

SUBMISSION TO THE
COMMISSION ON REGIONS

REF: 1/11/ **11** / **2**.

A. CONSTITUTIONAL MATTERS

**FIRST REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL
ISSUES TO THE NEGOTIATING COUNCIL: 13 MAY 1993**

1. INTRODUCTION.

- 1.1 Our instructions require us to prepare systematic documentation to facilitate discussion in the Negotiating Council. It has been made clear to us that we are not ourselves to engage in negotiation. What is expected is that we should address the issues raised in the Codesa documents, the discussions in the Negotiating Forum and the Negotiating Council, and the submissions and inputs of the participants in the current negotiating process which are relevant to the terms of reference of our committee, and on the basis of such information prepare documentation for the Negotiating Council which will enable the debate to be taken forward in that forum. For that purpose we can also have regard to submissions that may be made to our committee in writing by individual experts and interest groups.
- 1.2 On one issue we have been asked to go beyond these instructions and to make recommendations to the Planning Committee. That issue concerns the process to be followed in dealing with the debate on the boundaries, powers and functions of regions. This is clearly a core issue in the negotiations and directly relevant to the disputes which exist in relation to the form of the state and self determination. The way in which this matter is dealt with will have a bearing on several matters that are included in our terms of reference.
- 1.3 We were asked to make our report to the Planning Committee by Thursday 13 May, and to deal with the process for taking the regional debate further in that report. We have done so.
- 1.4 We are of the opinion that the debates in the Planning Committee and the Negotiating Council will be facilitated by a brief analysis of the constitutional issues that have been identified in our instructions as being the concern of our committee. The issues are interrelated and reflect in particular the concerns of the different participants in respect of the legitimacy of the constitution making process, and the position of minorities in any new constitutional order. The process for determining the boundaries, powers and functions of regions could be crucial to finding an acceptable solution to these fundamental concerns.
- 1.5 The framework within which the earlier debates took place, and the particular issues that have been raised appear from the documents with which we have been briefed. They include three documents dealing with deliberations at Codesa. These are a bundle of Codesa agreements, a summary of these agreements and a consolidated document based on Codesa reports. We will

refer to these documents as the agreements, the summary and the consolidated document respectively. We have also been briefed with a resolution on the transition process taken by the Negotiating Forum on the 1st and 2nd April, extracts from minutes of the Negotiating Council of the 26th April, 30th April and the 7th May, the declaration of intent on the negotiating process made by the Negotiating Council on the 30th April, and a transcript of discussions held in the Negotiating Council of matters relating to the transitional process.

1.6 " We have not yet received representations from all the participants in regard to these issues. Once we have the representations we will be able to identify the compatibilities and differences that may exist. We may then be able to suggest appropriate ways of addressing these matters.

2. We begin our report by setting out our views on the relationship between the questions concerning self determination and the form of state and the other issues which form part of our terms of reference. As directed, we have given consideration to each of the issues mentioned in our terms of reference, using the terminology thereof.

3. **SELF-DETERMINATION**

3.1 Self-determination, in the sense of making one's own choices, developing one's own potential, securing one's own well-being and of not being subjected to undue external pressures and domination, is certainly a very basic human need and aspiration. Similarly, it has to be conceded that nations and national sub-groups have similar aspirations. It is therefore only natural that the law, which is a normative system defining and regulating human freedoms and aspirations, should also give recognition to this very essential need. For this reason it is unproductive and not even necessary to contest the existence of the general right of self-determination of individuals, organised groups and nations. Stated succinctly, self-determination, being the expression of a basic urge to be master of one's own destiny, is recognised in law. What is of importance for the purposes of this report, is not the existence of such a right, but the actual content, scope, application and protection of this right.

3.2 In international law, the right of self-determination has been one of the strongest factors in promoting the liberation of countries and peoples from colonial rule, foreign subjection and external domination. In recent years some countries and peoples, especially in certain parts of Eastern Europe, have exercised their right of self-determination to liberate themselves from foreign rule.

- 3.3 In **national legal systems**, the right of self-determination manifests itself at different levels of society and of the life of the nation, as regards the individual as well as groups. It would be wrong to assert that the right of self-determination is a right which finds application in only one sphere of life or pertains only to some individuals or groups. For this reason, it is more appropriate to speak of the **rights** of self determination. In order to understand the scope of the rights of self-determination and their manifestations in a national legal system, it is necessary to distinguish between the recognition and the protection of the rights of self-determination and, at the same time, to appreciate the limitations which the law imposes on these rights (in the same way that all rights and freedoms have certain limits).
- 3.4 In a democratic constitutional system, the rights of self-determination are recognised in different ways:
- 3.4.1 Generally, when mention is made of the rights of self-determination, it is immediately thought of the rights of organised and other national groups to protect themselves from undue influence or coercion. It is often forgotten that the individual's rights to self-determination takes precedence and that virtually no collective rights of self-determination can be recognised effectively without ensuring the individual's rights to freedom, own choice and self-fulfilment. Individual self-determination covers a whole range of human activities: thus, the right to life, liberty and property and public freedoms of contract, conscience, movement, association, etc, all serve to secure the individual's overall right to self-determination, in one way or another. (It is noteworthy that the German Constitution goes even further and expressly recognises the right to the full development of every person's personality).
- 3.4.2 Collective rights of self-determination necessarily require preceding constitutional rights and freedoms such as freedom of association, assembly, conscience, etc. to give effect and meaning to these rights. It is self-evident that no group or groups will be able to maintain their identity and pursue their interests if they are not allowed to contract freely, associate at will, disseminate their views openly, etc. Collective rights of self-determination, either separately or conjunctively, are exercised in different ways: in the labour field, trade unions, either on their own, or with employers' organisations, exercise collective rights of self-determination by means of collective bargaining, the withholding of labour, etc; in the civic field citizen organisations also exercise their collective rights of self-determination in various recognised forms of group activities, be they of social, cultural, linguistic or religious nature (as a matter of fact, it is through the exercise of these rights of self determination that the foundations for a civil society are established and fortified); in the political field collective rights of self-determination are best ensured by a pluralistic electoral system which allows free participation in elections and

institutions of government.

(In this respect it might very well be necessary to have representative institutions on different levels of government to give greater opportunities of representation to political parties which enjoy less support on the national level, for effective representation, for it is clear that a political party with stronger regional support will feel more comfortable in the exercise of its right of self-determination if it is well-represented in the regional institutions where its support lies.) What needs to be emphasised, is that collective rights of self-determination in a democratic society are not singular, solitary rights which can be claimed and exercised as such, but entail a totality of specific legal rights and freedoms which groups can rely on in the context of predetermined social, economic and political relationships.

