SOUTHERN AFRICA PROJECT

# SOUTH AFRICA:

# THE COUNTDOWN TO ELECTIONS

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## ELECTION BRINGS PEACE TO SOUTH AFRICA

As the election period drew to a close in South Africa, the major story was the notable absence of high levels of violence during this period. According to South African police officials, the election period was the "quietest in years." A report in the May 2nd edition of the Johannesburg-based Star newspaper, noted that in incidents around the country during the period between Saturday, April 30th and Monday, May 2nd, fewer than 15 people were killed in either criminal or politically motivated violence.

According to the Star report, no incidents of the clashes between rival political groups that had been so prevalent in the KwaZulu/Natal region since the release from prison of Nelson Mandela four years ago, had been recorded during the weekend following the election. In addition, crime statistics in some regions dropped by as much as 50%. However, police officials did expect the crime levels to rise again after the election period.

## OVER 500 ELECTION COMPLAINTS RECORDED

While it is widely predicted that the elections will be declared "free and fair," over 500 complaints have been registered with the Independent Electoral Commission ("IEC") by various political parties. Pursuant to the Electoral Act, political parties were given a limit of 48 hours immediately following the the election within which to register their complaints about the fairness of the electoral process. Most of the complaints related to the logistics and the distribution of ballot papers. The following is a list of some of the complaints as reported in the Star and the Sunday Times, also based in Johannesburg:

- In the Northern Transvaal, the Democratic Party complained that one million ballot papers were missing and that as a result, 160 polling stations failed to open, denying thousands of would-be voters the opportunity to exercise their democratic right.

- In KwaZulu/Natal, parties complained that ballot papers and other voting materials were removed from voting stations by Inkatha Freedom Party ("IFP") supporters and police officials of the former KwaZulu homeland who allegedly set up "pirate" voting stations.

- The IFP complained that the ANC engaged in intimidation of voters. Its chief complaint, however, was that IEC officials failed to attach IFP stickers created as a result of Inkatha's late entry into the election process, to the ballot papers.

- National Party ("NP") and Democratic Party ("DP") officials expressed outrage at the "lax security" and "disorganization" at a counting station near Johannesburg.

- In Port Elizabeth, IEC officials were accused of tampering with ballot boxes containing 50,000 marked ballots. So far police investigations revealed that the seals had been missing from 6 of the boxes.

- At a polling station in the Transkei, a Pan Africanist Congress ("PAC") agent complained that the IEC presiding officer in charge of a station there arrived at the station "extremely drunk" and collapsed in a "drunken stupor" shortly after his arrival.

## IEC OFFICIALS QUESTIONED OVER MISSING BALLOTS

The May 2nd edition of the Star reported that four warehouse managers, two of whom had been seconded to the IEC from the National Party government's Department of Home Affairs are being questioned in connection with the disappearance of hundreds of thousands of ballot papers and other voting materials that were earmarked for Soweto and other nearby townships. An acute shortage of ballot papers was reported by polling stations in these areas. As a result of the shortage, an estimated 2 million ballot papers had to be printed in order to avert a crisis in the affected areas. Initially, the IEC had 80 million ballot papers printed to accommodate an electorate estimated at 22 million, each casting two ballots.

According to the Star report, one IEC official suggested that it was possible that many ballot papers which had not been accounted for "may still be lying around in a number of warehouses."

## INTERNATIONAL OBSERVERS APPROVE ELECTION

Despite the numerous irregularities reported during the election period, the South African election so far has won universal approval from international observer groups. In addition, to a stamp of approval from Jesse Jackson, leader of the official U.S. observer delegation, the election won confidence votes from the European Union, the United Nations, the Commonwealth, the Organization of African Unity and the International Confederation of Free Trade Unions. However, as of Monday, May 2nd, the major multilateral institutions still were reserving judgment as to the fairness of the election since the counting had not yet been completed.

## LAWYERS' COMMITTEE OBSERVER DEPLOYMENT A SUCCESS

The Lawyers' Committee successfully deployed over 200 observers from 25 U.S. non-governmental organizations throughout South Africa. Problems reported related mainly to voting material distribution delays and the failure of some voters to have the opportunity to vote as a result of such delays.

