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# CONSTITUTIONAL ASSEMBLY

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# CONSTITUTIONAL COMMITTEE

[12 Apr. 1996]

# DOCUMENTATION BILL OF RIGHTS



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## TECHNICAL REFINEMENT TEAM

### MEMORANDUM

TO : Chairperson and Executive Director of the CA

DATE : 12 April 1996

RE : Provision in the Bill of Rights forbidding South African citizens from becoming mercenaries

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**1. Introduction**

The ad hoc committee on security forces has suggested that the CA should include a provision in the Constitution forbidding South African citizens from becoming mercenaries. The TRT was asked to consider this idea.

**2. Implications for other provisions**

Including in the Constitution some form of express prohibition on mercenary activity by South African citizens may have implications for at least three of the rights in the Bill of Rights.

First, it would constitute an exception to the provision allowing freedom of occupation. Secondly, if it were linked to citizenship and the penalty were to be deprivation of citizenship, it would derogate from the right not to be deprived of citizenship. Thirdly, if it were linked to a prohibition on recruiting mercenaries in the country, it would limit the right to freedom of expression as well.

If mercenaries are to be dealt with in the Constitution, the most effective manner would probably be to include an express limitation to the right to freedom of occupation.

In deciding whether or not to do this the following factors seem to be relevant:

- (i) The Constitution as presently drafted does not preclude legislation outlawing mercenary activity. A prohibition on mercenary activity would certainly be permitted by the limitation clause to the Bill of Rights.
- (ii) An attempt has been made to keep specific limitations to rights to a minimum although, as the Panel suggested in an earlier memo, specific limitations are not always undesirable.
- (iii) Expressly outlawing mercenary activity would accord with the spirit of international humanitarian law which reflects its aversion to mercenary activity in the exclusion of mercenaries from the definition



of lawful combatants. This means that mercenaries are not entitled to prisoner-of-war status in international humanitarian law.

- (iv) Mercenary activity is only one of many undesirable activities. Mentioning it specifically requires a political decision to express particular aversion to it.

**In balance the TRT suggests that this problem is better dealt with in legislation.**

**3. Manner of incorporation**

**If the CA decides to include a provision expressly prohibiting South African citizens from being mercenaries we suggest that it be included as a limitation to the clause protecting freedom of occupation.**

Mercenaries are difficult to define. The most authoritative definition at the moment is contained in Article 47 of 1977 Protocol I to the Geneva Conventions of 1949 and is very lengthy. We suggest that, if mercenaries are dealt with in the Constitution, the matter of definition is left to legislation on the courts. In dealing with the matter, courts would inevitably consider international law.

The provision of freedom of occupation provision could be amended to read:

- (1) Every citizen has the right to choose a trade, occupation or profession freely. The practice of an occupation may be regulated by law.
- (2) Despite ss(1), no one may engage in mercenary activity or recruit mercenaries.



## TECHNICAL COMMITTEE 4

### MEMORANDUM

**TO :** Chairperson and Executive Director of the CA

**DATE :** 13 April 1996

**RE :** Memorandum regarding outstanding issues on states of emergencies (section 38) of the Bill of Rights

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**1. Non-derogable fair trial rights**

Arising from the Bill of Rights Sub-committee meeting on 3 April 1996 (Multi-lateral, Waenhuiskrans) the Technical Committee was requested to prepare a recommended list of non-derogable fair trial rights based on the Siracusa Principles. *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1996)* are set out on pages 251-242 of the Technical Committee's Explanatory Memorandum on States of Emergency.