- 3.4.3 The rights of self-determination of linguistic, cultural and religious groups are of particular importance, especially if these groups constitute minorities *vis-à-vis* the general population. These groups are often well-organised and influential and this allows them to exert influence and demand protection in all spheres of life and levels of society. This is not always the case, however, and especially in the face of an uncaring or unsympathetic and even hostile majority the law would require special recognition and safeguarding of linguistic, cultural and religious expression (e g allowing mother-tongue instruction, special schools, support of cultural activities, etc). In this respect Article 27 of the International Covenant on Civil and Political Rights still provides the most useful criterion: " In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."
- 3.5 In a democratic state, individual and collective rights of self-determination (which are, as explained, a totality of multi-faceted rights and freedoms pertaining to individuals and groups) are protected and safeguarded by various legal instruments and state institutions, the most important being:
 - ~~3.5.1~~ 3.5.1 A justiciable bill of rights and an independent judiciary.
 - 3.5.2 Watchdog bodies, such as ombudsmen, independent human rights commissions and generally a free press and an open society.
 - 3.5.3 Regional and local institutions as well as national bodies in which collective interests can be accommodated.
 - 3.5.4 Specially recognised and accredited linguistic, cultural and religious bodies of a representative nature and freely associated which can act in conjunction with governmental bodies and institutions to safeguard the interests of cultural, linguistic and religious groups.

- 3.6 Rights of self-determination, whether they are individual or collective, and which form the basis of a democratic society, have certain limitations. They may not be exercised in such a way that they impinge upon the rights and freedoms of others or endanger national safety or the integrity of the state. It is for this reason that international law is extremely hesitant to recognise any unilateral secession from national state territory. What is of the utmost importance is that the law will not recognise or enforce rights of self-determination which may lead to discrimination or unequal treatment on the basis of colour, race, gender, etc. In other words, this means that the law does not recognise one person's rights of self-determination in such a way that it infringes on another's rights, particularly where issues of colour, race, gender, ethnic origin or creed are concerned.
- 3.7 Conclusion: The Committee is convinced that, bearing in mind what has been said about the contents, scope and limitations of these rights of self-determination, a much more fruitful and constructive discussion will follow in the Council if these rights are viewed and assessed under the headings of concrete topics such as the recognition and protection of fundamental rights and freedoms; regionalism and the form of state; representative institutions; free political activities; etc.

4. FORM OF STATE

The second report of the Planning Committee to the Negotiating Council (29/4/93) deals with the form of state in paragraphs 3.2.1 and 3.2.2. We are in substantial agreement with the views expressed in these paragraphs.

The form of state will be shaped by decisions taken in regard to the structures of the Constitution. Concepts such as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions, and the like, all have a bearing on the form of state. It seems to us that the most expeditious way of dealing with this matter is to deal with these constituent parts. By resolving them, the Negotiating Council will determine the form of the South African state. Our report on Regional Demarcation and Related Issues (13/5/93) to the Planning Committee is consistent with this approach and should serve to advance the debate on the form of state.

5. CONSTITUTIONAL PRINCIPLES

The process of developing constitutional principles has as its object the establishment of a broad framework within which a future constitution could be developed. The development of such a framework commends itself as a sensible mechanism for the promotion of a successful resolution of constitutional negotiations.

A multi-party agreement on constitutional principles would in the first place provide fundamental direction to the constitutional debate, and secondly, should they be formalised as a set of principles binding on further constitution making, they will give direction and security to all relevant interests. The adoption of a comprehensive set of constitutional principles could therefore be an expression of a national consensus on the constitutional way forward for South Africa.

From the documentation provided to this committee, it appears that a broad area of agreement has already emerged. Thus the notion of a constitutional state seems to enjoy wide acceptance, implying the establishment of a modern democracy based upon universal adult suffrage, the supremacy of the constitution, the separation of the legislative, executive and judicial powers and justiciable fundamental rights binding all organs of the state. Furthermore it has become clear that the idea of the constitutional distribution of governmental powers and functions between the different levels of government has received general acceptance. These and other principles, when finalised and formalised, should serve as an important factor in the debate on the future form of state, the constitution making process and self determination.

The Committee therefore urges the Negotiating Council to discuss the content of a set of constitutional principles as a matter of urgency. As soon as this may be practicable, the Committee proposes to compile a report on the inputs received from all parties regarding constitutional principles in which it will identify areas of commonality, and issues which require further discussion and debate within the Negotiating Council.

6. CONSTITUTION MAKING BODY/CONSTITUENT ASSEMBLY

- 6.1 As appears from paragraph 5 of this report the principles are directed towards the development of a constitutional structure which would offer a democratic form of government, protection of minority interests, and safeguards against the abuse of power. They would provide guarantees in respect of such matters in an elected constitution making body/constituent assembly.
- 6.2 It appears to have been accepted by working groups 2 and 3 at Codesa that the final constitution would be drawn up by an elected constitution making body/constituent assembly within the framework of agreed constitutional principles, and that the body/assembly would also be vested with powers enabling it to act as a interim legislature. See: The report on the status of

discussions in working group 2 at page 33 of the agreements, and paragraph 2 of the section dealing with the constitution-making process at pages 34 to 36 of the consolidated document.

- 6.3 The Declaration of Intent on the Negotiating Process adopted by the Negotiating Council on 30 April 1993 records a commitment by the Council to reach agreement on binding constitutional principles, the constitutional framework and the constitution making process in terms of which elections will be held. It contemplates that a date will be set before the end of May 1993 for an election to be held not later than the end of April 1994.
- 6.4 If the Negotiating Forum agrees in due course that the final constitution will be drawn up by an elected constitution making body/constituent assembly within the framework of agreed constitutional principles, then in addition to agreement upon the relevant principles, agreement will also be required on the following matters:

Constitution Making

- 6.4.1. How the constitution making body/constituent assembly will be structures, including whether it will be unicameral or bicameral
- 6.4.2 How many members will it have.
- 6.4.3 What electoral system will be adopted.
- 6.4.4 Who will be entitled to vote.
- 6.4.5 How will decisions be taken.
- 6.4.6 Will time frames be set for the taking of decisions.
- 6.4.7 How will conflicts be resolved and deadlocks be broken.
- 6.4.8 How and by whom will questions concerning the application of the constitutional principles be resolved.

Acting as a Legislative Function

- 6.4.9 How will the body/assembly be composed, how will it function when it acts as a legislature.