The Lawyers' Committee's own observer team which consisted of prominent lawyers from the U.S., Kenya and Ghana was deployed to Mmabatho located in what was formerly the Bophuthatswana homeland and now the future capital of the new Northwest Province. The 16 member team was subdivided into 8 teams of two, each paired with a local South African observer. The teams were deployed to polling stations in and around Mmabatho, to neighboring white conservative towns and to outlying rural villages.

Voters, local observers, political parties and IEC officials had only three weeks to prepare for the election in this area, since prior that time, Lucas Mangope, former head of Bophuthatswana had refused to allow election-related activity including voter education, campaigning, and the establishment of polling sites, to take place there. Mr. Mangope was deposed in mid-March after civil servant strikes and a violent confrontation between police and white right wingers who had launched an offensive from neighboring white towns to assist the Mangope regime. Despite the significant delays in the distribution of voting materials, and extremely long lines resulting from the delays, most voters in the Mmabatho area did have the opportunity to vote. A complete report of the Lawyers' Committee's team's observations will be available by the end of this month and may be obtained by contacting Shirley King at the Lawyers' Committee.

## U.S. CHARGE INTO S.A. BEGINS

The U.S. government has announced that it will double its aid package for South Africa from its current level of $93 million to $180 million. According to the U.S. government, the increase will

be aimed at helping the new government to address massive socio-economic disparities created by apartheid. Approximately $60-70 million of the new aid package will be earmarked for loan guarantees to financial institutions to encourage them to lend money for housing to those disadvantaged by apartheid.

Meanwhile in a sign that private capital is poised to follow the U.S. government's lead, a new U.S. airline, USAfrica has become the first U.S. carrier to schedule direct passenger and cargo flights to South Africa. The first flight is scheduled for June 3rd with service to Johannesburg from Washington-Dulles Airport. Service to Cape Town will be launched on July 2nd.

The Lawyers' Committee has been pleased to bring you **SOUTH AFRICA: THE COUNTDOWN TO ELECTIONS** over the past several months. We hope that it has been informative and helpful to you in your efforts to keep abreast of South Africa's historic transition to democracy. In addition, we would like to thank the Human Rights Commission, the anti-Apartheid Movement of the United Kingdom and Professor Stephen Ellmann of New York Law School for their valuable contributions. Professor Ellmann's analysis of the most recent amendments to the interim constitution accompanies this report.

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## THE SOUTH AFRICAN CONSTITUTIONAL AMENDMENTS - by Stephen Ellmann*

The interim South African constitution went into effect last week, as South African citizens, black and white, lined up in their millions to cast their votes in South Africa's first nonracial national elections. Adopted late in 1993 after years of negotiations, the interim constitution is meant to govern the country only while the members of the new Parliament pursue the task of preparing a final constitution for the long term. Yet even before it could go into effect, the interim constitution was amended twice, first in March and then in April of 1994. This is no criticism of South Africa's constitutional negotiators; these amendments played important parts in the almost miraculous process by which almost every faction in South African politics ultimately was persuaded to take part in last week's elections, and that prize more than justified the efforts involved in fashioning and enacting these amendments. It's worth remembering, too, that the framers of the United States constitution offered it to the people of this country without a Bill of Rights, and so our constitution too had to be amended almost as soon as it came into effect, to meet the popular demand for greater security for human liberty under our new government. Now that the votes are being counted, however, we should look at these amendments and consider their impact on the new South Africa.

Although these amendments altered more than 10 sections of the 1993 constitution and added four entirely new sections as well, they were all essentially concerned with a single topic: the distribution of power. The amendments focused on three aspects of this distribution: the allocation of authority to the provinces; the consideration of a volkstaat or Afrikaner homeland; and the protection of traditional Zulu institutions. Let us now consider these three aspects in more detail.

(a) The allocation of authority to the provinces: The most important provision allocating authority to the provinces is actually not one that directly regulates the provinces' powers. Instead, it is the provision that abandoned the "single ballot" format for the elections held last week, and declared instead that there would be two ballots, one for the National Assembly and one for the provincial legislatures. This change, a welcome one as a matter of democratic principle, means as a matter of pragmatic politics that parties which may not be able to win great support at the national level probably have a better chance of electoral success in particular provincial governments. To whatever extent this change increases the voice of dissenting groups in the provincial governments, it will tend to make those governments more important sites of political struggle.

If we turn now to those provisions that deal directly with the allocation of authority to the provinces, what we find is, essentially, that they confirm that the interim constitution establishes a federal system of government for South Africa. This is not to say that South Africa's provinces enjoy as much authority as do American states; they do not. But their authority, which was not trivial even before

these amendments, has now been considerably bolstered. Specifically, the amendments increase the range of issues--which already made up quite a long list--on which the provinces are competent to legislate. Though the national Parliament retains concurrent authority to legislate in all of these areas, and in a wide range of circumstances national legislation will override contrary provincial laws (much as the United States Congress' legislative power now overlaps extensively with, and overrides, that of the states), the amendments also rewrite the provision determining when national legislation will override provincial legislation in a way that slightly increases the provinces' protection from such overrides.

In addition, the amendments modestly enhance the financial picture for the provinces. The provinces' claim on national revenues has been bolstered, perhaps most importantly by the new requirement that when the national Parliament legislates to allocate portions of national revenue to the provinces (legislation it appears to be required to enact), the legislation must be passed separately by the Senate and the National Assembly. Normally the concurrence of the Senate, in which each of the provinces has 10 Senators, is not required for the new Parliament to act, and so this amendment increases the provinces' check on the national government's distribution of funds to them. (Or perhaps this amendment, and the other similar requirements of Senate concurrence mentioned below, simply make explicit what was already intended by the 1993 provisions, which provided for Senate concurrence on legislation "affecting the boundaries or the exercise or performance of the powers and functions of the provinces"--but the amendments' specificity at least removes any possible doubt that in the situations the amendments address Senate concurrence is required.) The amendments also make clear, however, that Parliament is not required to give equal proportions of the national revenue to each province; the absence of such a requirement is entirely appropriate, since the provinces are hardly equal to each other in size or needs, but its absence also confirms that Parliament enjoys a significant measure of discretion to choose among the provinces in allocating funds.

The provinces' tax powers have also been modestly enhanced, though it is fair to say that they remain very circumscribed. Most importantly, the provinces can now tax gambling--not necessarily a trivial source of income--and can do so whether or not the national Parliament wants them to. In addition, the national Senate's concurrence is now required for legislation authorizing the provinces to impose other taxes; this perhaps makes such legislation more likely to respect the provinces' interests, although the Senate has no power to insist on the passage of such authorizing legislation over the opposition of the other House of Parliament, the National Assembly. Senatorial concurrence is also now required for legislation authorizing provinces to borrow money for capital projects; in this and certain other respects the provinces' borrowing power has been enhanced to a degree.

Perhaps the most significant direct addition to the provinces' powers, however, deals neither with money nor with ordinary legislative competence, but rather with the provinces' authority to frame their own constitutions. As adopted in 1993, the interim constitution closely regulated much of what the provincial constitutions would be permitted to say. By virtue of the March, 1994 amendments, the national constitution now provides that provinces can structure their legislative and executive branches in ways that depart from the start-up rules (as they can now be seen) which the national constitution provides for the provinces' governance. By virtue of the April, 1994 amendments (according to the negotiators' statement announcing the agreement which led to these amendments), the national constitution also explicitly permits provincial constitutions to "provide for the institution, role, authority and status of a traditional monarch in the province," anywhere in the country and in particular "for the Zulu monarch in the case of the province of KwaZulu/Natal." The April amendments make almost explicit what perhaps was implicit even in March, namely that the province of KwaZulu/Natal can adopt a constitution making itself a constitutional monarchy within South Africa. The powers of such a monarch would be bounded, to be sure, by both national legislative competence and the constitutional guarantees of human rights--but exactly how those limits will interact with possible provincial constitutional provisions dealing with the "institution, role, authority and status of a traditional monarch" remains to be seen.

Finally, the interim constitution seeks to quell anxiety, on the part of those who pressed for greater provincial authority, that any concessions made in the interim constitution would simply be erased when the final constitution was written. Even as adopted in 1993, the interim constitution included a Constitutional Principle giving the provinces significant insulation from such a diminution of their powers; this and the other Constitutional Principles, moreover, are not just expressions of lofty sentiment, for the Constitutional Court is responsible for enforcing them when it reviews the proposed final constitution. The amendments, however, spell out that in the final constitution the provinces' powers, including their powers to write their own constitutions, "shall not be substantially less than or substantially inferior to those provided for" in the interim constitution. The amendments also largely lock in the provincial boundaries established by the interim constitution, presumably to remove any fear of boundary manipulation by the Constitutional Assembly. The result is to insure that the final constitution will not be substantially less federalist than the interim constitution has become.

(b) The consideration of a volkstaat: It is hard to believe that a future South Africa will come to include a volkstaat, or homeland, for whites. The very idea seems incongruous, and repellent, in the context of a constitutional transition whose central purpose is to enable black South Africans to enjoy democratic rights in their own country. The notion of a volkstaat is also perplexing in the very prosaic, but important, sense that it is apparently impossible to identify--without gerrymandering--any substantial geographical area in South Africa where whites are a majority. Nevertheless, a significant body of white or Afrikaner sentiment has congealed around the idea of a volkstaat, and it seems clear that many whites who hold these views have just expressed them in the ballot boxes of the nonracial election. They were persuaded to do so, in part, through the adoption of constitutional amendments designed to allow continued debate over, and advocacy of, a volkstaat within the new South Africa.

In particular, two new sections of the constitution provide for the establishment of a Volkstaat Council, and a new Constitutional Principle also attempts generally to accommodate communities' claims of self-determination within South Africa. The Volkstaat council is to be elected by those members of Parliament who support the Volkstaat idea, and is to "serve as a constitutional mechanism to enable" Volkstaat proponents "to constitutionally pursue the establishment of such a Volkstaat." The council's powers are limited; essentially, unless Parliament grants it more authority, it can only study, propose and advocate. But South Africa's new leaders have demonstrated more than once their desire for domestic peace and their willingness to fashion compromises to achieve that goal. While no Volkstaat as such may ever emerge from the Constitutional Assembly, it is quite possible that provisions of the final constitution will seek in some way to accommodate the emotional appeal of Afrikaner nationalism. A new constitutional principle not only promises that if a Volkstaat is established before the final constitution is adopted, the final constitution will preserve it, but also declares more generally--if half-heartedly--that the interim constitution does not preclude "constitutional provision 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."

(c) The protection of traditional Zulu institutions: Much of what the amendments say with respect to federalism can be seen as affording a measure of protection for traditional Zulu institutions, since traditionally-minded Zulu voters are likely to win a substantial measure of authority in the elections in their province, and will then be in a position to press for strong provincial constitutional protection of the traditional Zulu monarchy. The amendments' effort to offer room for such Zulu sentiment is also reflected in the provision changing the name of the province of Natal to KwaZulu/Natal. The constitutional principle on self-determination by communities within South Africa, mentioned in the previous section, also applies no less to Zulus than to Afrikaners. One final amendment, only made in April, is also important on this score. The joint statement announcing the negotiators' agreement stated that this amendment, to a constitutional principle promising protection to traditional leadership and indigenous law, would declare that provincial constitutional provisions "relating to the institution, role, authority and status of a traditional monarch shall be recognized and protected in the [final] constitution." It thereby guarantees that a

constitutional monarchy established in KwaZulu/Natal during the years of the interim constitution's operation will be preserved indefinitely. In all of these respects, the interim constitution's amendments seek to defuse what seemed, just weeks ago, to be a real threat of civil war or even attempted secession as a result of the fury of traditional Zulus led by Mangosuthu Buthelezi and his Inkatha Freedom Party. For now, that threat has receded; hopefully, these provisions will help preserve the peace in KwaZulu/Natal and elsewhere in the coming years as well. Buthelezi, F.W. de Klerk, and Nelson Mandela have also agreed to resume international mediation of "[a]ny outstanding issues in respect of the king of the Zulus and the 1993 constitution as amended" as soon as possible after the elections; perhaps this step will further help to ease the bitter tensions that have plagued South Africa's constitutional transition.

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All that remains for South Africans is to begin applying this constitution, writing the next one, and governing their newly democratic country. These are monumental challenges as well as profoundly welcome ones. After years of struggle to dismantle the unjust laws of apartheid, South Africa's lawyers, politicians and citizens now begin the task of making a democratic order work. The interim constitution, a complex, not always perfect, but ingenious and far-sighted document, offers the promise of becoming, in practice as well as on paper, South Africa's first charter of constitutional liberty--not the Freedom Charter, but a Freedom Constitution.

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