

REPORT ON CODESA AGREEMENTS

To the Sub-Committee of the Facilitating Committee - 18 March 1993

1. **Issue**

We were asked to present a summary of CODESA agreements to the next meeting of the Sub-Committee.

2. **The Declaration of Intent**

At its first plenary meeting the Convention for a Democratic South Africa (CODESA 1) adopted the Declaration of Intent. Afterwards an Addendum was added. By way of this solemn agreement the subscribing parties committed themselves to bringing about a democratic South Africa with a new constitution. The Declaration and its Addendum appear on pages 1-4 in the bound volume marked CODESA Agreements

3. **Working Groups**

In pursuance of the objectives to which Parties committed themselves in the Declaration of Intent, five Working Groups were set up by CODESA 1. All Parties were represented in each of the Working Groups.

The terms of reference can be summarised as follows:

3.1 **Working Group 1**

Working Group 1 was required to address itself to the creation of a climate for free political activity which included the need for the levelling of the playing field.

It was also required to make recommendations on the role that the International Community could play in the period leading up to the introduction of a new constitution.

The full terms of reference of Working Group 1 appear on pages 5-6

3.2 Working Group 2

Working Group 2 was charged with the drawing up of a set of constitutional principles to be embodied in the new constitution and with the making of recommendations on the appropriate body/process to draft that constitution.

The full terms of reference of Working Group 2 appears on pages 30-31

3.3 Working Group 3

Working Group 3 was required to make recommendations on the manner in which the country may be governed and managed until the introduction of the new constitution. A key focus of its task related to ensuring the levelling of the playing field.

The full terms of reference of Working Group 3 appears on page 45

3.4 Working Group 4

Working Group 4 had to deal with the future of the TBVC states on the basis that all the people living in the TBVC states should enjoy meaningful and democratic participation in the process of drawing up and adopting a new constitution for South Africa as well as in all possible transitional arrangements.

The full terms of reference of Working Group 4 appears on pages 64-65

3.5 Working Group 5

Working Group 5 was charged with the task of providing time frames, identifying the steps which would need to be taken by the Parties in CODESA in order to effect the implementation of agreements reached in CODESA.

The full terms of reference of Working Group 5 appears on pages 80-81

Reports of the Working Groups

Working Groups 1,3,4 and 5 agreed on reports to be submitted to the second CODESA Plenary Meeting (CODESA 2). Working Group 2 did not submit a report.

As Working Group 5 had to deal with the recording and implementation of substantive agreements reached in other forums, its report need not be included in this summary.

4.1 Working Group 1 Report: Climate of free political participation and the role of the international community.

The full text of all agreements appear on pages 7-29 of the Working Group 1 report.

The following aspects were dealt with by this Working Group:

4.1.1 Political prisoners and political trials

It was agreed that the release of political prisoners is a priority in the completion of the reconciliation process and that the South African Government and the ANC should pursue their bilateral talks relating to this matter in order to give effect to this.

4.1.2 The return of exiles and their families

This matter was referred to the bilateral talks between the South African Government and the ANC.

4.1.3 The amendment, and/ or repeal of any remaining laws militating against free political activity, including the elimination of all discriminatory legislation.

The Working Group endorsed the principle of free political activity and identified legislation that needed repeal or amendment.

4.1.4 **Political Intimidation**

The Working Group endorsed the need for all political disputes between Parties to be resolved peacefully and defined "political intimidation".

4.1.5 **Political neutrality of, and fair access to state controlled/statutorily state instituted media, including those of the TBVC states**

The Working Group agreed upon the establishment of an independent body to regulate the telecommunications sector. The question of an independent media committee was not dealt with on the basis that this will be addressed by Working Group 3.

4.1.6 **The successful implementation of the NPA**

A variety of agreements were reached aimed at strengthening the NPA and its implementation.

4.1.7 **Prevention of violence related crimes and matters related thereto**

Agreements on this Item were largely related to the question of strengthening the NPA.

4.1.8 **Composition and role of the security forces in South Africa and the TBVC states**

The Working Group agreed on the principles which should apply to the security forces.