A Transitional/Interim Executive

- 6.4.10 How will the transitional/interim executive be appointed, how will it be composed and how will it take decisions

The Constitutional Framework

- 6.4.11 A constitutional framework dealing with the above matters will be required. This will have to be done either through an amendment to the existing constitution or through the adoption of a transitional/interim constitution.
- 6.5 If the Negotiating Forum decided upon a process other than the one envisaged in 6.4, it should specify the details and constitutional and legislative framework which will be necessary to implement it.

7. TRANSITIONAL/INTERIM CONSTITUTION

- 7.1 A Transitional/Interim Constitution will be necessary if it is decided by the Negotiating Forum that the Constitution should be adopted by an elected constitution making body/constitutional assembly within the framework of agreed constitutional principles. The transitional/interim constitution will ensure constitutional continuity and provide the legislative framework for the functioning of a constitution making body/constituent assembly with legislative power.
- 7.2 If this process is adopted the Negotiating Forum will have to reach agreement on the structure of the transitional/interim constitution, which will require it to give consideration to and take decisions on the following matters:
- 7.2.1 The constitutional principles by which the constitution making body/constituent assembly will be bound.
 - 7.2.2 The constitutional framework governing the functioning of the assembly when it sits as a constitution making body.
 - 7.2.3 The constitutional framework governing the functioning of the assembly when it sits as a legislature.
 - 7.2.4 The way in which the transitional executive will be composed, what its powers will be and how it will function.
 - 7.2.5 Regional government, including the position of the self governing territories and the TBVC states prior to and subsequent to the election of the constitution making body/constituent assembly.
 - 7.2.6 Local government, including the periods prior to and subsequent to the election of the constitution making body/constituent assembly.

7.2.7 Whether provision should be made in the transitional constitution for the protection of certain fundamental rights. This issue is being considered by the Technical Committee on Fundamental Rights in the Transition.

7.2.8 Constitutional amendments during the transitional period.

7.2.9 The structure, functioning and powers of the judiciary, including whether there should be a special constitutional tribunal or court to deal with matters arising out of the provisions of the transitional constitution.

7.2.10 National symbols

7.2.11 Miscellaneous provisions including transitional provisions needed to ensure constitutional and legal continuity and effective government. Under this heading would be included any special structures or procedures that the Negotiating Forum may require to be included in the interim constitution.

7.3 These matters will have to be addressed in the Negotiating Council as a matter of urgency if the commitment made in the Declaration of Intent is to be met.

7.4 If we receive instructions to that effect we would be able to prepare a draft transitional/interim constitution for discussion and development by the Negotiating Council. The instructions should contain sufficient detail to direct us in regard to the main structures of the contemplated constitution.

8. **TRANSITIONAL REGIONAL/LOCAL GOVERNMENT**

This is dealt with in paragraph 7.2.5 and 7.2.6 above.

9. **FUTURE OF THE TBVC STATES**

If reincorporation takes place, it will be necessary to formulate the draft legislation according to which this will happen, and to address the practical implications of absorbing existing administrations into appropriate regional and local structures. The issue of the future of these states is closely linked to the demarcation of regions and regional powers. It requires urgent resolution, to facilitate the work of the Commission referred to in our report to the Planning committee on Regional Demarcation and Related Issues of 13 May 1993.

10. Submissions by Parties

As at 18h00 on 13 May we had received submissions from the following participants. These reports will be discussed as soon as possible.

1.	ANC	12/05/93	Form of state and Constitutional principles
2.	AZANYU	27/4/93	Demand for a constituent assembly
3.	AVU	13/05/93	Constitutional proposals
4.	Bophuthatswana	12/05/93	Submission on constitutional matters
5.	Ciskei	12/5/93	Constitutional Affairs
6.	Democratic	12/05/93	Submission re constitutional Party matters
7.	Dikwaketla	28/4/93	Constitution making process
8.	IFP	13/05/93	Heads of argument and positions on the form of state
9.	PAC	29/4/93	Input on constitutional principles and the form of state
10.	SA GOVT	12/05/93	Principles governing constitution making in SA
11.	Venda	13/05/93	Position paper on the form of state

SECOND REPORT OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL: 19 MAY 1993

1. Introduction

1.1 The resolution adopted by the Negotiating Council at its meeting on 18 May 1993 records broad agreement that the most suitable form of government for the future will be one which involves the allocation of powers to central and regional governments. We were asked to take into account the concerns and views of delegates expressed at the meeting of 18 May, and in their submissions to us, and to undertake the following tasks:

- 1.1.1 Provide the Negotiating Council with a report on constitutional principles.
- 1.1.2 Consider and report on the structures, powers and functions of states/provinces/regions (SPR).
- 1.1.3 Present proposals on various issues pertaining to the constitution-making process.
- 1.1.4 Provide the Negotiating Council with recommendations on how best the discussions within the Negotiating Council on these issues should be structured.

These issues are interrelated and consistently with the debate in the Negotiating Council, can be approached on an holistic basis.

1.2 The debate on the constitution-making process and the powers and functions of the SPR foreshadowed in the written representations that we have received from participants is likely once again to reflect the tension identified, for example 6.4 and 7.1 in our First Report to the Negotiating Council (13 May 1993). On the one hand a concern as to the legitimacy of the constitution-making process which underlies the position of many participants, that the constitution be drawn up by an elected body; on the other a concern reflected in the position of other participants that their interests will not adequately be protected if decisions are taken by a majority in a democratically elected constitution-making body.

- 1.3 The question is whether these two positions can be reconciled through the mechanism of developing a set of constitutional principles at the Negotiating Forum, which will be binding on the elected constitution-making body and provide sufficient assurances to meet the objections to a process which requires the constitution to be drawn up by an elected body.
- 1.4 Our task is to help in the structuring of the discussions and thereby to facilitate the negotiations. It is in that spirit that we have addressed the instructions given to us by the Negotiating Council on the 18 May.
- 1.5 The key to unlocking the differences that exist, and enabling the process to move forward, is to develop a set of constitutional principles. These should be sufficient to offer assurance to those who are concerned that their interests will not be adequately protected if the constitution is drawn up by an elected constitution making body, without being so detailed as to pre-empt the work of an elected constitution making body. They should guarantee that the constitution will be democratic in substance as well as in form, that basic rights will be respected and upheld, and that mechanisms will exist to prevent the abuse of power by the government of the day.
- 1.6 In this report we address:
 - 1.6.1 An approach to the formulation of constitutional principles, drawing on the work done in that regard at Codesa and the representations of the participants to us. We look at the common ground that exists and make suggestions that may help to take the process forward.
 - 1.6.2 We deal specifically with the SPR and make suggestions as to what may be necessary to provide the assurances that are sought in regard to the integrity and viability of the SPR.
 - 1.6.3 We locate our suggestions in the context of the broader debate involving self-determination and the form of state, and the process of constitution making.

