COMMISSION ON PROVINCIAL GOVERNMENT

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PRELIMINARY SUBMISSIONS ON PROVINCIAL GOVERNMENT SYSTEMS

In compliance with the agreement between the managements of the CPG and CA, I enclose the undermentioned preliminary recommendations of the Commission for consideration by the relevant committees. I must emphasise that these recommendations contain only the interim views of the Commission as all the information required for the final recommendations has not yet been collected. The comments of the provinces have also not been obtained yet. Kindly inform the committees accordingly.

Preliminary recommendations on self-determination with reference to the First Interim Report of the Volkstaat Council (Document 12)

J. Vermaak
Chairperson

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PRELIMINARY RECOMMENDATIONS ON SELF-DETERMINATION WITH REFERENCE TO THE FIRST INTERIM REPORT OF THE VOLKSTAAT COUNCIL (RECOMMENDATIONS DOCUMENT 12)

1 . INTRODUCTION

1.1 Section 184B of the interim Constitution provides for the competence of the Volkstaat Council to *inter alia* submit representations and recommendations to the Constitutional Assembly and the Commission on Provincial Government with regard to the possible establishment of a Volkstaat and any matter in connection therewith.

1.2 The section does not determine how the Commission should deal with such representations and recommendations. The Commission itself has an advisory function in regard to the development of a constitutional dispensation with regard to provincial systems of government (section 164(1)(a). The matters in regard to which the Commission must advise are enumerated in section 164(2) and include

- the finalisation of the number and boundaries of the provinces of the Republic;
- the constitutional dispensation of such provinces;
- the final delimitation of powers and functions between national and provincial institutions of government;
- relevant fiscal arrangements;
- the powers and functions of local government; and
- relevant or ancillary matters.

The Commission is of the opinion that the intention of section 184B is to cause the Volkstaat Council to submit representations and recommendations to the Commission so that it may advise the Constitutional Assembly in so far as matters raised in such representations and recommendations affect the development of a constitutional dispensation with regard to provincial systems of government as contemplated in section 164(1)(a).

1.3 The Commission finds it problematical to deal with representations and recommendations contained in a <u>first interim</u> report of the Volkstaat Council which implies that other interim reports may be forthcoming and that the final report may differ from the interim reports.

2. CONSTITUTIONAL PRINCIPLES AND PROVISIONS

2.1 The following Constitutional Principles (CP) must be considered when formulating recommendations regarding self-determination:

CP I - one sovereign state, common South African citizenship, democratic system of government committed to achieving equality between men and women and people of all races;

CP II - everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties (see e.g. freedom of association, movement and residence anywhere in the national territory (sections 17 - 19);

CP III - prohibition of racial, gender and all other forms of discrimination and promotion of racial and gender equality and national unity;

CP XI - acknowledgement, protection and encouragement of the diversity of language and culture;

CP XII - recognition and protection of collective rights of self- determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, on the basis of non-discrimination;

CPXVI - structuring of government at national, provincial and local levels;

CP XVIII - entrenchment of provincial powers, functions and boundaries to the extent mentioned in the CP.

2.2 Constitutional Principle XXXIV needs to be dealt with separately from the other CPs because of its particular relevance to the issues raised in the Volkstaat Council's report.

Paragraph 1 states that the Schedule containing all the CPs and the recognition therein of the right of the South African people as a whole to self-determination (probably referring to the right of South Africans to choose their own government for the national territory) shall not be construed as precluding, within the framework of that right, constitutional provisions for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way.

This is an enabling Principle; it does not create any rights and is rather vague, e.g. what is meant by "other recognized way"? The phrase “a notion of the right to self-determination” is also problematical and may seem to imply not only that there are various possible conceptualisations, but also that these would be less than and subject to the right of self-determination of the people as a whole.

Paragraph 2 allows that the new Constitution may provide for any particular form of self-determination “provided there is substantial proven support within the community concerned for such a form of self-determination.”

Paragraph 3 provides that if a territorial entity referred to in paragraph 1 is established before the new constitutional text is adopted, the continuation of such entity, including its structures, powers and functions, shall be entrenched in the new Constitution. The provisions will therefore lapse if such an entity is not created before the new Constitution is adopted.

2.3 Because of the vagueness in the use of the term “self-determination” in the Principles, it would be useful to examine briefly how the term is interpreted in international law.

3. SELF-DETERMINATION IN INTERNATIONAL LAW

3.1 Self-determination, like democracy itself, is not a matter of all-or-nothing; the real issues concern the extent to which the principle can be embodied in concrete practices, institutions, and constitutional arrangements.

Like democracy, self-determination is also a controversial and contested concept. Self-determination has come to be recognised as a right in international law, but a right which is still evolving, and consequently subject to partisan interpretation and imperfect or inconsistent applications.

3.2 In the twentieth century, the concept of self-determination has progressively come to embrace the right of a people to be politically independent, free from alien rule or colonial domination (“external selfdetermination”); and to choose their own form of government (“internal self-determination”), with some subsequent elaborations contending that this

should involve a process of government through a system of representative democracy, and/or other arrangements accommodating various groups.

3.3 Conceptualisations and definitions of those groups which might claim a right to self-determination are vague and problematical, ranging from all the people in a defined territory without further distinction, to particular groups distinguished by various ethnic or cultural characteristics; from all nationals or the majority in the national population, to specific minorities. In this way claims concerning the self-determination of peoples shade into questions about the protection of minority rights.