4.1.9 **Funding of political parties**

The Working Group agreed that the provisions of the Prohibition of Foreign Funding of Political Parties Act, 51 of 1968, with regard to the receipt of foreign funds by political Parties be suspended.

4.1.10 **Fair access to public facilities, meetings and venues**

4.1.11 **Fair and reasonable access of political parties to all potential voters**

4.1.12 **Assignment 2: The role of the international community**

The Working Group agreed to set up a task group to invite a neutral independent international body in relation to the process of elections.

4.2 **Working Group 2**

Working Group 2 was unable to file a report to CODESA 2.

The Management Committee at its meeting on 15 June (an extract of the MC minutes to this effect can be found on page 32) agreed that the last Chairperson of Working Group 2 and the Secretary of Working Group 2 be requested to prepare a report on the status of discussions in Working Group 2 prior to CODESA 2.

This report was prepared in the form of memorandum which appears on pages 33-44 and to which are attached the following annexures.

Annexure A: Entitled: Areas of agreement and areas on which no agreement yet exists on Assignment 1 of Working Group 2 prepared by the Steering Committee 27/4/92 , which appears on pages 40-42

Annexure B: Entitled: General Constitutional Principles: Areas of Commonality - prepared by Working Group 2 Steering Committee 12/5/92, which appears on pages 43 -44

Annexure C:Entitled: Working Group 2 Steering Committee proposal on a Constitution Making Body 13/5/92 as amended 16.30h 13/5/92 , as appears on pages 36-39

4.2.1 On the basis of this document it should be noted that with regards to Assignment 1: General Constitutional Principles, the Steering Committee document on Areas of Commonality including the principles on the Balance between Central, Regional and Local Government and the Participation of Political Minorities was tabled in the Working Group.

4.2.2 On Assignment 2: The Constitution making Body -Process

The Steering Committee proposal dated 13/5/92 was tabled at the Working Group. This proposal defined three phases, namely:

Phase 1: The present CODESA phase

Phase 2: The transitional/Interim constitution drafted by CODESA and legislated by the present parliament

Phase 3 The final constitution drafted and adopted by the National Assembly in terms of provisions of the Transitional/Interim constitution.

4.2.3 The only issue on which there was no agreement which is reflected in this document, is the issue of the percentages in terms of which the final constitution shall be adopted by the National Assembly.

4.2.4 The eventual deadlock in Working Group 2, however occurred on the following four issues:

4.2.4.1 interpretation of the time period in clause 1.1 of Annexure C

4.2.4.2 The percentages which should apply regarding the adoption of the different clauses of the final constitution

4.2.4.3 Whether there should be a role for the Senate in the adoption of the final constitution and future amendments to it

4.2.4.4 Special deadlock breaking mechanisms

4.3 Working Group 3: Interim /Transitional Arrangements

The full text of all agreements appears on pages 46-63

4.3.1 Working Group 3 agreed on a two-phased approach in respect

of the Interim/Transitional arrangements. The first is a preparatory phase premised on facilitating the transition to a democratic constitution, and, in particular the levelling of the playing field, and ensuring a climate favourable to free political participation and the holding of free and fair elections.

- 4.3.2 The report set out the structures necessary for phase 1, their powers and the manner in which decisions would be taken. There will be an overarching Transitional Executive Council which, together with its sub-councils, to be vested by legislation with powers necessary to enable them to carry out their functions. The transitional executive structure will function in conjunction with the existing legislative and executive structures. Some of the powers and functions it should have are spelt out.
- 4.3.3 The Terms of Reference of the Transitional Executive Council shall be the facilitation of the transition to a democratic constitution, including the levelling of the playing field, and it shall ensure that a climate conducive to free political participation and the holding of free and fair elections, exists.
- 4.3.4 The Transitional Executive Council will consist of at least one member of the governments/administrations who commit themselves to comply with and implement its decisions and at least one member each of the political organisations participating in CODESA, making the same commitment. Other parties can be admitted by the Transitional Executive Council.
- 4.3.5 Members of the Transitional Executive Council will be fulltime executives
- 4.3.6 The sub-councils shall operate within the same terms of reference, but shall be given specific responsibilities in particular areas of concern which will be identified for each sub-council. Every sub-council will have a multi-party character and will ordinarily consist of up to six members.