2. An Approach to Constitutional Principles

In its Declaration of Intent on the Negotiating Process of 7 May 1993, the Negotiating Council committed itself inter alia:

- 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.

In the Negotiating Council's mandate to the Technical Committee on Constitutional Issues of 18 May 1993, this Committee was instructed, inter alia, to: Provide the Negotiating Council with a report on constitutional principles.

The Technical Committee also received submissions from various participating parties on constitutional principles.

The following paragraphs reflect the preliminary conclusions of the Technical Committee based upon a consideration of the relevant documents.

2.1 On the purpose and nature of a set of constitutional principles

Constitutional principles could play an important role in providing participants with the security they need in the process of constitutional transition with regard to future opportunities for political participation and other basic concerns. (Refer to the First Report of the Technical Committee on Constitutional Issues to the Negotiating Council : 13 May 1993 paragraph 5) The principles should therefore incorporate basic rights of political participation, multi-party democracy, checks and balances, separation of powers and secure SPR representation in order to ensure that a future constitutional system provides for the protection of minority and regional interests.

The principles should provide a clear framework for the drafting and adoption of a future Constitution.

The principles should not have the character of constitutional provisions as such, but they should establish clear parameters within which a future Constitution must be drafted.

The principles must be formulated in clear language which is capable of effective judicial interpretation and adjudication.

Although the principles and constitution making process are related, it may be desirable to reach agreement on constitutional principles first. This could facilitate agreement being reached on the constitution-making process. In drafting such principles, regard may be had to other precedents, international instruments, the CODESA documents and the submissions of parties.

2.2 Emerging consensus

It appears from the documents and submissions that we have considered, that with a few exceptions, consensus so far has emerged in relation to the following:

- (a) Democracy in the form of universal adult suffrage at all levels of government.

- (b) Supremacy of a rigid Constitution, whereby the validity of all laws and all acts of government is made subject to consistency with the provisions of the Constitution, such consistency being justiciable by an independent judiciary.
- (c) The inclusion in the Constitution of a set of fundamental rights authoritatively protecting the individual in a non-discriminatory manner against the state and all its organs.
- (d) The constitutional separation of the executive, legislative and judicial powers.
- (e) The constitutional distribution of the powers of government among democratically elected national, regional and local institutions.
- (f) Constitutional recognition and accommodation of the variety of cultures and religions being practised, and languages used by various segments of the population.

It should be noted that the above wording is not intended as formulations of constitutional principles as such, but simply to indicate areas of consensus.

3. **Structures, Powers and Functions of the SPR: Remarks relevant to the form of state and confederation:**

3.1 In our First Report of 13 May 1993, point 4, it was stated:

"The second report of the Planning Committee to the Negotiating Council (29/4/93) deals with the form of state in paragraphs 3.2.1 and 3.2.2. We are in substantial agreement with the views expressed in these paragraphs.

The form of state will be shaped by decisions in regard to the structures of the Constitution. Concepts such as the separation of powers, the entrenchment of fundamental rights, the powers of the judiciary, the boundaries, powers and functions of the regions, and the like, all have a bearing on the form of state."

From the submissions received from the parties as well as the discussions of our First Report in the Negotiating Council on 18 May 1993, it is evident that most parties consider the form of state as a matter directly linked to the way in which powers and functions of the state are distributed on central, regional and local level and the way in which these powers and functions are exercised.

- 3.2 A primary observation must be made: all states in the world, whether unitary or federal, must decentralize government powers and functions in order to achieve effective government. Considerations of scale (i.e. physical proportions of countries), diversity of people and economies, etc. all influence the degree of decentralization. Decentralization in the modern state is a fact of life and is made possible through many constitutional mechanisms, e.g. delegation of powers and functions, deconcentration of government activities, etc. Generally, and broadly stated, it can be said that decentralization in the modern state rests on the principle of devolution of powers which, in turn, assures that government is brought close to the people and the principle of subsidiarity is given effect to. In all states, decentralized government has to be performed by state institutions, on central, regional and local level. It is wrong to assert that the unitary state does not apply mechanisms of decentralization; in fact, some unitary states abound with structures and institutions at regional and local levels which all assure a high measure of decentralized government. The major distinguishing feature between the unitary state and the other form of state organisation which can be broadly labelled "federal", is that in the unitary state the central government retains the ultimate say over the distribution as well as the exercise of government powers and functions. (This does not mean, however, that the central government in exercising this ultimate authority, can act at will and ignore constitutional requirements and procedures).
- 3.3 An analysis based on the empirical evidence provided may very well conclude that a particular state exhibits so many federal characteristics and complies in so many respects with the federal idea, that it can be called a federation. Conversely, that its characteristics are such that it can more appropriately be called unitary. This is, however, a consequence of and not necessarily the determining factor of the constitutional order and governmental structures.
- 3.4 To conclude: There is no universally accepted definition of federalism, and we are not convinced that in a discussion on the form of state, it would be useful or indeed possible to use as a point of departure preconceived concepts such as unitary or federal states. We should like to reiterate our view contained in our First Report that a more expeditious way of dealing with the matter of form of state would be to consider all those separate issues which have a bearing on the form of state.
- 3.5 Finally, some remarks must be made about a confederation. A confederation is not a form of state since confederation, per definition, is a combination of separate, independent states which finds its basis for cooperation and cohesion, not in one constitutional system (although, of course, the respective constitutional system of the independent, separate states may reflect confederal agreements and arrangements), but according to rules of international law. Being of an international nature, each of the confederal states should enjoy international recognition in order to have their confederal pact sanctioned by international law. A clear example of a confederation which was not sanctioned by international law, is the confederation of the Republic of South

Africa and its TBVC states. International recognition of the independent status of the separate states in the confederation will to a very large extent depend on how these states gained their independence.

Independence founded on partition and secession which does not conform to international norms of human rights and self-determination (ie. mutual agreement by the mother

country and the secessionist state based on the free and voluntary expression of the will of the people concerned) is unlikely to meet with international approval. Furthermore, it would be difficult to promote confederal ties of mutual trust, cooperation and support between independent states which do not necessarily hold the same convictions about democracy or, do not subscribe to the same norms on human rights and liberties. In the latter respect, the European Confederation of States in the form of the European Community provides a clear example of the type of co-operation that is required.

- 3.6 It would be helpful if participants in the Negotiating Council in favour of confederation as an option would provide us with more clarity on their proposals and in particular the territory and population of the envisaged separate state, and how it will meet the international law requirements of secession and self-determination.

