

more openly than might have been the case if the discussions had been public. It also enabled the delegates to 'negotiate' deadlocks and find solutions to what might otherwise have been insoluble problems. The question of how the assembly will conduct its affairs can possibly be postponed for decision by the assembly itself; the question of a chairperson may, however, have to be decided upon in advance.

7. HOW DECISIONS WILL BE TAKEN

This is of fundamental importance. Will a specified majority, such as two-thirds or three-quarters be required within the constituent assembly, or will a simple majority be sufficient. In Namibia a two-thirds majority was required. This led to compromises, but in the end it also led to the adoption of the constitution without dissent, and in turn to national consensus in regard to the acceptability of the constitution. It seems unlikely that the government will agree to a simple majority. It may argue for substantial consensus, or at least for a defined majority. Difficulty over this issue could hold up the negotiations. If the route chosen is to agree first on the constitutional principles, and then to refer the drafting of the constitution to a constituent assembly, the difficulty may be easier to overcome. Agreement on constitutional principles means agreement on the framework, and once such agreement has been reached, a demand for consensus may fall away.

campaign (including equal access to the media, not done satisfactorily) to the final counting of votes, to guarantee a free and fair election. The Special Representative of the Security Council had wide powers on such matters as ensuring the abolition of discriminatory legislation and the release of prisoners. Part of UNTAG's responsibility was the repatriation of Namibian refugees under the auspices of the UNHCR and the Namibian Council of Churches. Finally the Special Representative had to certify to the Security Council that the elections were fair and free.

3.3 WESTERN SAHARA

Contrary to its role in Namibia, the UN for the first time will not only observe but organise the whole election process in Western Sahara, under the agreement reached with Morocco and POLISARIO in 1991. The UN will establish the electoral procedure, identifying and register persons entitled to vote, monitor the election campaign and ballot, announce the outcome of the referendum - on condition that it was fair and free - and finally guarantee the implementation of the result.

- 3.4 The above examples are 'colonial' ones; in addition, the UN has been recently involved in conflicts of a certain international dimension where the core of the issue is the internationally supervised change of the internal political and legal order. These arrangements are for:

3.5 CAMBODIA

The Permanent Members have agreed to set up a UN Transitional Authority in Cambodia (UNTAC) in 1992 which will have authority which fall short of a government: UN officials will take over key positions in the national administration for monitoring and controlling all administering bodies. They will investigate complaints against civil servants and human rights violators. Military observers will monitor and verify the implementation of the cease fire. The soldiers of the parties to the conflict will be reduced in number and confined to specified areas and their weapons stored under the supervision of the UN. Over 300,000 refugees will be repatriated under UN auspices and the UN Development Programme will assess and meet short-term infrastructural needs. The main job of UNTAC, as in Western Sahara, is the organisation and implementation of free and fair elections for a Constituent Assembly.

- 3.6 In Central America, the presidents of countries there adopted a peace plan for democracy, national reconciliation and the holding of fair and free elections. These presidents invited the UN and the Organisation of

Finally, the peace process will lead to the holding of free and fair elections under international supervision during 1992. The role and tasks of the UN will be determined by the parties concerned.

4. ROLE FOR THE INTERNATIONAL COMMUNITY

- 4.1 The experience of Zimbabwe and Namibia, during their transition, shows that the roles of the OAU and the UN have been of considerable importance. In the case of Zimbabwe, the Commonwealth and the OAU ensured that the legal authority, Britain, effectively supervised the de facto power, the Muzorewa-Smith regime. In the case of Namibia, there can be little doubt that the UN, under pressure from various parts of the international community, ensured that the electoral law, the maintenance of order and the proper organisation of the ballot were changed in order to ensure a fair and free election.
- 4.2 The experience of other countries in recent years has shown the variety of ways in which the international community has provided assistance.
- 4.3 What follows on South Africa is the concluding and summary part of a paper prepared by a diplomat-scholar which provides insights into a possible role for the UN. The paper itself is nearly 40 pages long.
- 4.4 "UN practice clearly establishes the competence of the United Nations concerning the situation in South Africa and its overcoming. Insistence on the principle of non-intervention is therefore legally totally unfounded.
- 4.5 To exercise pressure on the South Africans to comply with the demands formulated in the resolutions, the Security Council adopted a mandatory arms embargo against South Africa and subsequently urged UN member states to adopt additional sanctions. These measures were aiming at the eradication of apartheid and at the attainment of peaceful change. With important changes in the policy of the NP-government and its embarking on reform policy it has to be decided, when the moment of lifting of sanctions has been reached. Whereas the arms embargo can only be lifted by a new resolution of the Security Council to that end, the question of lifting other sanctions principally lies within the competence of the individual countries.
- 4.6 In the Declaration on South Africa 1989, the international community unanimously decided, that sanctions shall not be lifted, until there is clear evidence of profound and irreversible changes in South Africa. This is short of the Harare Declaration of 1989, according to which

affairs administrations and homeland governments;

- (b) the creation of an interim government in which would be vested the executive authority, and the power to amend and repeal existing laws, and to make new laws by proclamation;
- (c) the composition of the interim government and how it will take decisions;
- (d) the holding of elections for a constituent assembly within a specified time, and the mandate that the constituent assembly will have to draw up a new constitution;
- (e) transitional arrangements dealing with matters such as the administration of the country, the functioning of the judiciary, the enforcement of existing laws, and the handling of financial matters during the interim period.

5 The composition and functioning of interim government will have to be defined in the amending statute. Issues to be addressed will include:

- (a) Who will participate in the interim government and how will such participation be determined? Will it include 'homeland leaders' and parties in the tri

However, what is necessary in order to create legal and constitutional certainty, is that there should be a comprehensive agreement with clear steps leading to a definite result spelt out. On the basis of such a comprehensive agreement, the legalisation of the whole process and ensuring that it enjoys the stamp of constitutionality become simplified.

Successful transitions in other countries including Zimbabwe and Namibia also proceeded in terms of comprehensive agreements.

The reunification of Germany, for example, is proceeding in terms of a Reunification Treaty which in terms of length runs to over 1000 pages. The Treaty deals with every aspect of reunification. In terms of the Treaty, the GDR disappeared at an early date and yet the process of reunification in its various facets still proceeds - despite the early disappearance of the GDR.

5. THE APC IS CRUCIAL

Whilst mindful of the ANC demand for an Interim Government to be installed without delay, it is nonetheless essential for a comprehensive agreement to be reached at the APC on at least the following matters:

- i) Constitutional Principles which must include the Bantustans.
- ii) The mechanism to draw up and adopt the constitution (Constituent Assembly).
- iii) The setting up of the Interim Government.
- iv) The role of the international community.
- v) Details relating to the convening and functioning of the Constituent Assembly until the adoption of a new democratic Constitution.
- vi) Elections in terms of the new Constitution for a new government.
- vii) The installation of the first government in terms of the new constitution.

In respect of each one of the above matters, detailed agreements and arrangements will have to be formulated. As much of the major transitional issues as possible should be resolved at the APC stage. This will make it possible for all the agreements to be legalised and leave the minimum to future dispute.

It is submitted that only after a comprehensive agreement has been reached, will it be possible to work out the

NEGOTIATIONS, THE TRANSITION AND THE ROLE OF THE INTERNATIONAL COMMUNITY

KADER ASMAL

1. BACKGROUND

- 1.1 The unique set of circumstances constituting the issue of apartheid has resulted in the international community at the regional and the international level adopting the most profound political and legal responses to deal with this threat to international order and morality. Such a response has involved over 300 resolutions since 1946 condemning apartheid as a breach of the right to self-determination and as a crime against humanity, has provided a legal validation for the armed struggle and a protected status for the combatants of the liberation movement.
- 1.2 In addition, the United Nations, the Organisation of African Unity, other regional bodies and countries have used this legal and moral consensus for the imposition of various forms of sanctions, including the first ever decision by the Security Council in 1977 to impose a binding arms embargo against a member State as such sales constituted a threat to international peace and security.
- 1.3 Throughout this period and especially with the intensification of repression, the international organisations have demanded the dismantling of the apartheid system, rejected the claim that apartheid was a matter of domestic jurisdiction, expelled apartheid South Africa from membership of international organisations and, in 1974, withdrew the credentials of the apartheid regime at the General Assembly of the U.N. This resulted in the culminating finding that the apartheid regime was illegitimate and had no authority to speak for the people of South Africa.
- 1.4 It was on this basis that the Security Council of the UN - more muted than the General Assembly because of the threat of the veto by apartheid's traditional allies - made its historic finding that the so-called new constitution of South Africa of 1983 runs counter to the UN Charter and was therefore null and void. Such a finding of nullity is without parallel in international law and relations and provided an even stronger basis for international intervention in South Africa and support for the struggle.
- 1.5 In order to assist in the historic task which the international community has undertaken to assist in the removal of apartheid, the Organisation of African Unity and the General Assembly of the United Nations adopted the now well known Declarations supporting the ending of

[illegible]

control the SAP and SADF;

- 7.3 The regulation and supervision of elections and to oversee the process towards the adoption of a new constitution;
 - 7.4 The placing of a moratorium on controversial projects;
 - 7.5 The restoration of the territorial integrity of South Africa which would include dismantling apartheid structures such as 'own affairs' Departments and Bantustans;
 - 7.6 The prevention of the use of the financial resources of the State, or the alienation of the financial resources of the State, either to favour a political party, or to pre-empt future economic, educational or social programs.
8. A theory of transition needs to be elaborated so as to inform the thinking on these issues. Without such a theory or vision responses and demands may be inconsistent.

oversight or supervisory control

Each modality of interim government would require a different structure. Questions of structure, decision-making, composition, are raised in more detail in the memorandum entitled "What We Mean by Interim Government".

3. Legality of Interim Government Rule

Important issues relating to the legality of interim government rule and the legal form in which its powers are to be exercised must be examined. These issues will come to the fore in any negotiations with the State. The issues are dealt with in the memorandum by Dullah Omar.

4. The Role of the International Community

Whereas a prominent role for the international community has not been previously asserted, conditions in the country have led to a reappraisal of the role the international community could play in supervising the transition. Issues related to the role of the international community in South Africa and in other countries is dealt with in the memorandum by Kader Asmal.

5. Duration

The duration of interim government is an important issue. Commentators have noted a tendency for interim governments to prolong their period of existence and it may well be that the State will not want to commit itself to a fixed time period for the transition process. The very existence of an interim government will reduce international, and possibly local pressure on the State to follow through with the process of transition.

WORKSHOP ON
INTERIM GOVERNMENT

Dossier No II

**ANC Constitutional
Committee**

**25 September 1991
Johannesburg**

sufficiently close to the Harare Declaration to be acceptable in principle, and at the same time it offers a possible way around what might otherwise become an intractable obstacle to a 'settlement.'

5. WHAT WILL THE POWERS OF THE CONSTITUENT ASSEMBLY BE

5. Will the constituent assembly have unrestricted power to settle the terms of the constitution, or will it only have power to put forward a draft which will be made the subject of a referendum. This raises questions posed in paragraph 4, and depends upon the answers to those questions. Approval through a non-racial referendum would establish popular support for the constitution. It would, however, add to the time and the uncertainty, which will be magnified if a general election has to be held once the new constitution has been adopted. Without making the error of rushing through the process to get a quick solution, there are advantages in the present political climate to attempting to reach a settlement as soon as this can reasonably be achieved. Reference has been made to the potential advantages of a procedure whereby constitutional principles are first agreed and recorded in legislation, which provides for the election of a constituent assembly to settle the terms of a constitution, and possibly a referendum. This is similar to the Namibian model, save that in Namibia there was no provision for a referendum. In Namibia a constituent assembly was elected by

5.3.5 The question however arises that should governments of South Africa, the independent homelands and the self-governing territories be permitted to participate? If they are allowed, they may have dual representation, through their government and through their party. On the other hand, if governments are excluded, how does one commit such governments to the decisions of the APC for example the re-incorporation of its territories to united South Africa.

5.3.6 If governments are not allowed to participate, how will homeland governments not belonging to political parties be drawn into the APC for example Transkei.

5.3.7 For parties to participate should there be a threshold for example minimum support, must a party exist for a particular period before it qualifies for participation. These are matters that need to be clarified.

5.4 **HOW MANY DELEGATES SHOULD EACH PARTY HAVE AT THE APC?**

Should participation be by proportional representation in accordance with their support.

5.5 **HOW WILL DECISIONS BE TAKEN AT THE APC?**

Will decisions be taken by consensus, majority vote, or will major participants have veto power.

5.6 **WHAT SHOULD BE THE RULES OF PROCEDURE?**

Should special rules be drawn for the APC or should the normal rules of meeting procedures apply.

5.7 **HOW WOULD DEADLOCK BE BROKEN?**

5.7.1 The service of a facilitator or mediator could be employed.

5.7.2 ~~The next question arises: Who should such facilitator~~

5.1.4.1 **WHEN DOES THE INTERNATIONAL COMMUNITY GET INVOLVED; AND**

5.1.4.2 **WHAT FORM DOES SUCH PARTICIPATION TAKE.**

The international community could be drawn in from the very early stages of the process and they could be called upon to convene the APC.

The possible form such international participation could take, could be the establishment of a United Nations Peace Committee for South Africa, comprising representatives from all the continents, such as Europe, Asia, America, Africa, etc.

5.2 **WHO IS TO CHAIR THE APC ?**

5.2.1 Ideally, the body convening the APC should nominate someone from among itself to chair the conference.

5.2.2 The convening body could also nominate free agents to chair the conference, provided such free agents are independent, impartial and has the respect of the participants to the APC.

5.2.3 The participants at the APC could also decide to appoint a Chairperson from amongst themselves and the role of the Chairperson could be rotated amongst them.

5.3 **WHO SHOULD BE REPRESENTED AT THE APC ?**

5.3.1 To make the APC successful and the outcome binding, as many parties with constituencies or proven support should participate.

5.3.2 The next question which arises is: **SHOULD ONLY POLITICAL PARTIES BE REPRESENTED OR CAN PARTIES REPRESENTING LABOUR, BUSINESS, CHIEFS, ETC., ALSO ATTEND THE CONFERENCE?**

5.3.3 A criteria for participation should be drawn up and provided a party qualifies in terms of such criteria, it should be entitled to participate at such conference.

5.3.4 All major parties such as the ANC, Nationalist Party, PAC, Inkatha, Conservative Party, the SACP, Labour Party and

NOTES ON A CONSTITUENT ASSEMBLY

1. The function of a constituent assembly will be to settle the terms of a new constitution for South Africa. In negotiations for a constituent assembly, consideration will have to be given to the following factors:

1.1 How the constituent assembly will be brought into existence.

1.2 How the members of the constituent assembly will be chosen.

1.3. What the powers of the constituent assembly will be.

1.4 How the constituent assembly will function and conduct its business.

1.5 How the constituent assembly will take its decisions.

1.6 How the decisions of the constituent assembly will be implemented.

1.7 How the implementation of the decisions of the constituent assembly can be guaranteed.

deliberations. Throughout this period there is likely to be uncertainty, and the possibility of a high level of political conflict.