Based on article 4 of the International Covenant on Civil and Political Rights and the Siracusa Principles, it is recommended that the following rights of arrested, detained and accused persons in section 36 be included in the list of non-derogable rights:

- (1) Sections 36(1)(a) and (b) - the right of arrested persons to remain silent and to be informed of that right;
- (2) Section 36(1)(c) - the right not to be compelled to make any confession or admission;
- (3) Section 36(2)(d) - to challenge the lawfulness of the detention before a court of law;
- (4) Section 36(3) - the right to a fair trial;
- (5) Section 36(3)(a) - to be informed of the charge in sufficient details;
- (6) Section 36(3)(b) - to have adequate time and facilities to prepare a defence;
- (7) Section 36(3)(c) - the right to a public trial in an ordinary court of law\*
- (8) Section 36(3)(e) - to be present when tried;
- (9) Section 36(3)(f) - to choose and be represented by a legal practitioner;
- (10) Section 36(3)(g) - to have a legal practitioner assigned to the accused persons at state expense if substantial justice would otherwise result;
- (11) Section 36(3)(h) - to be presumed innocent and not to testify during the proceedings;
- (12) Section 36(3)(i) - to adduce and challenge evidence;
- (13) Section 36(3)(j) - not to be compelled to give self-incriminating evidence;
- (14) Section 36(3)(k) - to be tried in a language that the accused person



- understands, or, if that is not practicable, to have the proceedings interpreted in that language;
- (15) Section 36(3)(l) - not to be convicted for any act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (16) Section 36(3)(m) - not to be tried for any offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - (17) Section 36(3)(n) - to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of the sentencing;
  - (18) Section 36(3)(o) - to appeal to, or review by, a higher court;
  - (19) Section 36(4) - where these rights require information to be given to a person that information must be given in language that the person understands.

**Notes:**

\* The Siracusa Principles require that trials of civilians be in ordinary courts except where strictly necessary to establish military tribunals or special courts to try civilians. In the latter case, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority. They also include in their list of non-derogable fair trial rights "the right to be tried in public save where the court orders otherwise on grounds of security with adequate safeguards to prevent abuse".

Section 36(3)(c) of the Working Draft of the Constitution protects the right "to a public trial in an ordinary court of law." Although the Siracusa Principles allow derogation from even this right in certain exceptional cases and subject to stringent safeguards, subsequent developments in international law have emphasised the importance of the right during emergencies.<sup>1</sup> As international experience has shown, departure from this aspect of a fair trial leads to widespread abuse. We accordingly recommend that the right to a public trial in an ordinary court should be non-derogable during emergencies.

**2. Section 38(6) of the Working Draft**

- 2.1 It should be made clear that this section applies to persons detained *without trial* under a state of emergency, i.e. when there has been a derogation from the right under section 14(1)(b). Where a person is arrested and detained on a criminal charge, the normal fair trial rights apply subject to the derogation

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<sup>1</sup> 'The right to a fair trial: Current recognition and measures necessary for its strengthening' - Final Report, UN Subcommission on Prevention of Discrimination and Protection of Minorities', UN doc. E/CN.4/Sub.2/1994/24.



provisions in section 38.

- 2.2 The Siracusa Principles require that "all arrests and detention and the place of detention shall be recorded, if possible centrally, and made available to the public without delay." In the light hereof it is recommended that section 38(6)(b) be amended to include the "place of detention".
- 2.3 The Siracusa Principles also require that "no person shall be held in isolation without communication with his family, friend, or lawyer for longer than a few days, e.g., three to seven days". Subsection 38(6)(c) and (d) ensure that a detainee has contact with a lawyer and doctor. However, detainees could be deprived of any contact with family or friends. We recommend that consideration be given to including section 36(2)(f)(i) and (ii) in the list of non-derogable rights.
- 2.4 The DP raised the point in a previous meeting that section 35(6)(f) of the Working Draft should make it clear that the right of detainees to apply for the review of their detention is not limited to a once-off application. We recommend that subsection (6)(f) be redrafted along the following lines:
- "(f) a detainee who is not released in terms of paragraph (3), or who is not released in terms of a review under this paragraph, may apply to a court for a further review of the detention any time more than 10 days after the previous review, and in either case, the court must release the detainee unless it is necessary to continue the detention to restore peace and order;"
- 2.5 To reflect the agreement of the parties regarding the detention of enemy aliens during international armed conflicts, it is suggested that a new subsection 38(8) is included:
- "(8) Sub-section (6) and (7) do not apply to persons who are not citizens of South Africa and who are detained in consequence of international armed conflicts. Instead, the State must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of those persons."