4. The Integrity and viability of the SPR

- 4.1 Following upon the Codesa debates there seems to be broad agreement that provision should be made for organs of government at central and SPR levels and that for this purpose the constitutional principles should require:

- 4.1.1 Democratic representation at each level of government.
- 4.1.2 Appropriate and adequate legislative and executive powers and functions to be vested in each level of government to enable each to function effectively.
- 4.1.3 The entrenchment of such powers and functions in the Constitution.
- 4.1.4 The general principles of the Constitution, including fundamental rights to be applicable at each level of government.
- 4.1.5 Provision to be made for tasks to be carried out at different levels of government on an agency or delegation basis, where this would be appropriate.

- 4.2 In addition to these areas of broad agreement there are proposals from participants that the constitutional principles should also address:

- 4.2.1 Procedures for amending the provision of the Constitution entrenching SPR boundaries, powers and functions.

- 4.2.2 The fiscal powers of and financial allocations to the SPR.
- 4.2.3 The distinction between exclusive and concurrent powers, and how conflicts arising out of the exercise of concurrent powers should be addressed.
- 4.2.4 Whether residual powers - i.e. those not specifically allocated to the central government or the SPR in the constitution, should vest in the central government or in the SPR.

4.3 There are sound reasons for the constitutional principles to address each of the matters referred to in paragraph 4.2. By doing so, the Negotiating Forum may be able to provide all the assurances necessary to guarantee the integrity and viability of the SPR, without pre-empting the work of any elected constitution making body. A decision as to process could then be taken in the knowledge that the integrity and viability of the SPR are not disputed.

4.4 Amendments to the constitution

- 4.4.1 We think that consideration should be given to the need for special procedures to be followed in regard to amendments to the boundaries, powers and functions of the SPR.
- 4.4.2 This offers an assurance that the SPR will be protected against the whims of a central government wishing to concentrate its power. There is a recent example in our own history of this having been done, and it is reasonable that the Constitution should contain safeguards against such actions.
- 4.4.3 Because circumstances change and the future can never be foreseen, constitutions should be capable of being amended to meet changed circumstances. Possibly some objective standard should be prescribed which would be justiciable in a court if disputed. Provision could also be made for a special role for the SPR in the making of any amendments which affect their boundaries, powers or functions.

4.5 Fiscal powers and financial allocation

- 4.5.1 It stands to reason that SPR's will have divergent financial and developmental capabilities.
- 4.5.2 Provision could be made for a fiscal commission to be involved in the allocation process, and for an objective standard to be followed (i.e. reasonable, having regard to the national interest and the interests of the SPR) which would be justiciable and a safeguard against the abuse of power.

4.6 Exclusive or concurrent powers, and residual powers

- 4.6.1 Any constitution that makes provision for the allocation of powers to more than one level of government, has to address the issue of where particular powers reside.
- 4.6.2 The Codesa principle that "appropriate and adequate" legislative and executive powers and functions shall be vested in each level of government to enable each to function effectively, does not specify where residual powers will lie, nor does it specify the basis for the allocation of powers either exclusively or concurrently, or how possible conflicts in respect of the exercise of concurrent powers will be resolved. Whilst there are no clear rules for determining these issues, we think that there is a need to address them in the Negotiating Council and to establish whether they can be made the subject of a constitutional principle or principles.
- 4.6.3 Where there are concurrent powers, the Central Government usually has an overriding power, but this can be made subject to objective criteria to prevent abuses. We suggest that this be debated, as well as the site of residual powers, and possible criteria for determining how the allocation of powers should be made.
- 4.6.4 The question of asymmetry of powers has been raised by a number of participants. It is a matter which calls for careful consideration. We would appreciate receiving a more detailed explanation of what particular participants have in mind so that we can deal with this matter in a later report.

5. CONSTITUTION MAKING PROCESS

- 5.1 From the proposals on the constitution making process submitted to us on Constitutional Issues by the participants, it appears that:
 - 5.1.1 There exists an overall unanimity that South Africa, [including the TBVC states] requires a new constitutional dispensation to replace the present one;
 - 5.1.2 The parties hold divergent views on the constitution making process and consequently on the process of transition to a new constitutional order;
 - 5.1.3 The proposals of the parties on the creation of a new constitution or constitutions for South Africa evince substantive differences on two cardinal issues:
 - 5.1.3.1 The structure, composition and function of the constitution making body, and
 - 5.1.3.2 The mechanism of transition from the present to a new constitutional order.

5.2 The proposals of the parties

There are differences between the various proposals. They have been developed over a period of time, during which positions have been modified in part to meet the concerns of some of the participants. Allowing for differences in emphasis and detail, the proposals of the parties may be classified **within two categories:**

- 5.2.1 On constitution making, an elected constituent assembly acting as a national constitution making body, on the one hand, and the present Negotiating Forum ["MPNP"] acting as a constitution making body, on the other.
- 5.2.2 On constitutional transition, a one phase transition or two or more phases of transition.

5.3 The structure, function and composition of CA.

One proposal which in broad terms has the support of a number of parties is that a CA should draw up and adopt the final new Constitution, subject *inter alia* to the following important qualifications.

- 5.3.1 Members of the CA shall be elected on the basis of a non racial unqualified franchise including citizens of the TBVC States, in an electoral system based on regional and national proportional representation within the CA.
- 5.3.2 The CA shall be sovereign and not limited in any way in its constitution making mandate subject to what is stated hereinbelow:
- 5.3.3 The CA shall fashion a new constitution within the framework of binding the general constitutional principles agreed upon in the MPNP.
- 5.3.4 The CA shall be required to adopt the new constitution within fixed time frames, by predetermined and entrenched adoption procedures and shall be subject to an agreed dead-lock breaking mechanism.
- 5.3.5 Regional boundaries for purposes of elections of the CA shall be determined by the Multi Party Negotiation Council upon the recommendation of the Commission on demarcation of SPR.