- 4.7 An alternative route to follow would be for the major parties to the negotiations to attempt to reach agreement on principles which will define the broad parameters of the constitution and within which an elected constituent assembly would be required to function. This is what happened in Namibia. The advantage of this procedure was that the framework, though not the detail, of the new constitution was known before the elections were held for the constituent assembly. The assembly, functioning within the predetermined framework, was able to complete its deliberations within a comparatively short space of time. Once the constitutional principles had been accepted, there was a degree of certainty as to the future and it was possible to conduct the elections in a relatively peaceful atmosphere. All this was facilitated by the presence of the United Nations forces - a situation which is unlikely to occur in South Africa. The disadvantages were that the people as a whole did not participate through their chosen representatives in the determination of the broad framework of the constitution. There has been some criticism of the Namibian constitution on these grounds, but on the whole it seems to have gained widespread support within Namibia, and

constitutional and/or statutory steps which will have to be taken to create a ~~new~~ transitional regime which will begin with the installation of the interim government and end with the installation of the first democratic government.

6. CONSTITUTIONAL CONTINUITY

On the assumption that a sovereign interim government is to be established, it seems that a new interim constitutional order which includes the TBVC formations is the most practical path and the least hazardous. This means that the present government will be required to effect amendments in terms of the existing constitution to create the interim ~~constitutional~~ order. In effect there will have to be a new interim constitutional brought into being through the process of constitutional amendment.

~~The interim constitution~~ will provide for all those matters and processes which are set out in our document entitled "INTERIM GOVERNMENT". In this way constitutional continuity will be assured and the process which will ensure the transfer of sovereignty, legalised.

7. CONCLUSION

The above approach envisages the establishment of a SOVEREIGN Interim Government, the establishment of which implies the dissolution of a tricameral parliament and the handing over of the administration of the country to the Interim Government. Other versions of Interim Government have been put forward which do not involve the immediate transfer of sovereignty or the dissolution of the existing government. In terms of these approaches which are also referred to in the document entitled "Interim Government" the administration and government of the country are to be left in the hands of the present regime, functions relating to the holding of elections for a Constituent Assembly and other related matters are to be placed in the hands of other bodies to be established and some form of supervision over government is to be created. It is not the purpose of this paper to examine different versions of "Interim Government".

Whatever approach is adopted, however, it may still be necessary to establish a series of appropriate commissions to oversee, and perform, specific functions - for example in relation to media, broadcasting, security forces, electoral matters, etc.

The idea of an interim constitution is not new. (The Basic Law of the Federal Republic of Germany adopted in 1949 is one example of a temporary constitution.)

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- ii) Agree on the mechanism for drawing up the new constitution - which the ANC says should be an elected Constituent Assembly.
- iii) Agree on the establishment of an Interim Government.
- iv) Agree on the role of an international community.

In the face of the regime's argument above, the ANC persists in its demand for an Interim Government and Constituent Assembly. However, it needs to demonstrate for a number of reasons that - without being sucked into the regime's legality - such a scenario does not necessarily involve constitutional discontinuity but can be achieved through invoking the existing constitutional and legal machinery, thereby ensuring that every stage in the process ending with the installation of South Africa's first democratic government will be legal and constitutional. It must be assumed that the regime will never submit to any constitutional discontinuity.

It is also a matter of political importance for the ANC. Its ability to demonstrate the legality and constitutional continuity of the process it envisages, will lend powerful impetus to its claims. It will more readily be able to resist getting involved in mechanisms and procedures under the tricameral system.

It must be noted that the ANC approach also envisages that the TBVC formations will become part of the process at a very early stage.

4. SUGGESTED APPROACH

It is undesirable that the issue of constitutional continuity and the legality of the various processes should be handled on a piecemeal or step by step basis. A piecemeal approach lends itself at best to a loss of direction and at worst to co-option. Handling the issue on a piecemeal basis is also highly impractical and even complex because of the open-ended nature of a piecemeal approach.

The most efficacious way of handling the matter is to separate the political issues from the issues of constitutional continuity and legality. In terms of this approach, the APC needs to come to a comprehensive agreement on all the processes and mechanisms as well as various steps to be taken culminating in the end result, namely the installation of the first democratic government.

Once such a comprehensive agreement is reached, then the question of what legal and constitutional steps the South African government should take to provide the stamp of legality and constitutionality to each of the steps and each stage of transition should be discussed.

It is difficult in practice to separate the various steps in the transitional process from legal and constitutional issues.

-cameral parliament? What extra-parliamentary parties will be included?

- (b) Will the office of President be retained, and if so, how will the President be chosen? Will there be a joint presidency, and if so, how will the joint presidents be chosen, and how will they take decisions. If the office of President is abandoned, who will perform the function of head of State, and who will preside at meetings of the interim government?
- (c) Will existing departments of State remain in place? If so, who will assume responsibility for the functioning of the departments. Will there be a coalition of members responsible for each department, or will responsibility be allocated to individual members of the interim government, and if so, how will such allocation be made.
- (d) What will happen to Provincial Administrations and Local Government organs, and how will responsibility for such matters be dealt with.
- (e) For how long will the interim government last?

6 How decisions are to be taken will be of crucial importance. Will interim government call for government

d'etat or by fraudulent elections. As a result, the elections held in June 1990 were supervised by the UN through the UN Observation Group for the Verification of Elections in Haiti (ONUVEH). Its mandate was to advise the electoral board in establishing a credible electoral process in order to guarantee democratic elections, support the local security forces to draw up an election security plan and to uphold law and order on election day.

The UN mission was in the form of a technical assistance programme rather than peace-keeping. But it ensured that the elections were fair. International surveillance was crucial.

3.11 ANGOLA

In May 1991, the Government of Angola and UNITA signed the "Peace Accord for Angola" consisting of 4 documents, providing for a comprehensive political settlement. In one of these documents, UNITA and the government agree that fair and free elections under the supervision of international observers who will certify that the elections are fair and free, will be held. The Government will amend the Constitution and draft laws repealing the electoral powers. There will be a single army and its neutrality will be guaranteed by the Angolan parties with the support of the international monitoring group. The monitoring system is complex, consisting of both national and international elements. The primary responsibility lies with the parties directly involved, with a Joint Political-Military Commission of the two parties, together with the US, Portugal and the USSR as observers. The PMC does not replace the Angolan Government but has the powers (decision-making by consensus) to guarantee the conditions of peace for the holding of free, fair, multi-party and internationally verifiable elections.

The Security Council on May 30, 1991 enlarged the mandate of the Cuban withdrawal supervision group. UNAVEM will not monitor compliance with the agreements. Its function is more modest: it will verify that the national monitoring groups are assuming their responsibilities.

Upholding law and order remains the responsibility of the Government of Angola during the transition period. However, the neutrality of the police will be supervised by teams of monitors, made up of two members designated by the Government and by UNITA. They will visit police facilities, examine police violations of political rights. UN police observers have the task of verifying and assisting the monitoring teams. UNITA will be allowed to participate in the police force. To achieve this, vacancies in the police shall be filled by personnel designated by UNITA.

American States to send observers to monitor compliance with the agreements and the holding of elections. As a result, the Security Council set up in 1989 the UN Observer Group for Central America to verify compliance with the agreements. The democratisation of individual states has been at the request of these states.

3.7 NICARAGUA

The independent State of Nicaragua requested the Security General of the UN to verify the election process in Nicaragua. The task of ONUVEN was to: verify that political parties were fairly represented in the Nicaraguan Supreme Electoral Council; verify that political parties enjoyed complete freedom of organisation and mobilisation; that political parties had equal access to radio and television; verify that the electoral registers were properly drawn up and to report any complaint or irregularity to the Electoral Council. ONUCA also had responsibility over the cease-fire between the Nicaraguan arms and the Contras and the demobilisation of the Contras. ONUCA's work was carried out to the satisfaction of all.

3.8 EL SALVADOR

A comprehensive peace plan is about to be announced after a decade of civil war when over 50,000 have died. The peace plan will include a cease-fire, agreements on constitutional and electoral reform, reform of the judiciary and the armed forces, based on full respect for human rights and economic justice. An agreement on respect for human rights has now been reached. In 1991, the Security Council established the UN Observer Mission in El Salvador (ONUSAL). Its initial mandate is to verify compliance of the parties with the human rights agreement, promote human rights and investigate the violations of human rights and to make recommendations for the elimination of these violations. It will also remodel Salvadorean society by making recommendations on the reform of the army, the judiciary, the security system. It is therefore the first peace-keeping operation with a mandate in the field of human rights.

3.9 A similar process as in El Salvador is occurring in Guatemala. The Government and the resistance movement have signed an agreement to deal with similar topics as in Salvador. The verification of the agreement will be to the National Reconciliation Commission, the UN and, possibly another international organisation such as the OAS.

3.10 Haiti's crisis after the fall of Duvalier arose from the fact that successive governments came into power by coups

8. GUARANTEES AND INTERIM GOVERNMENT

These issues are closely related. If the government retains the reins of power until a new constitution comes into force, and particularly if it retains control over the police, the army, the public media and the electoral process, it will be in a position to influence elections and even to frustrate any agreement. Political forces and international opprobrium may make it impossible for the government to avoid the implementation of an agreed constitution; but the risk is always there. There are obviously risks which have to be taken in any negotiated settlement; but there are also risks, possibly greater, in not reaching a settlement. In this context consideration may have to be given to agreeing in the negotiations to interim government structures, which fall short of full interim government, but are nonetheless sufficient to meet a demand for neutrality in all matters connected directly or indirectly with the electoral process and the holding of free and fair elections.

also to have commanded respect internationally. Conditions in South Africa are different to those which existed in Namibia. What needs to be decided is whether the advantages of attempting to agree on principles before the enactment of legislation for the convening of a constituent assembly, outweigh the disadvantages of such a procedure. In the present political climate the government is unlikely to want to call an election in which its share of the vote could well be less than that of the conservatives. An approach which involves as an initial step, an agreement on constitutional principles, to be followed by the election of a constituent assembly, may go some way towards meeting the objections that are likely to be raised by the government to the convening of a constituent assembly. The government is more likely to be willing to agree to a constituent assembly and to vest power in it, if it knows in advance what the framework of the constitution will be, and has this recorded in legislation. It also offers the practical advantage of permitting negotiations to continue and more rapid movement forward to be made, than will be the case if negotiations on process and procedures have to be conducted, a voters roll prepared and an election conducted. The procedure could incorporate a referendum to confirm the principles, or a referendum at a later stage to confirm the constitution, which would enable the government to meet the commitment that it has made in that regard. This procedure is

7.4 **PATRIOTIC FRONT:**

Many of the issues raised in this report should be discussed by the ANC at the Patriotic Front Conference.

8. **NEGOTIATING TEAM**

It is expected that a negotiating team of the Nationalist Government will be certain ministers and the four provincial leaders. They will be backed by constitutional and other experts.

The ANC must elect its negotiating team as soon as possible to prepare for such negotiations. Such team must be assisted by constitutional and other experts to advise them before, during and after the APC.

9. **MINORITIES**

The Nationalist Government will argue very strongly for the protection of minority rights and the negotiating team should be mandated on this particular issue.

10. **CONCLUSION**

The All Party Conference will be the start of real negotiations for the establishment of a united, non-racial, non-sexist South Africa. It should be followed by a constituent assembly entrusted with the task of drafting a new constitution for South Africa based on the broad constitutional principles agreed upon at the APC. Elections will then have to follow for the establishment of a new Parliament based on the new constitution. The entire process is to be managed by an interim government until the new order is established.

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- 4.4 Members of the government claims that they had discussed many aspects of the APC with the ANC and agreement was reached on a number of issues. We need to ascertain what discussions took place and what was agreed upon. The government believes that before the actual APC takes place, there would have to be a series of adhoc meetings to work out the details for the APC, such as procedure, agenda, etc.

5. PRE-APC ISSUES

There are a number of issues that need to be agreed upon before the APC can start. They are identified as follows:-

5.1 **WHO CONVENES THE APC?** The following has been suggested:

- 5.1.1 The government;
- 5.1.2 The international community;
- 5.1.3 Other options proposed are as follows:
 - 5.1.3.1 Mrs Margaret Thatcher;
 - 5.1.3.2 The Eminent Persons Group of the Commonwealth;
 - 5.1.3.3 The Churches;
 - 5.1.3.4 Big business;
 - 5.1.3.5 Ideas of Dr Van Zyl Slabbert and Democratic Institute of Dr Oscar Dhlomo;
 - 5.1.3.6 Joint venture between the Nationalist Government and the ANC.
- 5.1.4 The ANC need to take a position on the question "Who convenes the APC". Being a signatory to the Harare Declaration, it is committed to the involvement of the international community. The international community would have the necessary credibility and it would be difficult for any party to argue against their involvement. They would also ensure and guarantee the implementation of the eventual outcome and result of the negotiating process.

Once it has been accepted in principle that there should be international participation, the next question that arises is:

proportional representation to draft the constitution within the framework of agreed principles. It was decided by the constituent assembly that it would become the first National Assembly, and a provision to that effect was incorporated into the constitution. In order to avoid a multiplicity of elections which are costly, time consuming and sometimes lead to conflict, a procedure similar to the Namibian model whereby the constituent assembly is converted into a parliament could possibly be devised for South Africa.

6. HOW THE CONSTITUENT ASSEMBLY WILL CONDUCT ITS BUSINESS

Should the assembly elect its own chairperson, or should an 'independent' chairperson be appointed to preside over the discussions? Should the discussions take place in public, or should they be in private. Publicity enables people to know what is being said, but there may be advantages to the discussions being in private and away from the pressures which will inevitably be placed on delegates if they know that whatever they say will be reported in the press. It may be that the initial drafting should be away from the glare of publicity and entrusted to a committee of the assembly, in the knowledge that the draft will be subjected to public debate in the assembly and approved by the assembly. This is what happened in Namibia. Although there was some criticism of this procedure, particularly by the press, it had the advantage of enabling the delegates to speak

of all participants. The following agenda is submitted for consideration.

- 5.8.1 Statement of Intent;
- 5.8.2 Principles for a new constitution;
- 5.8.3 Mechanism for the drafting of a new constitution;
- 5.8.4 Mechanism for transition;
- 5.8.5 Role of security forces during the interim period;
- 5.8.6 Role of the SABC during the interim period;
- 5.8.7 Future economic system;
- 5.8.8 Financial/social/educational crisis;
- 5.8.9 Sanctions / Disinvestments / Boycotts;
- 5.8.10 Implementation of agreement;
- 5.8.11 General;

5.9 OBSTACLES

Certain obstacles like the release of all the political prisoners and the repeal of the Internal Security Act in terms of the Harare Declaration, has not yet been removed.

