diminished as a result of development of adjoining land for the public good.
- 9 It was agreed that it is almost impossible to formulate in a sentence or two the concerns of both sides. The best we could do in the present circumstances is to suggest the following formulation to be incorporated in the draft Bill of Rights: 'A system of just and secure property rights which will include the principle that there shall be no expropriation of property without equitable compensation and determined by a court of law'.
- 10 The details in relation to how the compensation is going to be fixed, the factors that have to be taken into consideration, the manner in which it is going to be paid, etc., will have to be determined by law. The validity of the legislation providing the manner in which compensation is to be determined and paid will of course be subject to a testing right by the constitutional court.

TRANSITIONAL EXECUTIVE COUNCILS

- 11 It was pointed out that by their very nature the TEC's are weak structures. Their powers are limited in relation to the activity in which they may take part,

such as for example, levelling the playing field. The fact that they have to make their decisions on the basis of 80% majority will make them ineffective. Now that the number of the participating parties may be substantially increased, serious consideration ought to be given to revisiting the 80% tentative agreement to a lesser figure.

- 12 We should be careful to avoid the use of 'interim government' in relation to the TEC's. They are merely a facilitating mechanism to prepare for interim government. Their ability to participate in finance, the security forces in relation to the defence force, police force and intelligence, local government and foreign affairs materially limits their function. It should be remembered that it was the regime's idea that we should become co-opted into their government. The proposed arrangement leaves many of the departments free of the TEC's intervention.
- 13 In order to correct the situation an attempt should be made to induce the government to agree to see itself as a caretaker government that should oversee the day to day running of the country and not indulge in new initiatives. The legislation referred to the TEC's and approved by it the government should undertake to pass through tri-cameral parliament insofar as this may be necessary and to undertake to implement it. The government should not be allowed to exclude the TBVC countries from the operation of generally accepted decisions and legislation.

- 14 In relation to the independent electoral commission, agreement should possibly be obtained that in the event on any matter which has any bearing upon the election any of the decisions of the TEC's should be referred to the election commission as a form of appeal to it whenever the TEC's cannot come to any agreement.
- 15 Efforts should be made to obtain agreement that the security forces will be under unified command and that there will be no new appointments or promotions either to the security forces or the civil service without the concurrence of the TEC.
- 16 The state security council and the subordinate bodies under its control must come clean. Information should be supplied in relation to the structures that still exist, the financing of these structures, the type of work that they do, the membership at a national/regional level, the work done in conjunction with other departments. Should it be contended that some classified information is not to be disclosed, some form of ombudsman should be appointed in order to decide whether the information is of such a nature or not.
- 17 It was felt that not too much should be expected from the TEC's and the greater our demands may be the greater the delay may occur.

GENERAL.

- 18 It was felt that it should be brought home to the regime's representatives that

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there is an abundance of evidence that whilst they were negotiating with us hitherto, steps were being taken by the state security council, the security forces and others to subvert the organisation. Assurances should be obtained at the outset that the negotiations are going to be in absolute good faith. If there is going to be an interim government it is impossible for it to succeed unless the parties trust each other. There can be no trust if covert action is undertaken by one of the parties to subvert the other.