- 5.4 The other proposal, supported broadly by participants opposed to the CA, is that the present negotiation forum should draft and adopt the final national constitution/s subject to the following:

- 5.4.1 The MPNP should agree beforehand on the form of state, the boundaries, powers and functions of SPR as well as on constitutional principles;
- 5.4.2. A panel of experts appointed by MPNP should draft the national constitution:

- 5.4.3 Simultaneously, or in interaction with the drafting of the national constitution. "people at ground level" must negotiate and determine SPR constitutions in accordance with the constitutional principles set at national level.
 - 5.4.4. The constitutions of regions or states shall be drawn up and adopted by regional, multi party fora, or referenda, or regional constituent assemblies.
 - 5.4.5. Legislative organs of the respective SPR shall pass their national and SPR constitution.
 - 5.4.6. Elections shall take place on a national as well as SPR levels in terms of the new national and respective regional constitutions.
- 5.5 One of the participants appears to propose that the present negotiating forum draft and adopt a transitional constitution:
- 5.5.1 Which will be drafted in accordance with and amended or replaced by and only within the framework of agreed, justiciable and specially entrenched constitutional principles;
 - 5.5.2 Which shall be a fully fledged constitution;
 - 5.5.3 Which shall not be amended or repealed in any other manner or by any other procedure than that prescribed by its own provisions:
- 5.6 Whilst subscribing to the views of the general category described in 5.4 hereabove, one of the parties holds a distinct view that:
- 5.6.1 The demarcation, powers and functions governing at least two States - "an Afrikaner state and the new South Africa there might be more", should be negotiated beforehand by all interested parties, presumably within the multi-party negotiation process.
 - 5.6.2 Such constitutions of the confederal states or states within a commonwealth should be legislated into power by the existing South African parliament. It is argued that only the present parliament can lawfully transfer its powers to the new states.
- 5.7 **Transitional/interim process**
- Two broad approaches emerge from the submissions of the parties in respect of constitutional transitional arrangements:
- 5.7.1 The group that favours constitution-making in the MPNP:
 - 5.7.1.1 Rejects the notion of a two-phased transition to a final national constitution;

- 5.7.1.2 Consequently, they oppose the establishment of a transitional executive council, elections leading to a CA, the CA itself, an interim government of national unity, or any form of transitional authority, and a transitional constitution;
- 5.7.1.3 They seek prior determination of the form of state and, obviously of SPR boundaries, functions and power;
- 5.7.1.4 They all support the principle of asymmetrical SPR powers and of the principle of a "bottom up" constitution making process in terms whereof the regions draft and adopt separate, distinct and autonomous constitutions, on the one hand, and the MPNP adopts the national constitution which will not override the autonomous constitutions of the SPR.
- 5.7.1.5 They resist the holding of elections at a national or regional level at any stage before the SPR constitutions have been predetermined by the SPR themselves.
- 5.7.1.6 They all oppose the termination or amendment of the present constitutional dispensation including the TBVC states prior to the final adoption of the constitutions for the SPR and the national constitution.
- 5.7.1.7 All but one which advances a confederal model, propose a "federal" constitutional order within one country.

5.7.2 The two-phased model generally speaking is characterised by:

- 5.7.2.1 The determination of the constitutional principle by the MPNP;
- 5.7.2.2 The demarcation of regions by the MPNP for purposes of elections;
- 5.7.2.3 Installation of a transitional executive council. [Some parties hold that the TEC should function in terms of the transitional constitution whilst others hold that it should function in terms of agreements by the MPNP.]
- 5.7.2.4 The adoption of a transitional constitution
- 5.7.2.5 A firm election date should be proclaimed and a formal election process should commence.
- 5.7.2.6 Once elections have been held:
 - 5.7.2.6.1 The new parliament will be installed [some parties advocate for legislative as well as constitution making functions by the new parliament].
 - 5.7.2.6.2 A new multi-party executive government will be structured, and

5.7.2.6.3 Newly structured regional, [including TBVC states] and local government levels will be phased in, and

5.7.2.7 The constituent assembly/parliament adopts [on some versions amend, the transitional constitution] a new constitution replacing the transitional one.

6. PROPOSALS OF THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES.

- 6.1 No significant progress can be made by the parties without a significant resolution of what appears to be mutually exclusive approaches to the constitution making process. Historically two predictable modes of constitution making have come to be:
- 6.1.1 *Pouvoir Constituant* - has been utilised to create a new constitution following upon a new and distinct historical moment such as a total collapse of a regime or a revolution. In this case the new constitution would not owe its existence to the old.
 - 6.1.2. *Pouvoir Constitué* - existing constitutional order is amended and thus the new order derives its legitimacy and continuity from the old.
- 6.2 The present constitutional impasse exhibits features of both of the aforementioned approaches. Here it may be said that the new constitution cannot derive its legitimacy, popular acceptability and democratic character from the existing constitutional dispensation. A mere amendment of the existing constitutional order would not suffice. The major source of legitimacy would be a democratic process signifying an irreversible and "cleansing" break from an undemocratic constitutional order. On the other hand it may be argued that a new constitution may not and cannot come into being without the explicit co-operation of the existing constitutional order.
- 6.3 Can the differences that exist in regard to the process be resolved? A possible solution which may be worth exploring in the Negotiating Council is the careful and sensitive formulation of a mutually acceptable principle of regional government, adequate constitutional principles and provision for the democratic creation and adoption of a final constitution.
- 6.4 Each of the following constitutional processes could be examined in that context and given effect to as instruments of reconciling the competing concerns of the parties:

6.5 Adequate principle of regional government including:

- 6.5.1 The idea of a special role for regions in the formal amendment procedure of the constitution, especially on matters affecting regions;
- 6.5.2 The concept of regional representation in the central legislature;
- 6.5.3 A list of justiciable criteria limiting the exercise of the override to prevent the party at the centre from exercising such powers for the purpose of penalising regional opponents;
- 6.5.4 Agreed criteria for the determination of regional boundaries, and powers.

6.6 Justiciable and binding constitutional principles.

6.7 Special majorities.

6.8 Entrenched and justiciable rights.

CONFIDENTIAL
THIS REPORT IS EMBARGOED UNTIL 12H00
ON FRIDAY 28 MAY 1993

**THIRD REPORT TO THE NEGOTIATING COUNCIL ON CONSTITUTIONAL
PRINCIPLES BY THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL MATTERS**
27 May 1993

1. Introduction

- 1.1 We were requested by the Planning Committee to develop our Second Report on Constitutional Issues (19 May 1993) so as to formulate a comprehensive set of constitutional principles, and in particular principles on the powers and functions of regions to serve the purpose suggested by us in paragraph 6.3 of our Second Report.
- 1.2 We do not think that any good purpose will be served by attempting to analyse each of the submissions made to us in order to indicate the type of constitution that is contemplated by the various participants, or how they differ from one another. We have considered all the proposals put to us, and have decided that we can best give effect to the request from the Planning Committee by formulating a set of constitutional principles for debate in the Negotiating Council. In formulating these principles, we have drawn on the Codesa documents, and on our own knowledge and experience as well as the submissions of the participants.
- 1.3 The principles that we offer for debate do not accord wholly with the submissions of any of the parties, and we appreciate that they are likely to meet some resistance from all of the participants. It seems to us, however, that areas of agreement, disagreement and possible compromise will emerge from the debate on our report, and that in the process, the participants may be able to find a solution along the lines suggested by us in paragraph 6.3 our

Second Report (19 May 1993). For the sake of clarity we deal with general constitutional principles and principles on SPR's in separate paragraphs. Together they constitute one body of constitutional principles.