The question therefore arises: Can the ANC attend the APC while political prisoners are still in prison and the Internal Security Act is still on the statute books?

5.10 SECRETARIAT

In certain circles it was suggested that a Secretariat be established to prepare for the APC. The question arises: Who will appoint the Secretariat. What will be its tasks. Who will it be responsible and/or accountable to.

5.11 FINANCE

to find the funds.

[illegible]

6. Relationship Between the ANC and the Interim Government

It is foreseeable that if an interim government comes into existence there will be a potential tension between the interim government and the ANC. In this regard the ANC may not be able to determine the exact policies and decisions taken by the interim government body/mechanism and in any event may wish to distance itself from the execution of interim government policies by an administration which will largely be staffed by the agents of the existing regime. If the ANC needs to criticise the interim government it may be advisable that consideration should be given, in advance, to the level of leadership which should be involved in the administration of government business. It has been suggested that national leaders, who will be involved in campaigning for public support in respect of elections for the constituent assembly, should not be involved in the interim government structures.

7. Functions of Interim Government

While the exact extent and reach of interim government responsibility is open to debate (see above), there are certain minimum functions an interim government arrangement would have to form. These would include, at the least:

- 7.1 The creation of conditions in which all political parties would be free to campaign, solicit members, propagate their policies and engage in public debate;
- 7.2 The disbanding of vigilante groups, hit squads etc., and the integration of the military wings of the national liberation movements and homeland forces into the security forces, and generally to

INTERIM GOVERNMENT

What do we mean by interim government?

- 1 The purpose of this memorandum is to identify the forms that interim government structures can take, and legal and practical issues that may be raised in the debate concerning interim government.
- 2 Three types of interim governmental structures are considered. They illustrate issues that may be raised in negotiations for interim government, and point to the type of decisions that will have to be taken. It is important that these issues be addressed, and that a detailed framework for interim government be established before negotiations are commenced.

TRANSFER OF SOVEREIGNTY

A

- 3 The transfer of sovereignty to an interim government involves the transfer of legislative and executive functions from the tri-cameral parliament, cabinet and own affairs ministers councils to an interim government structure. This can only be done by repealing or amending the existing constitution, which would require the approval of each of the houses of the tri-cameral parliament. Without such approval the interim government would be unlawful and subject to challenge in the courts.
- 4 The new constitutional order thereby created - in effect an interim constitution - would have to provide for
 - (a) the dissolution of the tri-cameral parliament, own

assembly will be the product of the tri- cameral parliament, or of an interim government set up by the tricameral parliament. The terms of the legislation will be of the greatest importance, and could themselves become the subject of prolonged and difficult negotiations.

4.HOW WILL THE CONSTITUTUENT ASSEMBLY BE CHOSEN

4.1 The fairest would be by way of universal adult franchise with a common voters roll, and an election conducted according to a system of proportional representation. This would permit all views, that command a specified minimum of the votes cast, to be reflected in the constituent assembly, and at the same time, would give weight to those views that command the greatest support. A constitution should as far as possible meet the reasonable needs of the people as a whole. The opportunity given to people with different political affiliations to have their views advanced in the assembly through their chosen representatives, not only involves a wide cross-section of the population in the negotiations, but also offers the prospect that the constitution that is ultimately adopted will be able to gain widespread acceptance. Having regard to the broad base of the ANC's support throughout the country, proportional representation is not likely to work to its disadvantage. It is the voting system recommended by the constitutional

committee and seems to have gained widespread acceptance both within the ANC and from other parties. There may be demands for regional representation, but mechanisms could be devised to accomodate such demands within a proportional representation framework.

- 4.2 The disadvantage of a constituent assembly elected according to proportional represntationt is that particular interest groups, as such, will not be represented in the assembly. There may be demands for groups such as labour, women, the youth etc. to be represented so that their views can be heard and taken into account. The difficulty in making provision for 'group representation' will be in the definition of the groups and the manner in which each group will choose its representatives. If there is a demand for labour to be represented, there will immediately be a demand from commerce and industry for representation as well; also, ethnic groups may seek separate representation on the grounds of their special interests, which would incorporate apartheid structures into the assembly itself. Any attempt to accomodate special interests is likely to give rise to more problems than it will solve. It would be better for any number of reasons for the assembly to consist of representatives of political parties, who can have regard to the special interests within their own constituencies in selecting their representatives.

5.12 **BUDGET**

A budget will have to be drawn up for such conference and this task could be entrusted to the Secretariat if a Secretariat is established.

6. **CURRENT APC ISSUES**

There are a number of matters which need to be arranged and considered for the duration of the conference. It can be identified as follows:

- 6.1 Venue
- 6.2 Accommodation
- 6.3 Recording and translation
- 6.4 Resolutions
- 6.5 Press releases
- 6.6 Confidentiality
- 6.7 Tapping devices
- 6.8 Security
- 6.9 Transport and travelling
- 6.10 Seating arrangements at the APC
- 6.11 Meeting procedures for the APC
- 6.12 Voting procedures for the APC
- 6.13 Experts and research
- 6.14 Statement of affirmation on conclusion of APC

7. **POST-APC ISSUES**

Matters which need to be addressed after the APC are as follows:

7.1 **IMPLEMENTATION**

- 7.1.1 Mechanism for implementation;
- 7.1.2 Time-scales for implementation;
- 7.1.3 Personnel for implementation;

7.2 **MANDATE**

The decisions emerging from the APC will have to be referred to the constituencies of the various participating parties for endorsement and approval or a referendum could be held.

7.3 **CONSTITUTIONAL CONTINUITY**

for many of the decisions arising from the APC to be implemented, the existing constitutions of South Africa and the independent homelands might have to be amended, scrapped or substituted. Also laws which provide for self-governing homelands will have to be repealed and provision will have to be made for the interim administration of such

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3.4 The Harare Declaration sets out the process of negotiations as follows:

3.4.1 Negotiations should proceed to establish the basis for the adoption of a new constitution by agreeing on, amongst others, the principles enunciated in the Declaration.

3.4.2 Having agreed on these principles, the parties should then negotiate the necessary mechanism for drawing up the new constitution.

3.4.3 The parties shall agree on the formation of an interim government to supervise the process to a democratic order including the holding of elections.

3.5 Other participating parties would either support the stand of the ANC or that of the Government, depending whether they operated within or outside the system. There might however, be exceptions, like the Labour Party. There is however, uncertainty whether Azapo will participate in such a conference.

3.6 The result and outcome of the APC will depend on what is eventually agreed upon between the participating parties.

4. EXPLORATORY TALKS

Certain exploratory talks have been held between interested parties.

4.1 The ANC had exploratory talks with the PAC in Harare and is due to have talks with Azapo. It also had talks with sympathetic homelands leaders. The Patriotic Front Conference is scheduled to meet in October 1991. The purpose of such meeting is to find common ground amongst progressive forces and to adopt a common approach at the APC.

4.2 The government had preliminary talks with the Parliamentary Standing Committee on Constitutional Affairs, leaders of self-governing territories, members of the Minister's Council in the Tricameral Parliament and Provincial Administrators. The government and certain homeland leaders decided to form a Working Group to work out proposals for the APC.

4.3 The PAC agreed to hold talks with Inkatha Freedom Party and the Labour Party to draw them into the Patriotic Front. The Labour Party indicated that it will attend the Patriotic Front Conference while Inkatha indicated that it would not.

ISSUES IN THE CONSTITUTIONAL DEBATE

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WORKSHOP ON INTERIM GOVERNMENT

AGENDA

Introduction to Workshop

SESSION 1

9.15 Presentation

"Interim Government: What Do We Mean"?

Thabo Mbeki

10.15 TEA

10.45 General Discussion (Chair - Cyril Ramaphosa) "What Do We Want Interim Government To Do?"

- (1) Functions and Powers
- (2) Decision Making and Structures
- (3) Interim Government -
How does it become legal?
How does it function in law?
- (4) Organisational and Political Implications
for ANC/Alliance
- (5) Duration and Timing of Interim Government
- (6) Government's Position
- (7) The Role of the International Community

LUNCH

2.00 General Discussion Continued

3.00 TEA

3.30 The Way Forward Linking Interim Government Demand to the Patriotic Front and All Party Conference Mahommed Valli / Peter Mayibuye

Discussion

Closure

by consensus? If so, what if consensus cannot be achieved, particularly in regard to vital issues concerned with the creation of conditions for the holding of free and fair elections, or the allocation of the budget. If consensus is necessary deadlock could result if a minor party is obstructive and chooses to block decisions by withholding its consent. A provision that resolutions be taken by majority decisions, even if a special majority is required, may be unsatisfactory; majorities could possibly be achieved by a combination of parties representing together a minority of the population. A possible way around this difficulty would be to require decisions by a majority, or a specific majority, with a veto power being given to certain of the major parties. But who will have the power of veto, and how will agreement be reached on this? And what will happen if decisions are vetoed and deadlock results? Could this lead to a power vacuum?

CONTROL OVER GOVERNMENT

- 7 This is less radical than a transfer of sovereignty. Under this procedure all or some of the existing legislative and executive structures would remain in place. An interim governing council would be constituted with the power to veto bills passed by parliament, and decisions taken by the cabinet, and with the power to repeal or amend existing laws and to make new laws by proclamation. In effect this would vest effective

THE ISSUE OF LEGALITY AND CONSTITUTIONAL CONTINUITY

1. INTRODUCTION

The issue of legality and constitutional continuity is one which has to be faced. A revolutionary victory entails constitutional discontinuity. The constitutionality and legality of the old regime is overthrown. A new legality and a new constitutionality are created.

When it is sought to replace an illegitimate constitution with a legitimate constitution through the process of negotiations, the situation is different. The question of constitutional continuity then arises.

The apartheid regime clings to its legality and constitutionality because firstly, no regime is prepared to abandon its own legality and constitutionality, but secondly, it does so to enable it to remain in control of the period of transition and therefore place it in a strong position to influence its eventual outcome.

For the ANC the issue is crucial but for a different reason. The ANC wishes to be assured that the processes which it envisages commencing with the All Party Congress (APC) viz the Interim Government (IG), the Constituent Assembly (CA), the adoption of a new Constitution and the installation of the first government in terms of a new constitution will all bear the stamp of legality and constitutionality. From the ANC viewpoint, not a single one of these steps should be capable of challenge in a court of law.

2. ARGUMENT OF THE APARTHEID REGIME

The regime argues that South Africa is a sovereign independent state. Its status is recognised in international law. The government is a lawful government operating in terms of the 1983 Tricameral Constitution. South Africa is not a colony or a mandated territory.

Not only is there, therefore, no basis for the involvement of any kind by the international community (unless invited) but in the circumstances it argues that a Constituent Assembly is inappropriate and the idea of an interim government unacceptable. It states that it will not agree to the present constitution being suspended during the negotiation process. "The lawful institutions of government and administration, set up according to the valid constitution and laws of the land, will continue ..." Transitional arrangements will have to be within the framework of the existing constitution.

3. POSITION OF THE ANC

The ANC envisages that an APC will be convened and that it will be called upon to do a number of things, inter alia:

- 1) Agree on the principles for a new constitution (note: in line with Harare Declaration and UN Statement).

apartheid by negotiations. These Declarations reflected the close relationship between a regional organisation and the international community, increasingly displayed also in other theatres. The Declarations identified the principles to govern a new constitutional order in South Africa, the creation of a climate of opinion for free political discussion and the further route towards the adoption of a constitution, including an interim government (OAU).

- 1.6 Both Declarations anticipated a continued role for the international community in 'ensuring a successful transition to a democratic order' (but the parties must agree on such a role).

2. THE ATTITUDE OF THE PARTIES

- 2.1 The transition is the crucial period, in all countries. Crucial for the National Party perspective on the transitional process is that the process should be embarked upon according to the present constitutional order. This means that the current regime remains fully in power and continues to have the monopoly of power, especially concerning the maintenance of law and order.
- 2.2 Responding to the calls for an interim government, the regime proposes some form of interim participation of the 'extra-parliamentary' groups in the decision-making process, such as the holding of an informal summit of leaders, the forming of specialised working groups or the use of the envisaged 'multi-party conference' as a channel to convey to the government advice, requests or criticism concerning interim government action. Another suggestion is the appointment of representatives of extra-parliamentary groups to cabinet positions. Complaints about violence would be investigated by a Standing Committee on Violence which would advise the government.
- 2.3 For drawing up a new constitution, the National Party proposes the holding of a multi-party conference where parties with 'proven' support would be entitled to participate. The conference would have an open agenda but should first of all discuss the composition, functioning and decision-making process of the actual constitutional negotiation conference and work out principles to be embedded in a constitution. A new constitution would have to be adopted in legal continuity with the present constitutional order i.e. by a referendum among the white electorate followed by a general referendum, provided that the first result is positive.
- 2.4 The position of the ANC is well known. We want an interim government of national unity, with powers transferred from

an act against one's partner in the agreement, who, perhaps, does not have the means and possibilities to react adequately, but against the international community and its institutions itself. Thereby a higher degree of observance and implementation of the transitional agreements can be reached.

4.11 It can well be stated, that the situation in SA constitutes a case of fundamental change: The white minority government is de facto effectively in power but governs on the basis of a constitution which the Security Council declared null and void. Therefore, in principle, the case of South Africa does not differ from cases, where so-called multi-dimensional peacekeeping operations were deployed.

4.12 Moreover, from the point of view of the international community the transition process in a country of such importance as South Africa should not be left to the power game of South Africans alone - having in mind the actual unequal distribution of power in the country. The international community has to secure an internationally acceptable solution, i.e. in line with international standards of democratic governance and basic human rights. In South Africa, there seems to exist a lack of neutral, non-partisan institutions within the country, which have both the moral authority among the parties and the political power to act as an effective mediator, to find binding decisions on concrete debated issues according to agreements between the parties, and to enforce them.

4.13 Moreover, with regard to transitional security mechanisms, for the same reasons there is no force inside South Africa in sight which seems to be suited for upholding law and order during transition in a non-partisan and unchallenged way. A possible role for the United Nations would therefore probably not be one of actually conducting the implementation of the agreement(s) on the transition process but to act as an additional accompanying mediation and verification institution

4.14 The paper tries to give some recommendations on possible features of UN participation in the transition process: As in many other cases, the UN Secretary-General could appoint a Special Representative on South Africa who participates in the capacity of an observer in the talks about talks and in the negotiations. He may convene negotiations, and could submit mediating proposals to overcome deadlocks. In the agreements on the transition mechanism the United Nations could be given a guaranteeing role, securing the proper implementation of the arrangements. A rather limited United Nations presence could monitor and verify the compliance of the mandated authorities with the tasks and obligations assigned to

international community in ensuring a successful transition to a democratic order".

