

DRAFT

**SECOND REPORT TO THE PLANNING COMMITTEE
OF THE NEGOTIATING COUNCIL****1. Introduction**

- 1.1 The Resolution on the Transition Process adopted by the Negotiating Forum on 1 April 1993 constitutes the mandate for the course of action being pursued in the Negotiating Council and the Planning Committee.
- 1.2 On 26 April 1993 the Consolidated Document on the CODESA Reports, together with proposals on technical committees relating to a number of issues arising there from, were tabled at the meeting of the Negotiating Council. The focus of those proposals was the preparation for free and fair elections and the creation of a climate for free political activity.
- 1.3 The Sub-Committee report noted that two outstanding issues arising from the CODESA reports namely, the Constitution Making Body/Process and the Transitional/Interim Constitution as well as other constitutional issues listed in the Resolution on the Transition Process of the Negotiating Forum, would be dealt with in a subsequent report.
- 1.4 The Negotiating Council on 26 April 1993, decided that the Sub-Committee submit its report on the outstanding constitutional issues to the Planning Committee on 29 April 1993, in order to ensure that the report is presented at the meeting of the Negotiating Council scheduled for 30 April 1993.
- 1.5 Accompanying the proposals in this Report and the first Report of the Sub-Committee is a draft explanatory memorandum to be accepted by all participants, which underpins these proposals.

2. The Negotiating Forum Resolution

- 2.1 On 1 April 1993 the Negotiating Forum adopted a Resolution on the Transition Process instructing:

"... the Negotiating Council to consider and report on all matters arising from the Consolidated Report, including the following and other constitutional issues:

- * Form of State and Constitutional Principles
- * Constitution Making Body/ Constituent Assembly
- * Transitional/Interim Constitution
- * Transitional Regional/Local Government

- * Fundamental Human Rights during the Transition
- * Transitional Executive Council, its Sub-Councils, the Independent Elections Committee and the Independent Media Committee
- * Future of the TBVC states
- * Self-determination"

2.2 It should be noted that of the above list of constitutional matters, the question of the Transitional Executive Council, its Sub-Councils, the Independent Elections Committee and the Independent Media Committee have already been dealt with in the first set of proposals which were tabled at the Negotiating Council on 26 April 1993.

2.3 The current proposals therefore address the remaining constitutional matters listed in the Resolution of the Negotiating Forum.

3. Approach to the Outstanding Constitutional Matters

3.1 All these constitutional issues have a direct bearing on two specific aspects:

- * Binding Constitutional Principles
- * Constitution Making Process

3.2 The outstanding list of constitutional matters are very much interrelated:

3.2.1 Form of State can be understood in its total dimension. Descriptions of the particular Form of State that might be used in this case, may include *inter alia*, socialist state, democratic republic, Westminster parliamentary government, constitutional state, dictatorship, democracy, union or federation. The term Form of State may also be used to focus on one particular attribute of the overall constitutional form, for example the relationship between central and regional government. Whatever the term entails, the rest of the outstanding matters listed in the Resolution (Transitional Regional/Local Government; Fundamental Human Rights during the Transition; The Future of the TBVC states; and Self-Determination) are all interrelated with the Form of State, whether as determined in a final constitution or in a transitional, an interim or a next constitution. It is accordingly suggested that it may prove unproductive, or even futile, to discuss any one of these items in complete isolation. It is suggested that whenever anyone of these listed matters is the subject of discussion in the Negotiating Council, participants

should be allowed to simultaneously also deal with any or all of the others.

3.2.2 Many appellations are used to describe any particular state or aspect of a particular Form of State. Examples are social democracy, liberal democracy, parliamentary government, federation, union, unitary state, constitutional state and multi-party government. What we seek is a consensus agreement on the political and constitutional arrangements defining the relationship between the State and its constituents. The possibility of reaching understanding and accommodating what at first sight appears to be conflicting aspirations, is enhanced if the content of particular issues and aspects are addressed.