- 1.4 We have not yet had a response to paragraph 3.6 of our Second Report. In the circumstances we do not intend dealing in this report with the question of confederation. How, if at all, a confederation can be accommodated within one set of constitutional principles may depend on that response.

2. General Constitutional Principles

- 2.1 The constitution of South Africa shall provide for the establishment of a single sovereign state with a democratic system of government and a common South African citizenship.
- 2.2 The constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial and all other forms of discrimination and promote racial and gender equality and national unity.
- 2.3 There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.
- 2.4 The judiciary shall be competent, independent, legitimate and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.
- 2.5 There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.

- 2.6 Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.
- 2.7 Formal legislative procedures shall be adhered to by legislative organs at all levels of government.
- 2.8 The diversity of languages, cultures and religions shall be acknowledged, promoted and protected.
- 2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognised and protected.
- 2.10 All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.
- 2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.
- 2.12 The status of traditional leaders shall be acknowledged and recognised in an appropriate manner in the constitution. Unless provided otherwise by legislation, indigenous law shall be applied to the extent that it is compatible with the provisions of the fundamental rights contained in the constitution.
- 2.13 Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

- 2.14 Amendments to the constitution shall require special procedures involving specified majorities.

3. Principles dealing with the allocation of powers to different levels of government

- 3.1 Government shall be structured at national, SPR and local levels.
- 3.2 At each level of government there shall be democratic representation.
- 3.3 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively.
- 3.4 The powers and functions of each level of government shall be defined in the constitution. Amendments to the constitution which alter the powers, boundaries, functions or institutions of regions shall in addition to any other procedures specified in the constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed.
- 3.5 The powers and functions of each level of government may include exclusive and concurrent powers, as well as the power to perform functions for other levels of government on an agency or delegation basis.
- 3.6 Each level of government shall have fiscal powers which will be defined in the constitution.
- 3.7 A Financial and Fiscal Commission, including representatives of each of the SPR's, shall be constituted to advise the national government on the distribution of financial and fiscal resources.

3.8 Fiscal and financial allocations by the national government to SPR governments shall be made on an equitable basis after taking into account the national interest, disparities within SPR's, the advice of the Financial and Fiscal Commission, the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

3.9 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

3.9.1 General¹

3.9.1.1 The level at which there is most control over the quality and delivery of services, should be the level responsible for the execution of the programme or the delivery of the services.

3.9.1.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the territorial, functional or institutional integrity of the SPR's.

3.9.1.3 In the event of a dispute concerning the legislative powers allocated by the constitution concurrently to the national and SPR governments, precedence shall be given to the legislative powers of the national government.

¹ In dealing with this issue we have made extensive use of the report on Constitutional Options and their Implications for Good Government and a Sound Economy prepared by a group of experts which consisted largely of South Africans of different political persuasions, published in March 1993 by the Consultative Business Movement.

3.9.1.4 Where it is necessary for the maintenance of national standards, the maintenance of economic unity, the maintenance of national security or the prevention of action taken by one SPR which is prejudicial to the interests of another SPR or the country as whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.

3.9.1.5 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

3.9.2 National Government

3.9.2.1 Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

3.9.2.2 Where uniformity across the nation is regarded as important with regard to a particular function, then power over that function should be allocated predominantly, if not wholly, to the national government.

3.9.2.3 Where minimum standards across the nation are regarded as important for the delivery of public services, the power to set such standards should be allocated to the national government.

3.9.2.4 The power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

3.9.3 SPR Government

SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries.

3.9.4 Concurrent Powers

Where mutual co-operation is essential or desirable or where it is important to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

3.9.5 Residual Powers

Powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall vest in the national government, alternatively in the SPR governments. (This is a fundamental issue which calls for a political decision).

4. Asymmetry

Certain parties have made submissions to our committee that the constitution should make provision for SPR asymmetry. Regional asymmetry may manifest itself in the following ways:

4.1 Geographical and demographic asymmetry

It stands to reason that a measure of geographical and demographic asymmetry will exist amongst SPR's. If such asymmetry becomes disproportionate and creates possibilities of economic decline or disruption of inter-regional relationships, constitutional mechanisms could be applied to rectify the position (eg adjustment of SPR borders on a basis of consent by the people concerned and approval by the respective SPR's as well as the national legislature).

4.2 Asymmetry in respect of functions and powers

There can be asymmetry in the allocation of powers and functions. In the submissions to our Committee it has been suggested that SPR's may require different powers and functions depending on their location, the nature and extent of the development that has taken place in a particular SPR, and even the composition of the population. It has been suggested that asymmetry could be extended not only to powers and functions, but also to matters such as SPR citizenship, and the recognition and use of languages.

4.3 Institutional asymmetry

There can be asymmetry in the institutions of government, ie different types of legislatures, different electoral systems etc. There can also be asymmetrical institutions, ie different institutions for the accommodation and recognition of traditional leaders, and linguistic, cultural and religious groups etc.

4.4 Temporal Asymmetry

SPR governments, institutions, functions and powers may be phased in at different times.

We have not dealt with asymmetry as a principle because it is not clear to us what the views of all the parties are on this issue. The principles that we have formulated are of general application and ought not to hamper a debate on asymmetry.

5. **Matters requiring the consideration of the Negotiating Council:**

- 5.1 Matters such as the powers, functions and boundaries of the SPR's and local governments in the interim depend on decisions to be taken by the Negotiating Council in regard to the process of transition and can only be dealt with after such decisions have been taken.
- 5.2 The process of decision making with regard to the allocation of exclusive, concurrent or residual powers specifically to different levels of government, is a matter requiring political negotiation in the light of this report. The final model should be one which, inter alia, is financially viable and conducive to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.

**THE FOURTH REPORT OF THE TECHNICAL COMMITTEE ON
CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL**

3 JUNE 1993.

1. Introduction

1.1 The process of transition contemplated by the Resolution submitted by the Planning Committee to the Negotiating Council on 1 June 1993 requires agreement to be reached by the Multi-Party Negotiating Forum on:

1.1.1 General Constitutional Principles

1.1.2 A constitutional principle on the allocation of powers to different levels of government

1.1.3 A constitutional framework which makes provision:

1.1.3.1 For the election of a Constitution Making Body which will adopt a constitution;

1.1.3.2 For government at national, regional and local levels during the period between the election for a constitution making body, and the adoption of a new constitution by that body - the transitional period;

1.1.3.3 For the establishment of structures for national, regional and local government, the powers that each level of government will have, the way each will function and take decisions during the transitional period, and the manner in which the different levels of government will relate to one another.