- 4.19 As far as the ANC is concerned, there seems to exist a growing sympathy with a possible UN involvement in the transition process can be implemented by South Africans alone was to some extent based on the belief that the NP-government is a good faith negotiating partner. This belief was fundamentally shaken in recent months i.a. due to the NP-government's dealing of obstacles of negotiations and the "Inkathagate". Increasingly, the ANC regards an international presence in South Africa as a useful leverage of international pressure to achieve the aim of a united, democratic, and non-racial society based on the principle of one person one vote. United Nations participation in the transition process would prevent the removal of the question of South Africa from the international agenda in its most crucial phase.
- 4.20 So far the NP-government as the stronger actor in the national power game was against a possible internationalisation of the transition process.
- 4.21 As it was shown in chapter III, in an increasing number of countries, where de facto governments with a questionable legitimacy try to be admitted to the international community as a fully accepted member by embarking on a policy of fundamental reform, the United Nations are invited to assist in the transition process. From this follows, that the good faith of a de facto government which is strictly opposed to transparency and opening up for the international community, has to be seriously doubted. Considering the "Inkathagate" and other dubious developments a clear cut-dismissal by the NP-government of demands of the ANC to involve the United Nations in the transition process will be understood in that direction both by South Africans and by the international community.
- 4.22 In the past, the NP-government was openly hostile towards the United Nations. Since 1990, however, the NP-government is making efforts to prove its commitment to fundamental change and is co-operating with the United Nations: In June 1990, a UN mission visited South Africa to investigate the question of existence of irreversible and fundamental changes called for in the UN Declaration of 1989. They fully co-operated with the mission and thus accepted the principle of international evaluation of the political situation in South Africa. A second UN mission will take place in the near future. Furthermore, the NP-government is currently negotiating an agreement with the UNHCR on the latter's participation in the repatriation of refugees. Maybe this is the point of departure for a more extensive United Nations presence in South Africa in the post-sanctions era".

Finally, the S.S. and government that the process will be
 expected to be completed by the government of the Republic
 to all the same as it is in the report from 1977

WORKSHOP ON
INTERIM GOVERNMENT

Dossier No II

**ANC Constitutional
Committee**

**25 September 1991
Johannesburg**

WORKSHOP ON INTERIM GOVERNMENT

Summary of the Issues Regarding an Interim Government for South Africa

[illegible]

1. This memorandum merely summarises the issues relating to the form of interim government that is sought to be achieved. It is drawn from various memoranda prepared by the Constitutional Committee for this and previous workshops and introduces the more detailed memoranda contained in this Dossier.

2. Modality and Structure of Interim Government

The most important issue which needs to be confronted in advancing a demand for interim government is the precise form of interim government which is sought to be achieved. IN this regard distinction has been drawn between the following three scenarios.

Interim government in which the African National Congress and its allied forces has :

- 2.1 responsibility for the administration and government of South Africa without effective control over the organs of government. Such a scenario may be what the State envisaged when referring to its "super-cabinet".
- 2.2 responsibility and effective control over government and the organs of government. Such a scenario would require a greater degree of involvement in the apparatuses of the State.
- 2.3 control over the organs of state without responsibility for government or execution of government policy. Such a scenario takes place when interim government takes the form of

SUMMARY OF THE ALL PARTY CONFERENCE

(A P C)

1. INTRODUCTION

There is broad consensus that an all party congress (APC) be held to work out the broad principles for a future democratic South Africa. Parties with proven support will attend such conference. The purpose of this report is to highlight important issues concerning the APC to enable the NEC to address them for the direction and guidance of the delegates of the ANC who will be attending the conference.

2. ISSUES

The issues that need to be addressed can be divided into three categories, namely:

- 2.1 Issues which need to be resolved before the APC, such as who convenes the APC;
- 2.2 Issues which need to be discussed by the APC itself, such as Constitutional Principals, etc.
- 2.3 Issues which need to be handled after the APC, such as the question of implementation.

3. AIM OF THE APC

3.1 The aim of the APC according to the President of the ANC, is:

- 3.1.1 To establish the principles on which the new constitution will be based;
- 3.1.2 To establish the mechanism by which such a new constitution will be drafted and by whom it will be drafted;
- 3.1.3 To decide on the mechanism that will manage the process of transformation and especially what body will manage the process.

3.2 The aim of the APC according to the State President De Klerk is to negotiate a new constitution for South Africa which will guarantee participation and representation to all South Africans within a true democracy and with effective protection of minorities.

3.3 The Democratic Party said that the aim of the APC is to find areas of agreement on the structuring of real negotiations on a new constitutional

of all participants. The following agenda is submitted for consideration.

- 5.8.1 Statement of Intent;
- 5.8.2 Principles for a new constitution;
- 5.8.3 Mechanism for the drafting of a new constitution;
- 5.8.4 Mechanism for transition;
- 5.8.5 Role of security forces during the interim period;
- 5.8.6 Role of the SABC during the interim period;
- 5.8.7 Future economic system;
- 5.8.8 Financial/social/educational crisis;
- 5.8.9 Sanctions / Disinvestments / Boycotts;
- 5.8.10 Implementation of agreement;
- 5.8.11 General;

5.9 OBSTACLES

Certain obstacles like the release of all the political prisoners and the repeal of the Internal Security Act in terms of the Harare Declaration, has not yet been removed.

The question therefore arises: Can the ANC attend the APC while political prisoners are still in prison and the Internal Security Act is still on the statute books?

5.10 SECRETARIAT

In certain circles it was suggested that a Secretariat be established to prepare for the APC. The question arises: Who will appoint the Secretariat. What will be its tasks. Who will it be responsible and/or accountable to.

5.11 FINANCE

to find the funds.

- 4.3 The age at which people will qualify for the vote must be fixed. Presumably it will be 18, which is the age at which people presently qualify to vote in the tri-cameral elections. To fix a higher age would result in the disenfranchisement of some of these people. It would also be likely to provoke opposition from the youth. Other qualifications for the vote will have to be determined. Will the vote be given only to citizens? If so, how will the position of people who have been denationalised, 'citizens' of 'independent homelands', exiles who may have lost their South African citizenship and children born in exile, be accommodated. If not, what will the qualification for voting for the constituent assembly be?
- 4.4 The registration of voters and the compilation of a voters roll will probably be required once these decisions have been taken. This will be a massive task, which will call for impartiality, and careful scrutiny.
- 4.5 The period set aside for the run up to the elections and campaigning will have to be fixed and agreement reached on the method of supervising and conducting the election to ensure that it is free and fair.
- 4.6 All this will take time. Thereafter, there will be the time taken by the constituent assembly to conduct its

7.4 PATRIOTIC FRONT:

Many of the issues raised in this report should be discussed by the ANC at the Patriotic Front Conference.

8. NEGOTIATING TEAM

It is expected that a negotiating team of the Nationalist Government will be certain ministers and the four provincial leaders. They will be backed by constitutional and other experts.

The ANC must elect its negotiating team as soon as possible to prepare for such negotiations. Such team must be assisted by constitutional and other experts to advise them before, during and after the APC.

9. MINORITIES

The Nationalist Government will argue very strongly for the protection of minority rights and the negotiating team should be mandated on this particular issue.

10. CONCLUSION

The All Party Conference will be the start of real negotiations for the establishment of a united, non-racial, non-sexist South Africa. It should be followed by a constituent assembly entrusted with the task of drafting a new constitution for South Africa based on the broad constitutional principles agreed upon at the APC. Elections will then have to follow for the establishment of a new Parliament based on the new constitution. The entire process is to be managed by an interim government until the new order is established.

A.N.C. CONSTITUTIONAL COMMITTEE
25 SEPTEMBER 1991

1.8 How the country will be governed while the process of choosing, decision making, and implementing decisions is being carried out

2. There are sharp differences between the negotiating parties in regard to these issues. The government is opposed in principle to the convening of a constituent assembly. The obvious reason for its opposition is a concern that if it surrenders power to a constituent assembly it will lose control over the negotiations and the terms of the constitution. There is also disagreement in regard to the principle of interim government - which is rejected not only by the government, but also by some of the parties who will participate in the Patriotic Front meeting. The issues referred to in paragraph 1 are dealt with below. They have important political implications and the question which has to be confronted is whether, without compromising principles of importance, there is room for flexibility in regard to any of these matters.

3.HOW WILL THE CONSTITUENT ASSEMBLY BE BROUGHT INTO EXISTENCE

3. If the constituent assembly is to have binding powers it will presumably have to be constituted by legislation which will define what those powers are, and how the constituent assembly will be chosen. If this is done it means that the constituent

them under the agreements and use its good offices in the case of disagreement on the interpretation and application of the agreements. The United Nations could be used to secure the impartiality of the transitional government, be it by monitoring the de facto government, be it by being included in an interim government.

- 4.15 The paper also states, that the deployment of a large-scale UN peace keeping force to put an end to township violence is unrealistic and probably even not recommendable. The United Nations could, however, supervise and secure the impartiality of the transitional security mechanism. The form of UN participation could be to expand national commissions of inquiries to include UN experts, or to deploy a UN mission of experts. International investigation of this issue would result in the internationalisation of the question of violence and would give this burning issue a more prominent place with regard to the evaluation of the overall international community's policy towards South Africa.

- 4.16 The strongest arguments for UN involvement can be found concerning the holding of general, free and fair election or to the holding of a referendum. Since in the elections the partners at the negotiating table are becoming competitors for power in the new political system all means will be used to influence the elections in one's favour and to dominate the electoral process. Of course, the party de facto in power has many advantages in that respect. One measure to meet this problem is to entrust a national body consisting of representatives of all political organisations with the implementation of elections. Additionally, in most cases international observers are invited to give a judgement on the character of the elections and increasingly, the United Nations are requested to assist in the election process. As it is described in Chapter III, UN participation in the electoral process can take different forms.

- 4.17 In the case of South Africa, probably a national electoral body will be formed. In addition, the United Nations could be invited to monitor and surveille the proper implementation of the elections. Such a UN operation could be mandated to monitor all aspects of importance for the holding of free and fair elections, but also to secure a climate free of intimidation and fraud by a limited presence on the ground.

- 4.18 UN participation in the transitional process will only take place, however, on the basis of an agreement among all parties and a formal request by the current government. Therefore the UN Declaration on South Africa of 14 December 1989 requests the parties concerned to conclude an "agreement on the role to be played by the

sanctions shall not be lifted until the adoption of a new constitution.

- 4.7 In recent months, however, one could notice a crumbling of sanctions against South Africa, taking away from the democratic forces what they describe as an important weapon in the struggle for a democratic constitution. The ANC is therefore adopting a more flexible position, trying to bind the lifting of specific sanctions to the achievement of specific objectives in the transition process. Nevertheless, sanctions seem to be an outgoing model which during the proper negotiating process will not be effectively in place any longer to be instrumentalized as a leverage. But in general, it seems that sanctions are an instrument too superficial and crude to be employed as a means of pressure on the government with regard to specific and subtle questions during the transition process.
- 4.8 Therefore, the next step is to explore if alternative modes of participation of the international community in the transition process of countries are available. The most prominent instruments for such international involvement are so-called United Nations Peace Keeping Operations. An analysis of examples like Cambodia, Namibia, Western Sahara, Central America (Nicaragua, El Salvador, Guatemala), Haiti, and Angola shows, that UN peace keeping operations are employed not only in the aftermath of classical international conflicts but also in the overcoming of situations of i.a. civil war, foreign intervention, or unstable governance. This is especially true in cases or countries, where a government, being de facto in power, but, with its legitimacy being fundamentally questioned, shows its readiness to transform the political system of the country into a participatory democratic way of governance. *Upholder*
- 4.9 In order to get this process recognised both nationally and internationally, such a transition process must take place under conditions of full transparency and equal participation of all sectors of the society. In a growing number of cases there is an agreement between the conflicting parties to deploy international mechanisms of monitoring and assistance to that end.
- 4.10 International presence in countries of civil war and long political repression offer the population of a country the trust in their right to free political expression. International bodies of mediation boost the process of confidence building and consensus finding among the parties concerned. International observers are, finally, important "watch dogs" over the compliance of the parties with the agreements reached. Breaking provisions of the agreement on the mechanism of transition is thus not only

the present constitutional arrangements, to govern the country in the short interim period. The mechanism to draw up a new constitution should follow the example of Namibia i.e. an elected Constituent Assembly. In addition, there is now reference to the role of the international community in relation to the transition period. In his opening address to the National Conference in July, the President of the ANC said:

'... It would be important that we discuss the question of the possible role of the international community during the transitional period, the role it would play to expedite this process so that we move forward with minimum delay towards the accomplishment of our goals.'

2.5 The role that the international community could play, though the Organisation of African Unity and, especially, the United Nations is concerned largely with such matters as monitoring the security forces, peace-making through mediation acting as a verification institution or even taking on the powers of an interim administration.

2.6 But what is of importance is to realise that the UN role is no longer limited to peace-keeping forces as in the Middle East, to keep warring factions apart or even to supervise a cease-fire, as in Iraq. Over the past four years, a sophisticated multi-dimensional role has been developed to deal with a variety of situations of transition which will be described now.

3. UN TRANSITION ROLES

3.1 The nature of the international role has undergone a great deal of change in recent years. The best way of looking at the varied way the international community has been requested to assist is to look at some situations.

3.2 NAMIBIA

Following the adoption of resolution 435 in 1978, the UN undertook to supervise the process of elections towards a Constituent Assembly. The Group of 5 states negotiated supplementary agreements with the front line States, South Africa and SWAPO. These were incorporated into the overall agreement. The lesson of this stage of the negotiations is that there must be a single comprehensive document for the sake of clarity and interpretation.

The UN Transition Assistance Group (UNTAG) consisted of a scaled down military contingent which monitored the cease fire and movement of troops. A civilian police unit, together with local police, was responsible for law and order. Civilian observers supervised the election powers carried out by South Africa - from the election

levels including law enforcement. The council would have to have wide powers, including the power to establish its own budget and to amend, repeal and make laws by Proclamation if it considers it necessary to do so to achieve its objects. Individual members of the council could be empowered to have access to government departments and government records. Decision making in the absence of consensus will again present a difficulty, but if the council is composed of people of acknowledged integrity, a provision that decisions be taken by a majority might be less objectionable than would be the case if the council consists of representatives of political parties.

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control over the legislative and executive functions in the governing council, but would leave intact existing structures in so far as they may be necessary for the running of the country.

- 8 Once again, however, there will be difficulties in regard to decision making where there is disagreement within the governing council. If the veto power cannot be exercised because of the absence of consensus, or if important legislation or executive decisions cannot be taken because of disagreement within the governing council, effective power will reside in the old legislative and executive structures that are left intact.