- 4.3.7 The following sub-councils were agreed upon and their areas of responsibility described:
- 4.3.7.1 Regional and local government
 - 4.3.7.2 Finance
 - 4.3.7.3 Law and Order, Stability and Security
 - 4.3.7.4 Defence
- 4.3.8 Regarding the sub-council on Foreign Affairs it has been agreed that, due to the unique character thereof, there is a need for broader discussion concerning it.
- 4.3.9 It was also agreed that there be an Independent Election Commission with responsibility for the holding of free and fair elections.
- 4.3.10 There may be a need for an election sub-council to provide services and information to an Independent Election Commission. The Transitional Executive Council will decide whether or not there is a need for such a sub-council.
- 4.3.11 The Independent Election Commission will be independent of the Transitional Executive Council and will consist of respected suitably qualified persons drawn from the broad cross section of the population.
- 4.3.12 The Transitional Executive Council and sub-councils will endeavour to take their decisions by consensus. Where consensus cannot be achieved, a majority of at least 80% will be sufficient for a decision. If a party is of the opinion that a minority view should have prevailed, the matter can be referred for adjudication to the Independent Election Commission.
- 4.3.13 It was also agreed that there be an Independent media Committee in accordance with recommendations from Working Group 1
- 4.3.14 It was agreed that the agreements reached with regard to phase 1, as well as its implementation, would be dependent upon agreement being reached in respect of phase 2, including the interim constitution and the general constitutional principles.

4.4 Working Group 4 : The future of the TBVC states

The full text of all agreements appear on pages 66-79

The report recorded:

- 4.4.1 Agreement in principle to the reincorporation of the TBVC states
- 4.4.2 Agreement that the TBVC states will participate in the transitional arrangements as projected by Working Group 3, on the understanding that these arrangements shall impact mutatis mutandis on the TBVC governments and territories in the same way that they impact upon the South African government and the territory of the RSA.
The Bophuthatswana government reserved its position
- 4.4.3 Agreement that the TBVC states shall take part fully in the process of constitution making and the transitional arrangements, including elections, as may be proposed by Working Groups 2 and 3. Their participation will be arranged in such a way that their vote in a national election shall signify support for, or rejection of reincorporation thus constituting a test of the will of the people. (Reservations were expressed by the Bophuthatswana government)
This will lead to the restoration of South African citizenship to all citizens of the TBVC states who would have been South African citizens had the TBVC states not come into existence. (Reservations by the Bophuthatswana government were expressed)
- 4.4.4 Consensus was reached on a number of issues in relation to the practical, financial and administrative effects of reincorporation.

5. The Multi-Party Negotiations Planning Conference

This summary which has dealt with the Declaration of Intent, the agreements recorded in the reports, of Working Groups 1,3 and 4 and the status of discussions in Working Group 2, its Steering Committee and the Management Committee, outlines the

substantive issues as well as the manner and the degree to which they were dealt with in CODESA.

In terms of paragraph 4.2 and 4.3 of Resolution 2 of the Planning Conference held on 6 March 1993, these constitute the substantive issues which are referred to.

This resolution requires the first meeting of the reconvened Multi-Party negotiations Forum to determine inter alia:

" 4.2 how to accommodate the views of those participants who were not in CODESA in relation to the agreements reached in CODESA;

" 4.3 how these agreements can serve as a constructive foundation for the resumed/commenced negotiations process to build on".

A copy of the entire records of what transpired in CODESA, which encompasses 13 volumes, has been put together and can be made available to the parties who were not in CODESA and have since joined the Multi-Party Negotiations Forum.

6. Way forward with regard to CODESA Agreements

6.1 The Subcommittee is therefore expected to advise the Facilitating Committee as to the most effective way in which these agreements can serve as a constructive foundation and ensure that the views of those participating who were not in CODESA, are taken into account, so that the process can be taken forward

From the point of view of the reconvened Multi-Party negotiating Forum, the full plenary sessions and the Multi Party Forum sessions are the critical points at which the participants register formal agreement/reservations etc.

