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Eunice

CONSTITUTIONAL ASSEMBLY

SUB-COMMITTEE ONE

**TUESDAY
1ST OCTOBER 1996**

Room V16

ADDITIONAL DOCUMENTATION

SUPPLEMENTARY MEMORANDUM ON STATES OF EMERGENCY

Technical Committee

Sub-Committee 1

1 October 1996

This memorandum supplements the Technical Committee Memorandum dated 26 September 1996, and deals with certain additional matters raised at the Sub-Committee meeting of this date.

* Note: All drafts set out below are subject to technical refinement.

1. Non-derogability of the right against discrimination on certain grounds

There was general agreement at the meeting that the drafting of this provision should be based on article 4(1) of the International Covenant on Civil and Political Rights (1966) [ICCPR]. In terms of this provision derogating measures may not involve discrimination "solely" on certain limited grounds. This provision prohibits derogating measures solely *based* on the specific grounds. Thus it prohibits discriminatory measures which are deliberately targeted against certain groups. In order to bring this provision in line with the ICCPR, it is suggested that it is re-drafted to read:

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Section 9 - Equality: with respect to legislation which involves unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.

2. Children's rights

It was agreed to include s 28(1) (i) in the list of non-derogable children's rights to

the following extent:

Section 28(1)(i) only in respect of children 15 years and younger

3. Fair trial rights

3.1. The general right to a fair trial

The right to a fair trial as a non-derogable right is included in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1966) [para. 70(e)]. During a state of emergency the state may conceivably derogate from certain elements recognised as part of the general guarantee of a fair trial during normal circumstances. However, there appears to be little justification for allowing derogation from the overall requirement that trial proceedings remain fair during a state of emergency.

3.2. Delay in trial proceedings

The right protected in s 35(3)(d) is not included in the list of non-derogable rights in the international human rights instruments referred to in our previous memorandum. A certain delay in the institution and conduct of criminal proceedings is permissible in view of the exigencies of emergencies. The right to a speedy trial is thus a derogable right (subject, of course, to the stringent requirements of s 37(4)).¹

3.3. The Exclusionary Rule (s 35(5))

As noted in our previous Memorandum, there is no international precedent for the non-derogability of this right. However, the Constitutional Court appears to have been concerned regarding the possibility of admitting evidence which would render

¹See S. Stavros (1992) 'The Right to a Fair Trial in Emergency Situations' 41 International and Comparative Law Quarterly 343 at 359.

the trial unfair as a consequence of a derogation from this right. The other 'leg' of the exclusionary rule is the exclusion of evidence which would "otherwise be detrimental to the interests of justice." The latter concept is broader than that of the fairness of the proceedings against the particular accused. Its purpose is to promote constitutional conduct by the police and by other officials concerned with the administration of justice. At issue is the moral authority and legitimacy of the administration of justice as a whole.² It is conceivable that a certain measure of derogation from this aspect of the exclusionary rule can be contemplated as a consequence of the extraordinary situations prevailing during a genuine national emergency. One possibility which could be considered to meet the concern regarding the non-derogability of the first leg of the exclusionary rule is to include only this aspect in the Table of Non-Derogable Rights.

The following tentative drafting of this provision is suggested:

Section 35(5) With respect only to the admission of evidence that would render the trial unfair.

²See S v Hammer 1994 (2) SACR 496 (C); S v Melani 1995 (2) SACR 141 (EC); and S v Motloutsi 1996 (1) SA 584 (C).