REMOVAL OF CERTAIN FUNCTIONS FROM THE GOVERNMENT

- 9 This is the least radical of the possibilities. It involves the transfer of key functions relating to the holding of free and fair elections and the creation of conditions necessary for that purpose, to an independent council composed either of representatives of political parties or of people of acknowledged integrity. This council could be given the power to assume control over the security forces, to regulate and control access to the public media, to place a moratorium on controversial projects, to require the government to take or refrain from taking particular action, and generally to do everything necessary during the interim period to ensure political freedom and government impartiality at all

apartheid by negotiations. These Declarations reflected the close relationship between a regional organisation and the international community, increasingly displayed also in other theatres. The Declarations identified the principles to govern a new constitutional order in South Africa, the creation of a climate of opinion for free political discussion and the further route towards the adoption of a constitution, including an interim government (OAU).

- 1.6 Both Declarations anticipated a continued role for the international community in 'ensuring a successful transition to a democratic order' (but the parties must agree on such a role).

2. THE ATTITUDE OF THE PARTIES

- 2.1 The transition is the crucial period, in all countries. Crucial for the National Party perspective on the transitional process is that the process should be embarked upon according to the present constitutional order. This means that the current regime remains fully in power and continues to have the monopoly of power, especially concerning the maintenance of law and order.
- 2.2 Responding to the calls for an interim government, the regime proposes some form of interim participation of the 'extra-parliamentary' groups in the decision-making process, such as the holding of an informal summit of leaders, the forming of specialised working groups or the use of the envisaged 'multi-party conference' as a channel to convey to the government advice, requests or criticism concerning interim government action. Another suggestion is the appointment of representatives of extra-parliamentary groups to cabinet positions. Complaints about violence would be investigated by a Standing Committee on Violence which would advise the government.
- 2.3 For drawing up a new constitution, the National Party proposes the holding of a multi-party conference where parties with 'proven' support would be entitled to participate. The conference would have an open agenda but should first of all discuss the composition, functioning and decision-making process of the actual constitutional negotiation conference and work out principles to be embedded in a constitution. A new constitution would have to be adopted in legal continuity with the present constitutional order i.e. by a referendum among the white electorate followed by a general referendum, provided that the first result is positive.
- 2.4 The position of the ANC is well known. We want an interim government of national unity, with powers transferred from

international community in ensuring a successful transition to a democratic order".

- 4.19 As far as the ANC is concerned, there seems to exist a growing sympathy with a possible UN involvement in the transition process can be implemented by South Africans alone was to some extent based on the belief that the NP-government is a good faith negotiating partner. This belief was fundamentally shaken in recent months i.a. due to the NP-government's dealing of obstacles of negotiations and the "Inkathagate". Increasingly, the ANC regards an international presence in South Africa as a useful leverage of international pressure to achieve the aim of a united, democratic, and non-racial society based on the principle of one person one vote. United Nations participation in the transition process would prevent the removal of the question of South Africa from the international agenda in its most crucial phase.
- 4.20 So far the NP-government as the stronger actor in the national power game was against a possible internationalisation of the transition process.
- 4.21 As it was shown in chapter III, in an increasing number of countries, where de facto governments with a questionable legitimacy try to be admitted to the international community as a fully accepted member by embarking on a policy of fundamental reform, the United Nations are invited to assist in the transition process. From this follows, that the good faith of a de facto government which is strictly opposed to transparency and opening up for the international community, has to be seriously doubted. Considering the "Inkathagate" and other dubious developments a clear cut-dismissal by the NP-government of demands of the ANC to involve the United Nations in the transition process will be understood in that direction both by South Africans and by the international community.
- 4.22 In the past, the NP-government was openly hostile towards the United Nations. Since 1990, however, the NP-government is making efforts to prove its commitment to fundamental change and is co-operating with the United Nations: In June 1990, a UN mission visited South Africa to investigate the question of existence of irreversible and fundamental changes called for in the UN Declaration of 1989. They fully co-operated with the mission and thus accepted the principle of international evaluation of the political situation in South Africa. A second UN mission will take place in the near future. Furthermore, the NP-government is currently negotiating an agreement with the UNHCR on the latter's participation in the repatriation of refugees. Maybe this is the point of departure for a more extensive United Nations presence in South Africa in the post-sanctions era".

Finally, the S.S. and government that the process will be
 expected to be completed by the government of the Republic
 to all the same as it is in the report from 1977

THE ISSUE OF LEGALITY AND CONSTITUTIONAL CONTINUITY

1. INTRODUCTION

The issue of legality and constitutional continuity is one which has to be faced. A revolutionary victory entails constitutional discontinuity. The constitutionality and legality of the old regime is overthrown. A new legality and a new constitutionality are created.

When it is sought to replace an illegitimate constitution with a legitimate constitution through the process of negotiations, the situation is different. The question of constitutional continuity then arises.

The apartheid regime clings to its legality and constitutionality because firstly, no regime is prepared to abandon its own legality and constitutionality, but secondly, it does so to enable it to remain in control of the period of transition and therefore place it in a strong position to influence its eventual outcome.

For the ANC the issue is crucial but for a different reason. The ANC wishes to be assured that the processes which it envisages commencing with the All Party Congress (APC) viz the Interim Government (IG), the Constituent Assembly (CA), the adoption of a new Constitution and the installation of the first government in terms of a new constitution will all bear the stamp of legality and constitutionality. From the ANC viewpoint, not a single one of these steps should be capable of challenge in a court of law.

2. ARGUMENT OF THE APARTHEID REGIME

The regime argues that South Africa is a sovereign independent state. Its status is recognised in international law. The government is a lawful government operating in terms of the 1983 Tricameral Constitution. South Africa is not a colony or a mandated territory.

Not only is there, therefore, no basis for the involvement of any kind by the international community (unless invited) but in the circumstances it argues that a Constituent Assembly is inappropriate and the idea of an interim government unacceptable. It states that it will not agree to the present constitution being suspended during the negotiation process. "The lawful institutions of government and administration, set up according to the valid constitution and laws of the land, will continue ..." Transitional arrangements will have to be within the framework of the existing constitution.

3. POSITION OF THE ANC

The ANC envisages that an APC will be convened and that it will be called upon to do a number of things, inter alia:

- i) Agree on the principles for a new constitution (note: in line with Harare Declaration and UN Statement).

by consensus? If so, what if consensus cannot be achieved, particularly in regard to vital issues concerned with the creation of conditions for the holding of free and fair elections, or the allocation of the budget. If consensus is necessary deadlock could result if a minor party is obstructive and chooses to block decisions by withholding its consent. A provision that resolutions be taken by majority decisions, even if a special majority is required, may be unsatisfactory; majorities could possibly be achieved by a combination of parties representing together a minority of the population. A possible way around this difficulty would be to require decisions by a majority, or a specific majority, with a veto power being given to certain of the major parties. But who will have the power of veto, and how will agreement be reached on this? And what will happen if decisions are vetoed and deadlock results? Could this lead to a power vacuum?

CONTROL OVER GOVERNMENT

- 7 This is less radical than a transfer of sovereignty. Under this procedure all or some of the existing legislative and executive structures would remain in place. An interim governing council would be constituted with the power to veto bills passed by parliament, and decisions taken by the cabinet, and with the power to repeal or amend existing laws and to make new laws by proclamation. In effect this would vest effective

of all participants. The following agenda is submitted for consideration.

- 5.8.1 Statement of Intent;
- 5.8.2 Principles for a new constitution;
- 5.8.3 Mechanism for the drafting of a new constitution;
- 5.8.4 Mechanism for transition;
- 5.8.5 Role of security forces during the interim period;
- 5.8.6 Role of the SABC during the interim period;
- 5.8.7 Future economic system;
- 5.8.8 Financial/social/educational crisis;
- 5.8.9 Sanctions / Disinvestments / Boycotts;
- 5.8.10 Implementation of agreement;
- 5.8.11 General;

5.9 OBSTACLES

Certain obstacles like the release of all the political prisoners and the repeal of the Internal Security Act in terms of the Harare Declaration, has not yet been removed.

The question therefore arises: Can the ANC attend the APC while political prisoners are still in prison and the Internal Security Act is still on the statute books?

5.10 SECRETARIAT

In certain circles it was suggested that a Secretariat be established to prepare for the APC. The question arises: Who will appoint the Secretariat. What will be its tasks. Who will it be responsible and/or accountable to.

5.11 FINANCE

to find the funds.

SUMMARY OF THE ALL PARTY CONFERENCE

(A P C)

1. INTRODUCTION

There is broad consensus that an all party congress (APC) be held to work out the broad principles for a future democratic South Africa. Parties with proven support will attend such conference. The purpose of this report is to highlight important issues concerning the APC to enable the NEC to address them for the direction and guidance of the delegates of the ANC who will be attending the conference.

2. ISSUES

The issues that need to be addressed can be divided into three categories, namely:

- 2.1 Issues which need to be resolved before the APC, such as who convenes the APC;
- 2.2 Issues which need to be discussed by the APC itself, such as Constitutional Principals, etc.
- 2.3 Issues which need to be handled after the APC, such as the question of implementation.

3. AIM OF THE APC

3.1 The aim of the APC according to the President of the ANC, is:

- 3.1.1 To establish the principles on which the new constitution will be based;
- 3.1.2 To establish the mechanism by which such a new constitution will be drafted and by whom it will be drafted;
- 3.1.3 To decide on the mechanism that will manage the process of transformation and especially what body will manage the process.

3.2 The aim of the APC according to the State President De Klerk is to negotiate a new constitution for South Africa which will guarantee participation and representation to all South Africans within a true democracy and with effective protection of minorities.

3.3 The Democratic Party said that the aim of the APC is to find areas of agreement on the structuring of real negotiations on a new constitutional

1.8 How the country will be governed while the process of choosing, decision making, and implementing decisions is being carried out

2. There are sharp differences between the negotiating parties in regard to these issues. The government is opposed in principle to the convening of a constituent assembly. The obvious reason for its opposition is a concern that if it surrenders power to a constituent assembly it will lose control over the negotiations and the terms of the constitution. There is also disagreement in regard to the principle of interim government - which is rejected not only by the government, but also by some of the parties who will participate in the Patriotic Front meeting. The issues referred to in paragraph 1 are dealt with below. They have important political implications and the question which has to be confronted is whether, without compromising principles of importance, there is room for flexibility in regard to any of these matters.

3.HOW WILL THE CONSTITUENT ASSEMBLY BE BROUGHT INTO EXISTENCE

3. If the constituent assembly is to have binding powers it will presumably have to be constituted by legislation which will define what those powers are, and how the constituent assembly will be chosen. If this is done it means that the constituent

7.4 PATRIOTIC FRONT:

Many of the issues raised in this report should be discussed by the ANC at the Patriotic Front Conference.

8. NEGOTIATING TEAM

It is expected that a negotiating team of the Nationalist Government will be certain ministers and the four provincial leaders. They will be backed by constitutional and other experts.

The ANC must elect its negotiating team as soon as possible to prepare for such negotiations. Such team must be assisted by constitutional and other experts to advise them before, during and after the APC.

9. MINORITIES

The Nationalist Government will argue very strongly for the protection of minority rights and the negotiating team should be mandated on this particular issue.

10. CONCLUSION

The All Party Conference will be the start of real negotiations for the establishment of a united, non-racial, non-sexist South Africa. It should be followed by a constituent assembly entrusted with the task of drafting a new constitution for South Africa based on the broad constitutional principles agreed upon at the APC. Elections will then have to follow for the establishment of a new Parliament based on the new constitution. The entire process is to be managed by an interim government until the new order is established.

A.N.C. CONSTITUTIONAL COMMITTEE
25 SEPTEMBER 1991

- 4.3 The age at which people will qualify for the vote must be fixed. Presumably it will be 18, which is the age at which people presently qualify to vote in the tri-cameral elections. To fix a higher age would result in the disenfranchisement of some of these people. It would also be likely to provoke opposition from the youth. Other qualifications for the vote will have to be determined. Will the vote be given only to citizens? If so, how will the position of people who have been denationalised, 'citizens' of 'independent homelands', exiles who may have lost their South African citizenship and children born in exile, be accommodated. If not, what will the qualification for voting for the constituent assembly be?
- 4.4 The registration of voters and the compilation of a voters roll will probably be required once these decisions have been taken. This will be a massive task, which will call for impartiality, and careful scrutiny.
- 4.5 The period set aside for the run up to the elections and campaigning will have to be fixed and agreement reached on the method of supervising and conducting the election to ensure that it is free and fair.
- 4.6 All this will take time. Thereafter, there will be the time taken by the constituent assembly to conduct its

WORKSHOP ON INTERIM GOVERNMENT

Summary of the Issues Regarding an Interim Government for South Africa

[illegible]

1. This memorandum merely summarises the issues relating to the form of interim government that is sought to be achieved. It is drawn from various memoranda prepared by the Constitutional Committee for this and previous workshops and introduces the more detailed memoranda contained in this Dossier.

2. Modality and Structure of Interim Government

The most important issue which needs to be confronted in advancing a demand for interim government is the precise form of interim government which is sought to be achieved. IN this regard distinction has been drawn between the following three scenarios.

Interim government in which the African National Congress and its allied forces has :

- 2.1 responsibility for the administration and government of South Africa without effective control over the organs of government. Such a scenario may be what the State envisaged when referring to its "super-cabinet".
- 2.2 responsibility and effective control over government and the organs of government. Such a scenario would require a greater degree of involvement in the apparatuses of the State.
- 2.3 control over the organs of state without responsibility for government or execution of government policy. Such a scenario takes place when interim government takes the form of

WORKSHOP ON
INTERIM GOVERNMENT

Dossier No II

**ANC Constitutional
Committee**

**25 September 1991
Johannesburg**

control over the legislative and executive functions in the governing council, but would leave intact existing structures in so far as they may be necessary for the running of the country.

- 8 Once again, however, there will be difficulties in regard to decision making where there is disagreement within the governing council. If the veto power cannot be exercised because of the absence of consensus, or if important legislation or executive decisions cannot be taken because of disagreement within the governing council, effective power will reside in the old legislative and executive structures that are left intact.

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levels including law enforcement. The council would have to have wide powers, including the power to establish its own budget and to amend, repeal and make laws by Proclamation if it considers it necessary to do so to achieve its objects. Individual members of the council could be empowered to have access to government departments and government records. Decision making in the absence of consensus will again present a difficulty, but if the council is composed of people of acknowledged integrity, a provision that decisions be taken by a majority might be less objectionable than would be the case if the council consists of representatives of political parties.

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them under the agreements and use its good offices in the case of disagreement on the interpretation and application of the agreements. The United Nations could be used to secure the impartiality of the transitional government, be it by monitoring the de facto government, be it by being included in an interim government.