As recently as 1991, UNESCO's Budapest Meeting of Experts on people's rights concluded that legitimate doubts exist as to the relationship between "peoples" and various subgroups e.g. ethnic minorities, and indigenous people. It should perhaps be noted that the right of indigenous peoples to self-determination is hotly disputed in contemporary debates, and remains undecided.

3.4 In the international context, the self-determination of peoples was first invoked as a political principle on behalf of national groups in Europe in the disintegrating German, Russian and Austro-Hungarian empires where, in the aftermath of the First World War, it was implemented imperfectly and only to a limited extent. The principle was given a more general status after World War 11, when it was incorporated into the UN Charter (Article I includes among the UN's purposes "respect for the principles of equal rights and self-determination of peoples"), but it was still too loosely formulated to be regarded as legally binding in international law. However, in the period of decolonisation it acquired major significance as a moral and political force in the development of international law specifically relating to non-self-governing territories, indeed to such an extent that its applicability to other cases was much disputed. In 1966 the debate was resolved in favour of a wider application in the International Covenant on Civil and Political Rights, which furthermore has been ratified by a sufficient number of states to give it international legal currency.

The principle has been reiterated and extended in many other declarations, documents and agreements including, for example, the Declaration on Principles of International Law Concerning Friendly Relations and Co -operation among States (1970), which devotes a section to selfdetermination, and the Helsinki Declaration (Conference on Security and Co-operation in Europe, 1975), which holds that self-determination is a continuing right, so that

a consistent violation of a group's rights allows it to assert a right to self-determination either internally through constitutional changes or by secession.

3.5 The International Covenant on Civil and Political Rights (1966) can be viewed as possibly the most widely accepted and authoritative document in international law concerning both self determination and minority rights, which are dealt with in Articles 1 and 27 respectively:

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

27. *In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

There is a deceptive simplicity in the wording of these Articles. Over and above the problem of elucidating the possible meanings of their various elements, and then applying them in a specific situation, two key points must be noted:

- in international law and practice, the maintenance of the territorial integrity of existing states is a powerful principle (drawing on the doctrine of *uti possedetis* in post-colonial contexts); and there is a serious tension if not an irreconcilable conflict between this principle and the right to self-determination in so far as the latter threatens a state's territorial integrity and political unity, especially where there is "a government representing the whole people belonging to the territory without distinction as to race, creed or colour" (General Assembly Resolution 1514). International practice is inconsistent in this regard, but the preponderant experience favours the claims of the existing state - most significantly perhaps in post-colonial Africa, in the OAU.

- International instruments do not provide clear guidelines for distinguishing between “peoples” and “minorities”. A widely quoted definition of a “minority” for the purposes of Article 27 speaks of a "numerically inferior” group, in a “non-dominant position", "whose members - being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language” *[Capotorti, UNDoc E/CN4/Sub 21384/Rev 1 (1979)]*. Minorities enjoy more limited rights than a “people”, and these rights do not necessarily include full political control. In the literature dealing with this subject, it is generally agreed that while minorities can claim protection for the rights set out in Article 27, these do not include any right to self-determination on a territorial basis as such.

3.6 Where a constitutional process is founded on the right of the “people” as a whole to self-determination, any group appealing to a right to "external” self-determination in international law, would have to demonstrate convincingly that it comprises a “people” with its own historic claim to a particular territory, whose rights are being systematically violated, and who would in turn respect the rights of others.

3.7 A claim to “internal” self-determination in the name of a “people” would face similar tests of identity and demonstrable grievances; and would also encounter the fact that internal self-determination as a concept is still evolving and may assume various forms, not necessarily territorially based and failing short of full self-government for the group as such, as distinct from the general rights of political participation enjoyed by all citizens.

3.8 In international law, claims for the protection of minority rights would certainly be endorsed in so far as a minority is entitled to (a) participate in free elections for the government of the country, (b) enjoy basic human rights, and (c) have its language, religion and culture protected.

3.9 The specific devices, institutions and constitutional arrangements for accommodating the legitimate claims of minorities (or of groups or communities who conceive of themselves as a “people” without necessarily being recognised as such in international law) are matters to be determined by the internal political processes of a state.

3.10 Such an accommodation may assume various forms, both territorial and non-territorial, and could be based on either corporate arrangements or the rights of persons. International law does not dictate what is to be done in this context. That is a matter for political negotiation and pragmatic judgement.

4. SELF-DETERMINATION AND THE SOUTH AFRICAN CONSTITUTIONAL PROCESS

4.1 In the opinion of the Commission, the implementation of any form of selfdetermination for communities in South Africa will also have to be the result of political negotiation. Such a process has apparently not yet arrived at any agreement on parameters within which proposals for structures to accommodate "a notion of self-determination" might be formulated. Even the Volkstaat Council itself has thus far only been able to produce a first preliminary report for comment. The implications for the systems of provincial and local government therefore are not yet clear.

4.2 In the light of these considerations, the Commission's view is that at this stage it cannot comment usefully on the proposals contained in the Volkstaat Council's First Interim Report. The Commission is of the opinion that it should respond only to a final report.

4.3 The issues concerning self-determination for communities may indeed prove to be so complex that it may not be possible for the negotiation process to be completed within the time-limits prescribed by the interim Constitution. Should it prove to be impossible to negotiate a political agreement relating to the establishment of a Volkstaat or any other form of self-determination for cultural groups before the new Constitution is finalised, the Commission would recommend that provision be made in the new Constitution for the continuation of a negotiation process which might lead to some form of self-determination for such groups.