- 1.2 The Resolution requires us to make recommendations to the Negotiating Council on:
- 1.2.1 The powers, functions and structures of the SPR during the transitional period;
 - 1.2.2 The constitution making process to be followed, including the structures that need to be established for that purpose;
 - 1.2.3 The procedures to be followed in the drafting and adoption by the Multi-Party Negotiating Forum of a constitution for the transitional period;
 - 1.2.4 The procedure to be followed thereafter in the drafting and adoption of a constitution by an elected constitution making body.
- 1.3 The issues which we have to address are once again inter-related and the tension which we have previously identified between decisions to be taken by the MPNP, and decisions to be taken by the Constitution Making Body is likely to arise at each stage of the process.
- 1.4 In this report we will address the powers, functions and structures of the SPR during the transitional period. We will do this in the context of our previous reports and in the knowledge that decisions taken in relation to the SPR during this period, have a bearing on the constitution making process as a whole, and on the functioning of the elected Constitution Making Body.
- 1.5 The need to make provision for a legal framework to regulate SPR government between the adoption of a constitutional framework by the MPNP, and the adoption of a new constitution by the elected Constitution Making Body cannot be questioned. The nature of that framework depends, however, to some extent upon the way in which the transitional framework is conceptualised. We deal with this later in our report.

2. **Assumptions regarding the constitution-making process and the establishment of regional government**

To enable us to formulate concise suggestions regarding the powers, functions and structures of SPR's during the transitional period, we have to make certain assumptions relating to the constitution making process:

- 2.1 Due to the variety of structures at present in existence (in particular the Provincial Governments, the TBVC states and the Self-governing Territories), various scenarios are possible depending upon the continuation or not of those, or some of those structures when a transitional constitution comes into effect.

For the purposes of this Report we therefore assume that:

- (a) **Transkei, Bophuthatswana, Venda and Ciskei will have been reincorporated into South Africa at the time of the coming into operation of the transitional constitution;**
 - (b) **The operation of the constitutional legislation underlying the institutions of the Self-governing Territories (Act 21 of 1971) and related measures will have ceased at the time of the coming into operation of the transitional constitution.**
- 2.2 The variety of existing regional and second-tier administrations will not be capable of instant rationalisation, whatever geographical or structural form the transitional regional dispensation may take. Personnel and infrastructures of each of the existing administrations will have to be taken into consideration in the process of inevitable rationalisation.

We therefore assume that the transitional constitution will make provision for the consolidation of the *political* authority over all the existing administrations and the infrastructure within each SPR established for the period of transition, and that the greatest measure of continuity of

employment and services will be ensured during the process of rationalisation.

3. The different approaches to SPR's in the transitional period

3.1 Broadly, two models of interim SPR's have been proposed:

3.1.1 The first envisages the establishment of interim regional administrations within existing provincial boundaries for the purpose of phasing out apartheid based structures, rationalising existing administrations and ensuring the provision of services in the transitional period.

3.1.2 The second contemplates the establishment of fully fledged transitional regional governments within boundaries demarcated for the purposes of the elections, and with elected legislative and executive structures.

3.2 These models have implications for the divisions of powers between national government and SPR's in the transitional period, the structures and composition of those SPR's and the effective powers of an elected CMB.

3.3 The two models overlap to the extent that they both envisage the reconstruction and rationalisation of existing second tier structures of government, an agreed distribution of the function of government between the national and regional levels in the transitional period, and the adoption of a final constitution by an elected Constitution Making Body.

3.4 No matter how the transition is conceptualised, three matters are clear:

- * First, that the framework will have to make provision for effective regional administration during the transitional period.

- * Secondly, that this will have to be done in way which has regard to the regional authorities (including the TBVC states), which may be in existence when the new arrangements are implemented.
- * And finally, that this must all be done in way which is compatible with the powers and functions of the elected Constitution Making Body.

4. The allocation of powers to SPR's during the transition

- 4.1 The process of the allocation of powers and functions between different levels of government is always a complex task. It is particularly difficult to undertake this task for a transitional period, when the nature of the final constitutional order has not been settled.
- 4.2 It would be more appropriate in these circumstances to have a flexible allocation of powers, which at SPR level could be exercised subject to the supervision of the Constitution Making Body and a broad based government of national unity. If this were to be done, the distinction in the emphasis in the two models to which we have referred between administration on the one hand and government on the other could be bridged.
- 4.3 As long as the demarcated boundaries are broadly acceptable, a way forward could be the acceptance of a model in which:
 - 4.3.1 Provisional regions are established in accordance with the demarcated boundaries;
 - 4.3.2 Provisional regional authorities are established on the basis of the electoral results within such regions;
 - 4.3.3 Powers consistent with criteria such as those contained in our Third Report are vested in the Provisional Regional Authority;
 - 4.3.4 Such powers are stated in general terms and are made subject to the supervision of the Constitution Making Body.

4.4.4 This would enable the foundations for SPR governments to be established and the necessary rationalisation to be undertaken, without finalising the precise boundaries of the SPR's and the precise areas of competence of the different levels of government. Those tasks would be left to the Constitution Making Body to accomplish within the framework of the constitutional principles and the detailed principle dealing with the allocation of powers to different levels of government.

5. Suggested allocation of powers and functions of SPR's during the transition

With reference to the criteria to be applied in the allocation of powers between national and SPR governments set out in paragraph in 3.9 of our Third Report, it is our view that during the transition SPR Governments could be entrusted with powers pertaining to the following functional areas, within the framework described in paragraph 4:

- 5.1 The imposition of SPR taxes
- 5.2 Appropriation of revenue
- 5.3 Health services
- 5.4 Welfare
- 5.5 Education
- 5.6 The environment
- 5.7 Local government
- 5.8 Town planning
- 5.9 Tourism and recreation
- 5.10 Agriculture
- 5.11 Public media
- 5.12 Public works and roads
- 5.13 Traffic control
- 5.14 Local policing and law enforcement
- 5.15 Casinos, racing and gambling

- 5.16 Transport
- 5.17 Cultural affairs
- 5.18 Traditional authorities
- 5.19 Protection services
- 5.20 Markets and pounds
- 5.21 Fish and game preservation

The allocation of specific elements of these functional areas to SPR's and other levels of government requires expertise in the field of public administration. Such detailed allocation should be done at the time of the drafting of the transitional constitution.

6. Structures of the SPR's during the transitional period

The exact structures of the SPR's are matters to be negotiated and agreed upon. However, these structures, including the form of regional government, should be democratic and in accordance with the Constitutional Principles as developed in our previous Reports.

7. Outstanding matters

We will deal with the other matters set out in paragraph 1.2 in subsequent reports.