- 4.15 The paper also states, that the deployment of a large-scale UN peace keeping force to put an end to township violence is unrealistic and probably even not recommendable. The United Nations could, however, supervise and secure the impartiality of the transitional security mechanism. The form of UN participation could be to expand national commissions of inquiries to include UN experts, or to deploy a UN mission of experts. International investigation of this issue would result in the internationalisation of the question of violence and would give this burning issue a more prominent place with regard to the evaluation of the overall international community's policy towards South Africa.

- 4.16 The strongest arguments for UN involvement can be found concerning the holding of general, free and fair election or to the holding of a referendum. Since in the elections the partners at the negotiating table are becoming competitors for power in the new political system all means will be used to influence the elections in one's favour and to dominate the electoral process. Of course, the party de facto in power has many advantages in that respect. One measure to meet this problem is to entrust a national body consisting of representatives of all political organisations with the implementation of elections. Additionally, in most cases international observers are invited to give a judgement on the character of the elections and increasingly, the United Nations are requested to assist in the election process. As it is described in Chapter III, UN participation in the electoral process can take different forms.

- 4.17 In the case of South Africa, probably a national electoral body will be formed. In addition, the United Nations could be invited to monitor and surveille the proper implementation of the elections. Such a UN operation could be mandated to monitor all aspects of importance for the holding of free and fair elections, but also to secure a climate free of intimidation and fraud by a limited presence on the ground.

- 4.18 UN participation in the transitional process will only take place, however, on the basis of an agreement among all parties and a formal request by the current government. Therefore the UN Declaration on South Africa of 14 December 1989 requests the parties concerned to conclude an "agreement on the role to be played by the

the present constitutional arrangements, to govern the country in the short interim period. The mechanism to draw up a new constitution should follow the example of Namibia i.e. an elected Constituent Assembly. In addition, there is now reference to the role of the international community in relation to the transition period. In his opening address to the National Conference in July, the President of the ANC said:

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Following the adoption of resolution 435 in 1978, the UN undertook to supervise the process of elections towards a Constituent Assembly. The Group of 5 states negotiated supplementary agreements with the front line States, South Africa and SWAPO. These were incorporated into the overall agreement. The lesson of this stage of the negotiations is that there must be a single comprehensive document for the sake of clarity and interpretation.

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sanctions shall not be lifted until the adoption of a new constitution.

- 4.7 In recent months, however, one could notice a crumbling of sanctions against South Africa, taking away from the democratic forces what they describe as an important weapon in the struggle for a democratic constitution. The ANC is therefore adopting a more flexible position, trying to bind the lifting of specific sanctions to the achievement of specific objectives in the transition process. Nevertheless, sanctions seem to be an outgoing model which during the proper negotiating process will not be effectively in place any longer to be instrumentalized as a leverage. But in general, it seems that sanctions are an instrument too superficial and crude to be employed as a means of pressure on the government with regard to specific and subtle questions during the transition process.
- 4.8 Therefore, the next step is to explore if alternative modes of participation of the international community in the transition process of countries are available. The most prominent instruments for such international involvement are so-called United Nations Peace Keeping Operations. An analysis of examples like Cambodia, Namibia, Western Sahara, Central America (Nicaragua, El Salvador, Guatemala), Haiti, and Angola shows, that UN peace keeping operations are employed not only in the aftermath of classical international conflicts but also in the overcoming of situations of i.a. civil war, foreign intervention, or unstable governance. This is especially true in cases or countries, where a government, being de facto in power, but, with its legitimacy being fundamentally questioned, shows its readiness to transform the political system of the country into a participatory democratic way of governance. *Upholder*
- 4.9 In order to get this process recognised both nationally and internationally, such a transition process must take place under conditions of full transparency and equal participation of all sectors of the society. In a growing number of cases there is an agreement between the conflicting parties to deploy international mechanisms of monitoring and assistance to that end.
- 4.10 International presence in countries of civil war and long political repression offer the population of a country the trust in their right to free political expression. International bodies of mediation boost the process of confidence building and consensus finding among the parties concerned. International observers are, finally, important "watch dogs" over the compliance of the parties with the agreements reached. Breaking provisions of the agreement on the mechanism of transition is thus not only

However, what is necessary in order to create legal and constitutional certainty, is that there should be a comprehensive agreement with clear steps leading to a definite result spelt out. On the basis of such a comprehensive agreement, the legalisation of the whole process and ensuring that it enjoys the stamp of constitutionality become simplified.

Successful transitions in other countries including Zimbabwe and Namibia also proceeded in terms of comprehensive agreements.

The reunification of Germany, for example, is proceeding in terms of a Reunification Treaty which in terms of length runs to over 1000 pages. The Treaty deals with every aspect of reunification. In terms of the Treaty, the GDR disappeared at an early date and yet the process of reunification in its various facets still proceeds - despite the early disappearance of the GDR.

5. THE APC IS CRUCIAL

Whilst mindful of the ANC demand for an Interim Government to be installed without delay, it is nonetheless essential for a comprehensive agreement to be reached at the APC on at least the following matters:

- i) Constitutional Principles which must include the Bantustans.
- ii) The mechanism to draw up and adopt the constitution (Constituent Assembly).
- iii) The setting up of the Interim Government.
- iv) The role of the international community.
- v) Details relating to the convening and functioning of the Constituent Assembly until the adoption of a new democratic Constitution.
- vi) Elections in terms of the new Constitution for a new government.
- vii) The installation of the first government in terms of the new constitution.

In respect of each one of the above matters, detailed agreements and arrangements will have to be formulated. As much of the major transitional issues as possible should be resolved at the APC stage. This will make it possible for all the agreements to be legalised and leave the minimum to future dispute.

It is submitted that only after a comprehensive agreement has been reached, will it be possible to work out the

affairs administrations and homeland governments;

- (b) the creation of an interim government in which would be vested the executive authority, and the power to amend and repeal existing laws, and to make new laws by proclamation;
- (c) the composition of the interim government and how it will take decisions;
- (d) the holding of elections for a constituent assembly within a specified time, and the mandate that the constituent assembly will have to draw up a new constitution;
- (e) transitional arrangements dealing with matters such as the administration of the country, the functioning of the judiciary, the enforcement of existing laws, and the handling of financial matters during the interim period.

5 The composition and functioning of interim government will have to be defined in the amending statute. Issues to be addressed will include:

- (a) Who will participate in the interim government and how will such participation be determined? Will it include 'homeland leaders' and parties in the tri

NEGOTIATIONS, THE TRANSITION AND THE ROLE OF THE INTERNATIONAL COMMUNITY

KADER ASMAL

1. BACKGROUND

- 1.1 The unique set of circumstances constituting the issue of apartheid has resulted in the international community at the regional and the international level adopting the most profound political and legal responses to deal with this threat to international order and morality. Such a response has involved over 300 resolutions since 1946 condemning apartheid as a breach of the right to self-determination and as a crime against humanity, has provided a legal validation for the armed struggle and a protected status for the combatants of the liberation movement.
- 1.2 In addition, the United Nations, the Organisation of African Unity, other regional bodies and countries have used this legal and moral consensus for the imposition of various forms of sanctions, including the first ever decision by the Security Council in 1977 to impose a binding arms embargo against a member State as such sales constituted a threat to international peace and security.
- 1.3 Throughout this period and especially with the intensification of repression, the international organisations have demanded the dismantling of the apartheid system, rejected the claim that apartheid was a matter of domestic jurisdiction, expelled apartheid South Africa from membership of international organisations and, in 1974, withdrew the credentials of the apartheid regime at the General Assembly of the U.N. This resulted in the culminating finding that the apartheid regime was illegitimate and had no authority to speak for the people of South Africa.
- 1.4 It was on this basis that the Security Council of the UN - more muted than the General Assembly because of the threat of the veto by apartheid's traditional allies - made its historic finding that the so-called new constitution of South Africa of 1983 runs counter to the UN Charter and was therefore null and void. Such a finding of nullity is without parallel in international law and relations and provided an even stronger basis for international intervention in South Africa and support for the struggle.
- 1.5 In order to assist in the historic task which the international community has undertaken to assist in the removal of apartheid, the Organisation of African Unity and the General Assembly of the United Nations adopted the now well known Declarations supporting the ending of

more openly than might have been the case if the discussions had been public. It also enabled the delegates to 'negotiate' deadlocks and find solutions to what might otherwise have been insoluble problems. The question of how the assembly will conduct its affairs can possibly be postponed for decision by the assembly itself; the question of a chairperson may, however, have to be decided upon in advance.

7. HOW DECISIONS WILL BE TAKEN

This is of fundamental importance. Will a specified majority, such as two-thirds or three-quarters be required within the constituent assembly, or will a simple majority be sufficient. In Namibia a two-thirds majority was required. This led to compromises, but in the end it also led to the adoption of the constitution without dissent, and in turn to national consensus in regard to the acceptability of the constitution. It seems unlikely that the government will agree to a simple majority. It may argue for substantial consensus, or at least for a defined majority. Difficulty over this issue could hold up the negotiations. If the route chosen is to agree first on the constitutional principles, and then to refer the drafting of the constitution to a constituent assembly, the difficulty may be easier to overcome. Agreement on constitutional principles means agreement on the framework, and once such agreement has been reached, a demand for consensus may fall away.

Finally, the peace process will lead to the holding of free and fair elections under international supervision during 1992. The role and tasks of the UN will be determined by the parties concerned.

4. ROLE FOR THE INTERNATIONAL COMMUNITY

- 4.1 The experience of Zimbabwe and Namibia, during their transition, shows that the roles of the OAU and the UN have been of considerable importance. In the case of Zimbabwe, the Commonwealth and the OAU ensured that the legal authority, Britain, effectively supervised the de facto power, the Muzorewa-Smith regime. In the case of Namibia, there can be little doubt that the UN, under pressure from various parts of the international community, ensured that the electoral law, the maintenance of order and the proper organisation of the ballot were changed in order to ensure a fair and free election.
- 4.2 The experience of other countries in recent years has shown the variety of ways in which the international community has provided assistance.
- 4.3 What follows on South Africa is the concluding and summary part of a paper prepared by a diplomat-scholar which provides insights into a possible role for the UN. The paper itself is nearly 40 pages long.
- 4.4 "UN practice clearly establishes the competence of the United Nations concerning the situation in South Africa and its overcoming. Insistence on the principle of non-intervention is therefore legally totally unfounded.
- 4.5 To exercise pressure on the South Africans to comply with the demands formulated in the resolutions, the Security Council adopted a mandatory arms embargo against South Africa and subsequently urged UN member states to adopt additional sanctions. These measures were aiming at the eradication of apartheid and at the attainment of peaceful change. With important changes in the policy of the NP-government and its embarking on reform policy it has to be decided, when the moment of lifting of sanctions has been reached. Whereas the arms embargo can only be lifted by a new resolution of the Security Council to that end, the question of lifting other sanctions principally lies within the competence of the individual countries.
- 4.6 In the Declaration on South Africa 1989, the international community unanimously decided, that sanctions shall not be lifted, until there is clear evidence of profound and irreversible changes in South Africa. This is short of the Harare Declaration of 1989, according to which

campaign (including equal access to the media, not done satisfactorily) to the final counting of votes, to guarantee a free and fair election. The Special Representative of the Security Council had wide powers on such matters as ensuring the abolition of discriminatory legislation and the release of prisoners. Part of UNTAG's responsibility was the repatriation of Namibian refugees under the auspices of the UNHCR and the Namibian Council of Churches. Finally the Special Representative had to certify to the Security Council that the elections were fair and free.

3.3 WESTERN SAHARA

Contrary to its role in Namibia, the UN for the first time will not only observe but organise the whole election process in Western Sahara, under the agreement reached with Morocco and POLISARIO in 1991. The UN will establish the electoral procedure, identifying and register persons entitled to vote, monitor the election campaign and ballot, announce the outcome of the referendum - on condition that it was fair and free - and finally guarantee the implementation of the result.

- 3.4 The above examples are 'colonial' ones; in addition, the UN has been recently involved in conflicts of a certain international dimension where the core of the issue is the internationally supervised change of the internal political and legal order. These arrangements are for:

3.5 CAMBODIA

The Permanent Members have agreed to set up a UN Transitional Authority in Cambodia (UNTAC) in 1992 which will have authority which fall short of a government: UN officials will take over key positions in the national administration for monitoring and controlling all administering bodies. They will investigate complaints against civil servants and human rights violators. Military observers will monitor and verify the implementation of the cease fire. The soldiers of the parties to the conflict will be reduced in number and confined to specified areas and their weapons stored under the supervision of the UN. Over 300,000 refugees will be repatriated under UN auspices and the UN Development Programme will assess and meet short-term infrastructural needs. The main job of UNTAC, as in Western Sahara, is the organisation and implementation of free and fair elections for a Constituent Assembly.

- 3.6 In Central America, the presidents of countries there adopted a peace plan for democracy, national reconciliation and the holding of fair and free elections. These presidents invited the UN and the Organisation of

5.1.4.1 **WHEN DOES THE INTERNATIONAL COMMUNITY GET INVOLVED; AND**

5.1.4.2 **WHAT FORM DOES SUCH PARTICIPATION TAKE.**

The international community could be drawn in from the very early stages of the process and they could be called upon to convene the APC.

The possible form such international participation could take, could be the establishment of a United Nations Peace Committee for South Africa, comprising representatives from all the continents, such as Europe, Asia, America, Africa, etc.

5.2 **WHO IS TO CHAIR THE APC ?**

5.2.1 Ideally, the body convening the APC should nominate someone from among itself to chair the conference.

5.2.2 The convening body could also nominate free agents to chair the conference, provided such free agents are independent, impartial and has the respect of the participants to the APC.

5.2.3 The participants at the APC could also decide to appoint a Chairperson from amongst themselves and the role of the Chairperson could be rotated amongst them.

5.3 **WHO SHOULD BE REPRESENTED AT THE APC ?**

5.3.1 To make the APC successful and the outcome binding, as many parties with constituencies or proven support should participate.

5.3.2 The next question which arises is: **SHOULD ONLY POLITICAL PARTIES BE REPRESENTED OR CAN PARTIES REPRESENTING LABOUR, BUSINESS, CHIEFS, ETC., ALSO ATTEND THE CONFERENCE?**

5.3.3 A criteria for participation should be drawn up and provided a party qualifies in terms of such criteria, it should be entitled to participate at such conference.

5.3.4 All major parties such as the ANC, Nationalist Party, PAC, Inkatha, Conservative Party, the SACP, Labour Party and

- 5.3.5 The question however arises that should governments of South Africa, the independent homelands and the self-governing territories be permitted to participate? If they are allowed, they may have dual representation, through their government and through their party. On the other hand, if governments are excluded, how does one commit such governments to the decisions of the APC for example the re-incorporation of its territories to united South Africa.
- 5.3.6 If governments are not allowed to participate, how will homeland governments not belonging to political parties be drawn into the APC for example Transkei.
- 5.3.7 For parties to participate should there be a threshold for example minimum support, must a party exist for a particular period before it qualifies for participation. These are matters that need to be clarified.