3.2.3 The Consolidated Document on CODESA Reports contains several sections on constitutional matters under the headings: "Constitutional Making Body/Process" and "Transitional/ Interim Constitution". These sections of the report(see Annexures A and B hereof), as well as extracts relating to the Future of the TBVC States (see Annexure C hereof), are attached hereto as they may be useful for focusing discussion on the constitutional matters listed in the Resolution. To cite a few examples:

3.2.3.1 Some of the principles listed stipulate that South Africa shall be a multi-party democracy with regular elections on the basis of universal suffrage on a common voters roll; that there shall be separation of powers between the legislature, executive and judiciary; and that the constitution will be the supreme law.

3.2.3.2 Another principle listed deals with the structuring of government at national, regional and local levels.

3.2.3.3 As points of reference the use of the Consolidated Report will enable each of the principles to be looked at, refined and if necessary further elaborated so as to form the basis for the possible accommodation between participants in the Multi-Party talks.

4. The Process Towards Reaching agreement

4.1 It is recommended that technical committees charged with formulating documentation in a systematic fashion under the direction of the Negotiating Council will facilitate discussion at the level of the Negotiating Council and enable participants to make structured inputs aimed at reaching accommodation.

4.2 In spite of the interrelationship of the constitutional matters listed we would suggest two technical committees:

4.2.1 A technical committee to deal with the remaining constitutional items (excluding the question of fundamental rights which is dealt with in 4.2.2. below.) as a package (Form of State and Constitutional Principles; Constitutional Making- Body/Constituent Assembly; Transitional/Interim Constitution; Transitional Regional/Local Government; Future of the TBVC states and Self Determination). This technical committee would (in no specific process order):

- * Take into account discussions in the Negotiating Council on these subjects;
- * Receive written inputs from participants; and
- * From time to time and under the direction of the Negotiating Council prepare documentation on which discussions can proceed.

4.2.2 A technical committee on the question of fundamental human rights during the transition. This technical committee would (in no specific process order):

- * Take note of discussions on this subject in the Negotiating Council; and
- * Receive written inputs on fundamental rights during the transition from any participating party;
- * From time to time and under the direction of the Negotiating Council prepare documentation on which discussions can proceed.

- 4.3 Documentation produced by each of these technical committees would be discussed at the Negotiating Council and sent back to the technical committee for further development. This process would be repeated until agreement is reached on a final document.

CONSTITUTION-MAKING BODY/PROCESS

1. General Constitutional Principles

1.1 The Declaration of Intent contains six general principles:

"To set in motion the process of drawing up and establishing a constitution that will ensure, inter alia:

- a. that South Africa will be a united, democratic, non-racial and non-sexist state in which sovereign authority is exercised over the whole of its territory;*
- b. that the Constitution will be the supreme law and that it will be guarded over by an independent, non-racial and impartial judiciary;*
- c. that there will be a multi-party democracy with the right to form and join political parties and with regular elections on the basis of universal suffrage on a common voters roll; in general the basic electoral system shall be that of proportional representation;*
- d. that there shall be a separation of powers between the legislature, executive and judiciary with appropriate checks and balances;*
- e. that the diversity of languages, cultures and religions of the people of South Africa shall be acknowledged;*
- f. that all shall enjoy universally accepted human rights, freedoms and civil liberties, including freedom of religion, speech and assembly protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality of all before the law."*

(cf Declaration of Intent, pages 2 & 3)

1.2 In this regard, an Addendum was subsequently appended to the Declaration as a clarification to the above principles:

"For the avoidance of doubt as to the interpretation of the Declaration of Intent, it is declared by its signatories that irrespective of their individual interpretive views thereof, no provision of the Declaration of Intent, interpreted alone or in conjunction with any other provision thereof shall be construed as -

1. *favouring or inhibiting or precluding the adoption of any particular constitutional model, whether unitary, federal, confederal, or otherwise, consistent with democracy;*
2. *preventing any participant from advocating the same or the separation, in terms of any constitutional model, of powers between a central government and the regions; during the proceedings of CODESA or any of its committees or Working Groups;"*

(cf Addendum to Declaration of Intent, page 4)

1.3 In addition to the above, the Management Committee issued a further clarification to the effect that the Declaration of Intent must be understood to allow any participant to make submissions on the question of self-determination.