## TECHNICAL COMMITTEE 4 ADVISORS

### MEMORANDUM

TO : Chairpersons and Executive Director of the CA  
DATE : 14 April 1996  
RE : Resolution of differences of opinion on Limitations Clause  
(Bill of Rights)

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1. The Draft 20 March 1996 in the (blue) documentation Vol I page 27 reads:

35. (1) *The rights in the Bill of Rights may be limited in terms of law of general application only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom.*
- (2) *Any limitation in terms of subsection (1) must -*
- (a) *be related to its purpose;*
  - (b) *limits the right as little as is reasonably possible;*  
*and*
  - (c) *take into account -*
    - (i) *the nature of the right;*
    - (ii) *the importance of the purpose of the limitation; and*
    - (iii) *the nature and extent of the limitation.*
- (3) *Except as provided in subsection (1) and (2) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

2. The ANC expressed concern that the phrase "must ... limit the right as little as is reasonably possible" amounts to an excessively strict test. The ANC proposed the following:

35. (1) *The rights in the Bill of Rights may be limited in terms of law of general application only to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom which must be determined taking into account -*
- (i) *the nature of the right;*
  - (ii) *the importance of the purpose of the limitation;*
  - (iii) *the nature of the extent of the limitation;*
  - (iv) *whether the limitation is related to the purpose;*
  - (v) *whether the limitation limits the right as little as is reasonable possible.*



(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

3. The DP and NP expressed concern that reformulating "limits the rights as little as is reasonably possible" as a factor to be taken into account and not as a test to be complied with, could unacceptably weaken the limitations clause.
4. **The TC4 advisors, after consultation with members of the Panel, advise as follows:**
  - 4.1 It is recommended that the format agreed upon for the expropriation clause (a general test plus "having regard to all relevant factors including ...") be followed.
  - 4.2 The inclusion of elements of the proportionality principle as matters which must be considered is recommended, because it will facilitate the interpretation of the new limitation clause when compared to section 33 of the interim Constitution. Including the elements of proportionality will indicate clearly, that, as elsewhere in other systems, a bifurcated approach can be developed by taking into account the "nature of the right" and the "importance of the purpose" involved, and that the essential content of rights could indeed play a role by taking into account the "extent and nature of the limitation" (see the Canadian decision in *Ford v AG Quebec* [1988] 2SCR 712 772).
  - 4.3 Since all matters taken into account in applying the limitations clause must be considered within the framework of the general test, the concern that the inclusion of elements of the proportionality as mere matters to be considered would weaken the limitation clause, could be met by including the words "reasonable" as part of the general test in section 35(1).
  - 4.4 The list of factors should remain open-ended. Because "reasonableness" will form part of the general test, none of the listed factors should be regarded as a conclusive "test" and care should be taken not to formulate these factors as "tests".
  - 4.5 The test in section 35(2)(b) of the Draft of 20 March 1996, originated in efforts to formulate the so-called minimal impairment / less restrictive measure element of proportionality. The important impact of this element is that it obliges everybody involved with the limitation of a right to consider alternative measures to achieve the purpose. As a matter to be considered, and not as a single conclusive test, it does



not imply that once a less restrictive measure to achieve the purpose has been identified, the limitation under consideration will necessarily be struck down. It would mean that a range of appropriate / acceptable measures will be identified and that the limitation under consideration will have to fall within this range to comply with the general test. Those restricting rights will be left with a discretion to decide on any particular measure within this range; taking into account all other relevant factors and the general requirement of reasonableness, this need not be the least restrictive measure viewed in isolation.

**5. Proposal**

- (1) *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, having regard to all relevant factors including:*
  - (a) *the nature of the right;*
  - (b) *the importance of the purpose of the limitation;*
  - (c) *the nature and extent of the limitation;*
  - (d) *the relation between the limitation and its purpose;*
  - (e) *less restrictive means to achieve the purpose.*
  
- (2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*