5.4 **HOW MANY DELEGATES SHOULD EACH PARTY HAVE AT THE APC?**

Should participation be by proportional representation in accordance with their support.

5.5 **HOW WILL DECISIONS BE TAKEN AT THE APC?**

Will decisions be taken by consensus, majority vote, or will major participants have veto power.

5.6 **WHAT SHOULD BE THE RULES OF PROCEDURE?**

Should special rules be drawn for the APC or should the normal rules of meeting procedures apply.

5.7 **HOW WOULD DEADLOCK BE BROKEN?**

5.7.1 The service of a facilitator or mediator could be employed.

5.7.2 ~~The next question arises: Who should such facilitator~~

sufficiently close to the Harare Declaration to be acceptable in principle, and at the same time it offers a possible way around what might otherwise become an intractable obstacle to a 'settlement.'

5. WHAT WILL THE POWERS OF THE CONSTITUENT ASSEMBLY BE

5. Will the constituent assembly have unrestricted power to settle the terms of the constitution, or will it only have power to put forward a draft which will be made the subject of a referendum. This raises questions posed in paragraph 4, and depends upon the answers to those questions. Approval through a non-racial referendum would establish popular support for the constitution. It would, however, add to the time and the uncertainty, which will be magnified if a general election has to be held once the new constitution has been adopted. Without making the error of rushing through the process to get a quick solution, there are advantages in the present political climate to attempting to reach a settlement as soon as this can reasonably be achieved. Reference has been made to the potential advantages of a procedure whereby constitutional principles are first agreed and recorded in legislation, which provides for the election of a constituent assembly to settle the terms of a constitution, and possibly a referendum. This is similar to the Namibian model, save that in Namibia there was no provision for a referendum. In Namibia a constituent assembly was elected by

deliberations. Throughout this period there is likely to be uncertainty, and the possibility of a high level of political conflict.

- 4.7 An alternative route to follow would be for the major parties to the negotiations to attempt to reach agreement on principles which will define the broad parameters of the constitution and within which an elected constituent assembly would be required to function. This is what happened in Namibia. The advantage of this procedure was that the framework, though not the detail, of the new constitution was known before the elections were held for the constituent assembly. The assembly, functioning within the predetermined framework, was able to complete its deliberations within a comparatively short space of time. Once the constitutional principles had been accepted, there was a degree of certainty as to the future and it was possible to conduct the elections in a relatively peaceful atmosphere. All this was facilitated by the presence of the United Nations forces - a situation which is unlikely to occur in South Africa. The disadvantages were that the people as a whole did not participate through their chosen representatives in the determination of the broad framework of the constitution. There has been some criticism of the Namibian constitution on these grounds, but on the whole it seems to have gained widespread support within Namibia, and

NOTES ON A CONSTITUENT ASSEMBLY

1. The function of a constituent assembly will be to settle the terms of a new constitution for South Africa. In negotiations for a constituent assembly, consideration will have to be given to the following factors:

1.1 How the constituent assembly will be brought into existence.

1.2 How the members of the constituent assembly will be chosen.

1.3. What the powers of the constituent assembly will be.

1.4 How the constituent assembly will function and conduct its business.

1.5 How the constituent assembly will take its decisions.

1.6 How the decisions of the constituent assembly will be implemented.

1.7 How the implementation of the decisions of the constituent assembly can be guaranteed.

[illegible]

control the SAP and SADF;

- 7.3 The regulation and supervision of elections and to oversee the process towards the adoption of a new constitution;
 - 7.4 The placing of a moratorium on controversial projects;
 - 7.5 The restoration of the territorial integrity of South Africa which would include dismantling apartheid structures such as 'own affairs' Departments and Bantustans;
 - 7.6 The prevention of the use of the financial resources of the State, or the alienation of the financial resources of the State, either to favour a political party, or to pre-empt future economic, educational or social programs.
8. A theory of transition needs to be elaborated so as to inform the thinking on these issues. Without such a theory or vision responses and demands may be inconsistent.

WORKSHOP ON
INTERIM GOVERNMENT

Dossier No II

**ANC Constitutional
Committee**

**25 September 1991
Johannesburg**

oversight or supervisory control

Each modality of interim government would require a different structure. Questions of structure, decision-making, composition, are raised in more detail in the memorandum entitled "What We Mean by Interim Government".

3. Legality of Interim Government Rule

Important issues relating to the legality of interim government rule and the legal form in which its powers are to be exercised must be examined. These issues will come to the fore in any negotiations with the State. The issues are dealt with in the memorandum by Dullah Omar.

4. The Role of the International Community

Whereas a prominent role for the international community has not been previously asserted, conditions in the country have led to a reappraisal of the role the international community could play in supervising the transition. Issues related to the role of the international community in South Africa and in other countries is dealt with in the memorandum by Kader Asmal.

5. Duration

The duration of interim government is an important issue. Commentators have noted a tendency for interim governments to prolong their period of existence and it may well be that the State will not want to commit itself to a fixed time period for the transition process. The very existence of an interim government will reduce international, and possibly local pressure on the State to follow through with the process of transition.

American States to send observers to monitor compliance with the agreements and the holding of elections. As a result, the Security Council set up in 1989 the UN Observer Group for Central America to verify compliance with the agreements. The democratisation of individual states has been at the request of these states.

3.7 NICARAGUA

The independent State of Nicaragua requested the Security General of the UN to verify the election process in Nicaragua. The task of ONUVEN was to: verify that political parties were fairly represented in the Nicaraguan Supreme Electoral Council; verify that political parties enjoyed complete freedom of organisation and mobilisation; that political parties had equal access to radio and television; verify that the electoral registers were properly drawn up and to report any complaint or irregularity to the Electoral Council. ONUCA also had responsibility over the cease-fire between the Nicaraguan arms and the Contras and the demobilisation of the Contras. ONUCA's work was carried out to the satisfaction of all.

3.8 EL SALVADOR

A comprehensive peace plan is about to be announced after a decade of civil war when over 50,000 have died. The peace plan will include a cease-fire, agreements on constitutional and electoral reform, reform of the judiciary and the armed forces, based on full respect for human rights and economic justice. An agreement on respect for human rights has now been reached. In 1991, the Security Council established the UN Observer Mission in El Salvador (ONUSAL). Its initial mandate is to verify compliance of the parties with the human rights agreement, promote human rights and investigate the violations of human rights and to make recommendations for the elimination of these violations. It will also remodel Salvadorean society by making recommendations on the reform of the army, the judiciary, the security system. It is therefore the first peace-keeping operation with a mandate in the field of human rights.

3.9 A similar process as in El Salvador is occurring in Guatemala. The Government and the resistance movement have signed an agreement to deal with similar topics as in Salvador. The verification of the agreement will be to the National Reconciliation Commission, the UN and, possibly another international organisation such as the OAS.

3.10 Haiti's crisis after the fall of Duvalier arose from the fact that successive governments came into power by coups

d'etat or by fraudulent elections. As a result, the elections held in June 1990 were supervised by the UN through the UN Observation Group for the Verification of Elections in Haiti (ONUVEH). Its mandate was to advise the electoral board in establishing a credible electoral process in order to guarantee democratic elections, support the local security forces to draw up an election security plan and to uphold law and order on election day.

The UN mission was in the form of a technical assistance programme rather than peace-keeping. But it ensured that the elections were fair. International surveillance was crucial.

3.11 ANGOLA

In May 1991, the Government of Angola and UNITA signed the "Peace Accord for Angola" consisting of 4 documents, providing for a comprehensive political settlement. In one of these documents, UNITA and the government agree that fair and free elections under the supervision of international observers who will certify that the elections are fair and free, will be held. The Government will amend the Constitution and draft laws repealing the electoral powers. There will be a single army and its neutrality will be guaranteed by the Angolan parties with the support of the international monitoring group. The monitoring system is complex, consisting of both national and international elements. The primary responsibility lies with the parties directly involved, with a Joint Political-Military Commission of the two parties, together with the US, Portugal and the USSR as observers. The PMC does not replace the Angolan Government but has the powers (decision-making by consensus) to guarantee the conditions of peace for the holding of free, fair, multi-party and internationally verifiable elections.

The Security Council on May 30, 1991 enlarged the mandate of the Cuban withdrawal supervision group. UNAVEM will not monitor compliance with the agreements. Its function is more modest: it will verify that the national monitoring groups are assuming their responsibilities.

Upholding law and order remains the responsibility of the Government of Angola during the transition period. However, the neutrality of the police will be supervised by teams of monitors, made up of two members designated by the Government and by UNITA. They will visit police facilities, examine police violations of political rights. UN police observers have the task of verifying and assisting the monitoring teams. UNITA will be allowed to participate in the police force. To achieve this, vacancies in the police shall be filled by personnel designated by UNITA.

8. GUARANTEES AND INTERIM GOVERNMENT

These issues are closely related. If the government retains the reins of power until a new constitution comes into force, and particularly if it retains control over the police, the army, the public media and the electoral process, it will be in a position to influence elections and even to frustrate any agreement. Political forces and international opprobrium may make it impossible for the government to avoid the implementation of an agreed constitution; but the risk is always there. There are obviously risks which have to be taken in any negotiated settlement; but there are also risks, possibly greater, in not reaching a settlement. In this context consideration may have to be given to agreeing in the negotiations to interim government structures, which fall short of full interim government, but are nonetheless sufficient to meet a demand for neutrality in all matters connected directly or indirectly with the electoral process and the holding of free and fair elections.

constitutional and/or statutory steps which will have to be taken to create a ~~new~~ transitional regime which will begin with the installation of the interim government and end with the installation of the first democratic government.

6. CONSTITUTIONAL CONTINUITY

On the assumption that a sovereign interim government is to be established, it seems that a new interim constitutional order which includes the TBVC formations is the most practical path and the least hazardous. This means that the present government will be required to effect amendments in terms of the existing constitution to create the interim ~~constitutional~~ order. In effect there will have to be a new interim constitutional brought into being through the process of constitutional amendment.

~~The interim constitution~~ will provide for all those matters and processes which are set out in our document entitled "INTERIM GOVERNMENT". In this way constitutional continuity will be assured and the process which will ensure the transfer of sovereignty, legalised.

7. CONCLUSION

The above approach envisages the establishment of a SOVEREIGN Interim Government, the establishment of which implies the dissolution of a tricameral parliament and the handing over of the administration of the country to the Interim Government. Other versions of Interim Government have been put forward which do not involve the immediate transfer of sovereignty or the dissolution of the existing government. In terms of these approaches which are also referred to in the document entitled "Interim Government" the administration and government of the country are to be left in the hands of the present regime, functions relating to the holding of elections for a Constituent Assembly and other related matters are to be placed in the hands of other bodies to be established and some form of supervision over government is to be created. It is not the purpose of this paper to examine different versions of "Interim Government".

Whatever approach is adopted, however, it may still be necessary to establish a series of appropriate commissions to oversee, and perform, specific functions - for example in relation to media, broadcasting, security forces, electoral matters, etc.

The idea of an interim constitution is not new. (The Basic Law of the Federal Republic of Germany adopted in 1949 is one example of a temporary constitution.)

SEPTEMBER 1991

-cameral parliament? What extra-parliamentary parties will be included?

- (b) Will the office of President be retained, and if so, how will the President be chosen? Will there be a joint presidency, and if so, how will the joint presidents be chosen, and how will they take decisions. If the office of President is abandoned, who will perform the function of head of State, and who will preside at meetings of the interim government?
- (c) Will existing departments of State remain in place? If so, who will assume responsibility for the functioning of the departments. Will there be a coalition of members responsible for each department, or will responsibility be allocated to individual members of the interim government, and if so, how will such allocation be made.
- (d) What will happen to Provincial Administrations and Local Government organs, and how will responsibility for such matters be dealt with.
- (e) For how long will the interim government last?

6 How decisions are to be taken will be of crucial importance. Will interim government call for government

WORKSHOP ON INTERIM GOVERNMENT

AGENDA

Introduction to Workshop

SESSION 1

9.15 Presentation

"Interim Government: What Do We Mean"?

Thabo Mbeki

10.15 TEA

10.45 General Discussion (Chair - Cyril Ramaphosa) "What Do We Want Interim Government To Do?"

- (1) Functions and Powers
- (2) Decision Making and Structures
- (3) Interim Government -
How does it become legal?
How does it function in law?
- (4) Organisational and Political Implications
for ANC/Alliance
- (5) Duration and Timing of Interim Government
- (6) Government's Position
- (7) The Role of the International Community

LUNCH

2.00 General Discussion Continued

3.00 TEA

3.30 The Way Forward Linking Interim Government Demand to the Patriotic Front and All Party Conference Mahommed Valli / Peter Mayibuye

Discussion

Closure

ISSUES IN THE CONSTITUTIONAL DEBATE

INDEX

VOLUME II - THE PROCESS

1.	Summary of Issues	FH
2.	Interim Government	
2.1	What Do We Mean by Interim Government?	AC
2.2	The Issue of Legality	DO
2.3	Government Responses to Interim Government	LL
2.4	Role of the International Community in the Period of Transition: International Comparisons	KA
3.	The All Party Congress	EM
4.	Constituent Assembly - Some Issues	AC

5.12 **BUDGET**

A budget will have to be drawn up for such conference and this task could be entrusted to the Secretariat if a Secretariat is established.

6. **CURRENT APC ISSUES**

There are a number of matters which need to be arranged and considered for the duration of the conference. It can be identified as follows:

- 6.1 Venue
- 6.2 Accommodation
- 6.3 Recording and translation
- 6.4 Resolutions
- 6.5 Press releases
- 6.6 Confidentiality
- 6.7 Tapping devices
- 6.8 Security
- 6.9 Transport and travelling
- 6.10 Seating arrangements at the APC
- 6.11 Meeting procedures for the APC
- 6.12 Voting procedures for the APC
- 6.13 Experts and research
- 6.14 Statement of affirmation on conclusion of APC

7. **POST-APC ISSUES**

Matters which need to be addressed after the APC are as follows:

7.1 **IMPLEMENTATION**

- 7.1.1 Mechanism for implementation;
- 7.1.2 Time-scales for implementation;
- 7.1.3 Personnel for implementation;

7.2 **MANDATE**

The decisions emerging from the APC will have to be referred to the constituencies of the various participating parties for endorsement and approval or a referendum could be held.

7.3 **CONSTITUTIONAL CONTINUITY**

for many of the decisions arising from the APC to be implemented, the existing constitutions of South Africa and the independent homelands might have to be amended, scrapped or substituted. Also laws which provide for self-governing homelands will have to be repealed and provision will have to be made for the interim administration of such

committee and seems to have gained widespread acceptance both within the ANC and from other parties. There may be demands for regional representation, but mechanisms could be devised to accomodate such demands within a proportional representation framework.