1.4 The question of constitutional principles which would be binding on a Constitution-Making Body (CMB) was part of the Terms of Reference of Working Group 2. The following areas of commonality with regard to general constitutional principles were prepared by the Steering Committee and submitted to the Working Group on 12 May 1992:

- "1. *South Africa will be a united, sovereign state in which all will enjoy a common South African citizenship.*
2. *South Africa will be democratic, non-racial and non-sexist.*
3. *The constitution shall be the supreme law.*
4. *There will separation of powers between the legislature, the executive and the judiciary with appropriate checks and balances.*
5. *The judiciary will be independent, non-racial and impartial.*
6. *There will be a legal system that guarantees the equality of all before the law.*
7. *There will be representative and accountable government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters role and, in general, proportional representation.*
8. *The diversity of languages, cultures and religions will be acknowledged.*

9. *All will enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly which will be guaranteed by an entrenched and justiciable Bill/Charter of Fundamental Rights.*
10. *Government shall be structured at national, regional and local levels.*
 - 10.1 *At each level there shall be democratic representation.*
 - 10.2 *Each level of government shall have appropriate and adequate legislative and executive powers, duties and functions that will enable each level to function effectively; such powers, duties and functions to be entrenched in the constitution.*
 - 10.3 *In addition to the powers, duties and functions entrenched in the constitution, each level of government may delegate powers, duties and functions to other levels of government.*
 - 10.4 *The general principles of the constitution including the terms of the Bill/Charter of Fundamental Rights shall apply to each level of government.*
11. *The new constitution shall provide for effective participation of minority political parties consistent with democracy."*

(cf pages 43 - 44)

- 1.5 The Steering Committee also prepared a report dated 27 April 1992 recording the areas on which no agreement yet existed:

"2. Issues on Which No Agreement Yet Exists

- 2.1 *Economic freedom, government intervention and economic systems.*
- 2.2 *Accommodation of the diversity of languages, cultures and religions.*
- 2.3 *Role of Traditional Leaders.*
- 2.4 *The Bill/Charter of Fundamental Rights including:*
 - 2.4.1 *Its nature and scope*
 - 2.4.2 *Affirmative action*
 - 2.4.3 *Second generation rights*

2.5 *Self-determination*

2.6 *New items proposed, namely:*

2.6.1 *The role of standing committees in the formulation of legislation.*

2.6.2 *Government will be open, accessible and accountable.*

2.6.3 *Power sharing.*

3. *Draft Principles on 2.1 to 2.4 Above Prepared by the Steering Committee on 23.3.92*

3.1 *Draft principle on economic freedom, governmental intervention and economic systems:*

"The constitution should provide for the promotion of the improvement in the quality of life of all South Africans by enabling economic growth, human development, social justice and equal opportunities for all."

3.2 *Draft principle on the Bill/Charter of Fundamental Rights:*

"There shall be a justiciable bill/charter of fundamental rights which shall ensure inter alia :

- universally accepted human rights and freedoms;*
- civil liberties including freedom of religion, speech and assembly;*
- the equality of all before the law;*
- property rights, provided that legislation may in the public interest authorise expropriation against payment of reasonable compensation which shall in the event of a dispute be determined by a court of law.*

The constitution shall enable the implementation of measures to help address the racial and gender inequities caused by past discrimination. "

3.3 *Draft principle on the accommodation of the diversity of languages, cultures and religions:*

"The constitution at all levels of government shall accommodate and protect the right of citizens to practice their religion, enjoy

their culture and use their own language both as individuals and in association with others. This shall include the right of citizens where practicable to have their children educated in their mother tongue and the right of citizens to establish educational institutions reflecting their language, culture and religion, provided that racial discrimination may not be practised."

3.4 *Draft principle on the role of traditional leaders:*

"The constitution should define a suitable role for traditional leaders consistent with the objective of a united, non-racial, non-sexist, democratic South Africa." "

(cf pages 41 - 42)

2. **Constitution-Making Body**

2.1 The Working Group 3 Report to CODESA 2 recorded commonality, on *pages 48 & 49*, in the following terms:

"9. *As will appear from the agreements set out below, the Working Group was of the opinion that the transition to democracy involves two preliminary stages. The first stage is one during which preparations will be made for the holding of free and fair elections for an elected parliament under an interim constitution with the power to draft in terms of agreed procedures a new constitution and to act as an interim legislature. This stage covers the whole of the period up to and including the holding of the elections. The second stage covers the period from the holding of the elections to the adoption of a new democratic constitution and the installation of a new government in accordance with the provisions of such constitution."*

2.2 This Report also recorded the following understanding:

"12. *The following agreements were reached in regard to the first stage of the transition. These agreements and their implementation are dependent upon agreement being reached by Codesa in respect of the second stage of the transition, including an interim constitution, and general constitutional principles."*

2.3 The memorandum prepared by the Chairman and Secretary of Working Group 2, dated 22 June 1992, which appears on *pages 33 - 44*, records the following basis approach:

"1. *Basic approach: Constitution making within the framework of a Transitional/Interim Constitution*

1.1 CODESA shall agree to and draft a transitional/interim constitution. This constitution shall be submitted to parliament for legislation within two months of this agreement and all parties within Codesa in parliament commit themselves to supporting such legislation.

1.2 The transitional/interim constitution shall make provision for the constitution making process through which, and the constitution making body by whom, a final constitution shall be drafted and adopted."

(cf page 36)

2.4 Working Group 2 was seized with three proposals which appear on *pages 34 - 35*, aimed at resolving the deadlock which had arisen. All three proposals were based on the premise that the elected National Assembly would draft and adopt the final constitution.

2.5 From the point of view of constitution making, the National Assembly shall be elected on the basis of proportional representation and universal adult suffrage, half the seats being allocated through national lists and half through regional lists, in order to ensure proper representation of regions.

(cf paragraphs 3.1.2, 3.2.1, page 37)

2.6 On the binding nature of the constitutional principles, the following was recorded:

"3.8.1 CODESA shall agree on a set of general constitutional principles to be enshrined in the final constitution and which shall not be contradicted by any provision of the final constitution.

3.8.2 The transitional/interim constitution shall contain an entrenched provision prescribing that the final constitution shall give effect to paragraph 3.8.1 and shall establish an independent mechanism which will be the only body to determine that the general constitutional principles have been enshrined and not contradicted in the final constitution; which determination may only be initiated by a party in the NA. "

(cf page 39)

2.7 On the question of time frames and deadlock-breaking for the CMB, the following is recorded:

"4. Special Mechanisms

Codesa shall agree on special mechanisms to ensure that the national assembly completes the work of drafting and adopting the final constitution within a specified period of time. The transitional/interim constitution shall remain in force until replaced by the final constitution."

(cf page 39 of the Volume on CODESA Agreements)

(cf pages 30-36 of the Consolidated Report.)

TRANSITIONAL/INTERIM CONSTITUTION

1. The Working Group 3 Report records the following:

"9. As will appear from the agreements set out below, the Working Group was of the opinion that the transition to democracy involves two preliminary stages. The first stage is one during which preparations will be made for the holding of free and fair elections for an elected parliament under an interim constitution with the power to draft in terms of agreed procedures a new constitution and to act as an interim legislature. This stage covers the whole of the period up to and including the holding of the elections. The second stage covers the period from the holding of the elections to the adoption of a new democratic constitution and the installation of a new government in accordance with the provisions of such constitution."

(cf page 48)

2. The Transitional/Interim Constitution (as distinct from the final constitution) shall be agreed upon in CODESA.
3. The Transitional/Interim Constitution shall make provision for the following:

"3.1 A Legislature

The legislative authority shall vest in a democratically elected interim/transitional parliament consisting of a National Assembly and a Senate functioning in terms of the special majorities and general constitutional principles agreed upon.

3.1.1 *The structure and role of the Senate must still be agreed upon.*

3.1.2 *The National Assembly shall be elected on the basis of proportional representation and universal adult suffrage, half the seats being allocated through national lists and half through regional lists in order to ensure proper representation of regions."*

(cf page 37)

"3.3 An Executive

3.3.1 *Executive authority shall vest in a multiparty executive in accordance with the principle of an interim/transitional government of national*

unity.

3.4 The separation of powers

There shall be a separation of powers between the executive, legislature and judiciary according to the principles underlying a constitutional state.

3.5 Fundamental Rights

CODESA shall agree on justiciable fundamental rights which shall form part of and shall be entrenched in the transitional/interim constitution.

3.6 Regional Government

3.6.1 *CODESA shall agree on the boundaries, powers, duties and functions of regional governments.*

3.6.2 *Provision shall be made for regional government and/or the phasing in of such government with the boundaries, powers, duties and functions as referred to in paragraph 3.6.1.*

3.6.3 *The transitional/interim constitution shall entrench regional government and its boundaries, powers, duties and functions in the transitional phase and the transitional/interim constitution shall in this regard not be amended without the agreement of all the parties in the National Assembly until the adoption of a new constitution in terms of the procedures set out in 3.2.*

3.7 Provisions regarding amendments to the transitional/interim constitution.

Amendments shall only be of force and effect if:

3.7.1 *They do not contradict the set of constitutional principles referred to in paragraph 3.8.1.*

3.7.2 *They have been adopted according to the procedures set out in paragraph 3.2. "*

(cf page 38 of the Volume on CODESA Agreements)

(cf pages 37-38 of the Consolidated Report)

Annexure C

4.4 Working Group 4 : The future of the TBVC states

(The full text of agreements appear on pages 66-73 of the Volume on CODESA Agreements)

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.

EXPLANATORY MEMORANDUM TO BE ACCEPTED BY ALL PARTICIPANTS IN THE MULTI-PARTY PROCESS RELATING TO PROPOSALS ARISING FROM THE MULTI-PARTY FORUM RESOLUTION ON THE TRANSITION PROCESS.

1. The Transition Process involves reaching agreement on a number of key elements. Discussion around any particular element gives rise to suspicion and fears that agreement on it would lead to that agreement being implemented before agreement has been reached on ALL the key elements that constitute a package around the transition process.
2. Such fears were addressed in the CODESA process in Working Group 3 whose report appears in the Consolidated Document on pages 22-29. This Report states that "These agreements (that is, relating to the first stage of the transition, namely the TEC) and their implementation are dependent upon agreement being reached by CODESA in respect of the second stage of the Transition, including an Interim Constitution, and general Constitutional Principles". (cf clause 4 of the Agreement on page 22).
3. Mindful that the above proviso is contained in the CODESA Agreements which are treated in the Multi-Party Forum as points of reference, and not as binding agreements; mindful also that some of the participants in the current Multi-Party Forum have specifically indicated that they consider themselves bound by the agreements reached in CODESA; it therefore becomes necessary that participants in the Multi-Party Forum should commit themselves to a similar type of provision so that the proposals based on the Multi-Party Resolution on the Transition Process may be addressed in a manner that removes any fears that agreement on any particular proposal necessarily implies agreement on their implementation.
4. The proposals contained in the first report of the Sub-Committee deals with the need for the setting up of technical committees on the following aspects:
 - 4.1 The Independent Elections Commission
 - 4.2 The Independent Media Commission and the Independent Telecommunications Authority
 - 4.3 The Amendment or repeal of legislation impeding free political activity and discriminatory legislation
 - 4.4 On the TEC and its Sub-councils with the proviso that the question of security forces and all armed formations shall be given priority attention.
 - 4.5 On strengthening the National Peace Accord
 - 4.6 On the Peace Corps
5. The second report of the Sub-Committee on other constitutional matters proposes two more technical committees;

- 5.1 On fundamental rights in the Transition
 - 5.2 On other constitutional matters namely, Form of State and Constitutional Principles, Constitution Making Body/ Constituent Assembly, Transitional/Interim Constitution, Transitional Regional Government, the Future of the TBVC States.
6. It is expressly understood by all participants that each of the above proposals and the documentation emanating from such technical committees shall be discussed in the Negotiating Council with the view to arriving at an agreement on these matters. Furthermore that as when agreement is reached on each of these matters the Council shall expressly determine when and how the specific agreement shall be implemented. This provision is made so as to ensure participants have a clear understanding of the package of agreements which would constitute the key elements of the transition process.
7. Technical committees are not fora for negotiating substantial issues. They are instruments of the Negotiating Council in order to produce systematic documentation to facilitate discussion and negotiating in the Negotiating Council. Documentation produced by each of these technical committees shall be discussed at the Negotiating Council and on the basis of those discussions sent back to the technical committees for further development. This process would be repeated until agreement is reached in the Negotiating Council on a final document on the issue in question.