6.2 It is further assumed that such agreements shall have emerged through the discussions, in the Facilitating Committee/Negotiations Council. The issue therefore revolves around how to ensure that all participants, including those present in CODESA shall be enabled to participate fully in constructing agreements. In considering how this can be achieved most effectively and efficiently we will like to present what was emerging in CODESA in the form of an organogram which is attached to the end of this report. This organogram gives a succinct overview to enable us to address the following recommendations as to how to proceed.

Accordingly we recommend the following approach :

6.2.1 Working Group 1 and 3 reports provide a fairly comprehensive set of agreements which relate to Phase 1 of the transition. This

phase deals with the levelling of the playing field, ensuring free political activity and the composite powers and duties of certain structures. The structures referred to are the Transitional Executive Council and its sub-councils, the Independent Election Commission, the Independent telecommunications Authority and the Independent Media Committee.

The agreements are interspersed in the work done in the different Working Groups. It would be important to bring all the agreements together, as they relate to phase one, and put them in a structured way. This would enable all participants, and particularly those who were not present in CODESA, to address the matters in concrete and specific ways but also taking into account how they are interlinked.

We therefore recommend that the agreements relating to this phase be entrusted to a drafting committee whose task it would be to structure the entire package relating to phase one in the form of a single draft which could be even in a draft statute form.

Such a drafting committee be composed of individuals with the necessary expertise and who would serve, not as representatives of their parties/organisations.

The draft document/statute would therefore be without prejudice to the views of the participants. In this way such a draft would be concrete and would facilitate accommodating the views of the participants in the form of approving, amending, substituting and/or introducing new clauses.

These drafts could be processed, again, on a without prejudice basis, by the Planning Committee and then taken to the Negotiations Council, before they are tabled at the Negotiations Forum.

The end product would be agreement/reservation by participants in the form of draft legislation to be enacted by the current parliament and amending the existing 1983 constitution.

Some aspects of such a draft may become parts of the Transitional/Interim constitution.

The Negotiations Forum would thereafter determine when such agreed legislation is to be enacted.

This approach would facilitate effective accommodation of the views of all participants and the emergence of well processed

agreements in the form of concrete draft legislation.

6.2.2 Constitution Making

The Working Group 2 Steering Committee approach isolated three phases:

The CODESA phase: This related to what has been dealt with above in terms of phase 1

The Transitional/Interim constitution: which needs to be negotiated in the resumed Multi-Party Negotiations Forum and which would deal with the interim governmental structures and include the protection of basic civil and political rights.

The constitution would also incorporate the general constitutional principles negotiated at the Multi-Party Forum and which would be binding on the Constitution Making Body. That is to say the final constitution shall be drafted and adopted in terms of the provisions of the Transitional/Interim constitution.

In this regard Working Group 2 discussions assumed an elected Constitution Making Body. All options which were under consideration referred to the National Assembly functioning as a Constitution Making Body.

On this basis Working Group 2 did not complete the task of agreeing on the general constitutional principles and some of the procedures relating to the functioning of the Constitution Making Body.

This, therefore, is an aspect that requires full attention by the resumed Multi-Party Forum. The matter can best be attended by having a sub-committee prepare a single document outlining the different aspects of the agreement and matters of disagreement and making proposals to resolve all the issues involved.

6.2.3 The future of the TBVC states has been dealt with in agreements interspersed between Working Groups 1, 3 and 4.

6.3 From the point of view of the transition process these would find their natural place in the following two sets of instruments:

6.3.1 The draft legislation dealing with the TEC and phase 1 in general

6.3.2 The transitional constitution to be agreed at the Multi_Party Forum

Phase 1

Purpose

- * levelling
- * free political activity

Means

- * TEC
- * IEC
- * IMC
- * Repeal laws impeding free political activity, etc
- * Strengthen National Peace Accord

ELECTIONS

GOVERNANCE

National Assembly



Interim Govt.

CONSTITUTION MAKING

- * National Assembly functions as CMB
- * General Constitutional Principles
- * Procedures

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