- 4.2 The disadvantage of a constituent assembly elected according to proportional represntationt is that particular interest groups, as such, will not be represented in the assembly. There may be demands for groups such as labour, women, the youth etc. to be represented so that their views can be heard and taken into account. The difficulty in making provision for 'group representation' will be in the definition of the groups and the manner in which each group will choose its representatives. If there is a demand for labour to be represented, there will immediately be a demand from commerce and industry for representation as well; also, ethnic groups may seek separate representation on the grounds of their special interests, which would incorporate apartheid structures into the assembly itself. Any attempt to accomodate special interests is likely to give rise to more problems than it will solve. It would be better for any number of reasons for the assembly to consist of representatives of political parties, who can have regard to the special interests within their own constituencies in selecting their representatives.

assembly will be the product of the tri- cameral parliament, or of an interim government set up by the tricameral parliament. The terms of the legislation will be of the greatest importance, and could themselves become the subject of prolonged and difficult negotiations.

4.HOW WILL THE CONSTITUTUENT ASSEMBLY BE CHOSEN

4.1 The fairest would be by way of universal adult franchise with a common voters roll, and an an election conducted according to a system of proportional representation. This would permit all views, that command a specified minimum of the votes cast, to be reflected in the constituent assembly, and at the same time, would give weight to those views that command the greatest support. A constitution should as far as possible meet the reasonable needs of the people as a whole. The opportunity given to people with different political affiliations to have their views advanced in the assembly through their chosen representatives, not only involves a wide cross-section of the population in the negotiations, but also offers the prospect that the constitution that is ultimately adopted will be able to gain widespread acceptance. Having regard to the broad base of the ANC's support throughout the country, proportional representation is not likely to work to its disadvantage. It is the voting system recommended by the constitutional

3.4 The Harare Declaration sets out the process of negotiations as follows:

3.4.1 Negotiations should proceed to establish the basis for the adoption of a new constitution by agreeing on, amongst others, the principles enunciated in the Declaration.

3.4.2 Having agreed on these principles, the parties should then negotiate the necessary mechanism for drawing up the new constitution.

3.4.3 The parties shall agree on the formation of an interim government to supervise the process to a democratic order including the holding of elections.

3.5 Other participating parties would either support the stand of the ANC or that of the Government, depending whether they operated within or outside the system. There might however, be exceptions, like the Labour Party. There is however, uncertainty whether Azapo will participate in such a conference.

3.6 The result and outcome of the APC will depend on what is eventually agreed upon between the participating parties.

4. EXPLORATORY TALKS

Certain exploratory talks have been held between interested parties.

4.1 The ANC had exploratory talks with the PAC in Harare and is due to have talks with Azapo. It also had talks with sympathetic homelands leaders. The Patriotic Front Conference is scheduled to meet in October 1991. The purpose of such meeting is to find common ground amongst progressive forces and to adopt a common approach at the APC.

4.2 The government had preliminary talks with the Parliamentary Standing Committee on Constitutional Affairs, leaders of self-governing territories, members of the Minister's Council in the Tricameral Parliament and Provincial Administrators. The government and certain homeland leaders decided to form a Working Group to work out proposals for the APC.

4.3 The PAC agreed to hold talks with Inkatha Freedom Party and the Labour Party to draw them into the Patriotic Front. The Labour Party indicated that it will attend the Patriotic Front Conference while Inkatha indicated that it would not.

5.12 BUDGET

A budget will have to be drawn up for such conference and this task could be entrusted to the Secretariat if a Secretariat is established.

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an act against one's partner in the agreement, who, perhaps, does not have the means and possibilities to react adequately, but against the international community and its institutions itself. Thereby a higher degree of observance and implementation of the transitional agreements can be reached.

- 4.11 It can well be stated, that the situation in SA constitutes a case of fundamental change: The white minority government is de facto effectively in power but governs on the basis of a constitution which the Security Council declared null and void. Therefore, in principle, the case of South Africa does not differ from cases, where so-called multi-dimensional peacekeeping operations were deployed.
- 4.12 Moreover, from the point of view of the international community the transition process in a country of such importance as South Africa should not be left to the power game of South Africans alone - having in mind the actual unequal distribution of power in the country. The international community has to secure an internationally acceptable solution, i.e. in line with international standards of democratic governance and basic human rights. In South Africa, there seems to exist a lack of neutral, non-partisan institutions within the country, which have both the moral authority among the parties and the political power to act as an effective mediator, to find binding decisions on concrete debated issues according to agreements between the parties, and to enforce them.
- 4.13 Moreover, with regard to transitional security mechanisms, for the same reasons there is no force inside South Africa in sight which seems to be suited for upholding law and order during transition in a non-partisan and unchallenged way. A possible role for the United Nations would therefore probably not be one of actually conducting the implementation of the agreement(s) on the transition process but to act as an additional accompanying mediation and verification institution
- 4.14 The paper tries to give some recommendations on possible features of UN participation in the transition process: As in many other cases, the UN Secretary-General could appoint a Special Representative on South Africa who participates in the capacity of an observer in the talks about talks and in the negotiations. He may convene negotiations, and could submit mediating proposals to overcome deadlocks. In the agreements on the transition mechanism the United Nations could be given a guaranteeing role, securing the proper implementation of the arrangements. A rather limited United Nations presence could monitor and verify the compliance of the mandated authorities with the tasks and obligations assigned to

- ii) Agree on the mechanism for drawing up the new constitution - which the ANC says should be an elected Constituent Assembly.
- iii) Agree on the establishment of an Interim Government.
- iv) Agree on the role of an international community.

In the face of the regime's argument above, the ANC persists in its demand for an Interim Government and Constituent Assembly. However, it needs to demonstrate for a number of reasons that - without being sucked into the regime's legality - such a scenario does not necessarily involve constitutional discontinuity but can be achieved through invoking the existing constitutional and legal machinery, thereby ensuring that every stage in the process ending with the installation of South Africa's first democratic government will be legal and constitutional. It must be assumed that the regime will never submit to any constitutional discontinuity.

It is also a matter of political importance for the ANC. Its ability to demonstrate the legality and constitutional continuity of the process it envisages, will lend powerful impetus to its claims. It will more readily be able to resist getting involved in mechanisms and procedures under the tricameral system.

It must be noted that the ANC approach also envisages that the TBVC formations will become part of the process at a very early stage.

4. SUGGESTED APPROACH

It is undesirable that the issue of constitutional continuity and the legality of the various processes should be handled on a piecemeal or step by step basis. A piecemeal approach lends itself at best to a loss of direction and at worst to co-option. Handling the issue on a piecemeal basis is also highly impractical and even complex because of the open-ended nature of a piecemeal approach.

The most efficacious way of handling the matter is to separate the political issues from the issues of constitutional continuity and legality. In terms of this approach, the APC needs to come to a comprehensive agreement on all the processes and mechanisms as well as various steps to be taken culminating in the end result, namely the installation of the first democratic government.

Once such a comprehensive agreement is reached, then the question of what legal and constitutional steps the South African government should take to provide the stamp of legality and constitutionality to each of the steps and each stage of transition should be discussed.

It is difficult in practice to separate the various steps in the transitional process from legal and constitutional issues.

[illegible]

6. Relationship Between the ANC and the Interim Government

It is foreseeable that if an interim government comes into existence there will be a potential tension between the interim government and the ANC. In this regard the ANC may not be able to determine the exact policies and decisions taken by the interim government body/mechanism and in any event may wish to distance itself from the execution of interim government policies by an administration which will largely be staffed by the agents of the existing regime. If the ANC needs to criticise the interim government it may be advisable that consideration should be given, in advance, to the level of leadership which should be involved in the administration of government business. It has been suggested that national leaders, who will be involved in campaigning for public support in respect of elections for the constituent assembly, should not be involved in the interim government structures.

7. Functions of Interim Government

While the exact extent and reach of interim government responsibility is open to debate (see above), there are certain minimum functions an interim government arrangement would have to form. These would include, at the least:

- 7.1 The creation of conditions in which all political parties would be free to campaign, solicit members, propagate their policies and engage in public debate;
- 7.2 The disbanding of vigilante groups, hit squads etc., and the integration of the military wings of the national liberation movements and homeland forces into the security forces, and generally to

INTERIM GOVERNMENT

What do we mean by interim government?

- 1 The purpose of this memorandum is to identify the forms that interim government structures can take, and legal and practical issues that may be raised in the debate concerning interim government.
- 2 Three types of interim governmental structures are considered. They illustrate issues that may be raised in negotiations for interim government, and point to the type of decisions that will have to be taken. It is important that these issues be addressed, and that a detailed framework for interim government be established before negotiations are commenced.

TRANSFER OF SOVEREIGNTY

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- 3 The transfer of sovereignty to an interim government involves the transfer of legislative and executive functions from the tri-cameral parliament, cabinet and own affairs ministers councils to an interim government structure. This can only be done by repealing or amending the existing constitution, which would require the approval of each of the houses of the tri-cameral parliament. Without such approval the interim government would be unlawful and subject to challenge in the courts.
- 4 The new constitutional order thereby created - in effect an interim constitution - would have to provide for
 - (a) the dissolution of the tri-cameral parliament, own

7.4 PATRIOTIC FRONT:

Many of the issues raised in this report should be discussed by the ANC at the Patriotic Front Conference.

8. NEGOTIATING TEAM

It is expected that a negotiating team of the Nationalist Government will be certain ministers and the four provincial leaders. They will be backed by constitutional and other experts.

The ANC must elect its negotiating team as soon as possible to prepare for such negotiations. Such team must be assisted by constitutional and other experts to advise them before, during and after the APC.

9. MINORITIES

The Nationalist Government will argue very strongly for the protection of minority rights and the negotiating team should be mandated on this particular issue.

10. CONCLUSION

The All Party Conference will be the start of real negotiations for the establishment of a united, non-racial, non-sexist South Africa. It should be followed by a constituent assembly entrusted with the task of drafting a new constitution for South Africa based on the broad constitutional principles agreed upon at the APC. Elections will then have to follow for the establishment of a new Parliament based on the new constitution. The entire process is to be managed by an interim government until the new order is established.

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also to have commanded respect internationally. Conditions in South Africa are different to those which existed in Namibia. What needs to be decided is whether the advantages of attempting to agree on principles before the enactment of legislation for the convening of a constituent assembly, outweigh the disadvantages of such a procedure. In the present political climate the government is unlikely to want to call an election in which its share of the vote could well be less than that of the conservatives. An approach which involves as an initial step, an agreement on constitutional principles, to be followed by the election of a constituent assembly, may go some way towards meeting the objections that are likely to be raised by the government to the convening of a constituent assembly. The government is more likely to be willing to agree to a constituent assembly and to vest power in it, if it knows in advance what the framework of the constitution will be, and has this recorded in legislation. It also offers the practical advantage of permitting negotiations to continue and more rapid movement forward to be made, than will be the case if negotiations on process and procedures have to be conducted, a voters roll prepared and an election conducted. The procedure could incorporate a referendum to confirm the principles, or a referendum at a later stage to confirm the constitution, which would enable the government to meet the commitment that it has made in that regard. This procedure is

of all participants. The following agenda is submitted for consideration.

- 5.8.1 Statement of Intent;
- 5.8.2 Principles for a new constitution;
- 5.8.3 Mechanism for the drafting of a new constitution;
- 5.8.4 Mechanism for transition;
- 5.8.5 Role of security forces during the interim period;
- 5.8.6 Role of the SABC during the interim period;
- 5.8.7 Future economic system;
- 5.8.8 Financial/social/educational crisis;
- 5.8.9 Sanctions / Disinvestments / Boycotts;
- 5.8.10 Implementation of agreement;
- 5.8.11 General;

5.9 OBSTACLES

Certain obstacles like the release of all the political prisoners and the repeal of the Internal Security Act in terms of the Harare Declaration, has not yet been removed.

The question therefore arises: Can the ANC attend the APC while political prisoners are still in prison and the Internal Security Act is still on the statute books?

5.10 SECRETARIAT

In certain circles it was suggested that a Secretariat be established to prepare for the APC. The question arises: Who will appoint the Secretariat. What will be its tasks. Who will it be responsible and/or accountable to.

5.11 FINANCE

to find the funds.

proportional representation to draft the constitution within the framework of agreed principles. It was decided by the constituent assembly that it would become the first National Assembly, and a provision to that effect was incorporated into the constitution. In order to avoid a multiplicity of elections which are costly, time consuming and sometimes lead to conflict, a procedure similar to the Namibian model whereby the constituent assembly is converted into a parliament could possibly be devised for South Africa.

6. HOW THE CONSTITUENT ASSEMBLY WILL CONDUCT ITS BUSINESS

Should the assembly elect its own chairperson, or should an 'independent' chairperson be appointed to preside over the discussions? Should the discussions take place in public, or should they be in private. Publicity enables people to know what is being said, but there may be advantages to the discussions being in private and away from the pressures which will inevitably be placed on delegates if they know that whatever they say will be reported in the press. It may be that the initial drafting should be away from the glare of publicity and entrusted to a committee of the assembly, in the knowledge that the draft will be subjected to public debate in the assembly and approved by the assembly. This is what happened in Namibia. Although there was some criticism of this procedure, particularly by the press, it had the advantage of enabling the delegates to speak

- 4.4 Members of the government claims that they had discussed many aspects of the APC with the ANC and agreement was reached on a number of issues. We need to ascertain what discussions took place and what was agreed upon. The government believes that before the actual APC takes place, there would have to be a series of adhoc meetings to work out the details for the APC, such as procedure, agenda, etc.

5. PRE-APC ISSUES

There are a number of issues that need to be agreed upon before the APC can start. They are identified as follows:-

5.1 WHO CONVENES THE APC? The following has been suggested:

- 5.1.1 The government;
- 5.1.2 The international community;
- 5.1.3 Other options proposed are as follows:
 - 5.1.3.1 Mrs Margaret Thatcher;
 - 5.1.3.2 The Eminent Persons Group of the Commonwealth;
 - 5.1.3.3 The Churches;
 - 5.1.3.4 Big business;
 - 5.1.3.5 Ideas of Dr Van Zyl Slabbert and Democratic Institute of Dr Oscar Dhlomo;
 - 5.1.3.6 Joint venture between the Nationalist Government and the ANC.
- 5.1.4 The ANC need to take a position on the question "Who convenes the APC". Being a signatory to the Harare Declaration, it is committed to the involvement of the international community. The international community would have the necessary credibility and it would be difficult for any party to argue against their involvement. They would also ensure and guarantee the implementation of the eventual outcome and result of the negotiating process.

Once it has been accepted in principle that there should be international participation, the next question that arises is:
