



INTERNATIONAL SECRETARIAT,
1 Easton Street, London WC1X 8DJ,
United Kingdom.

MC H 91-19-3-3

Fax: 071-956 1157

Tel: 071-413 5500

FACSIMILE COVER SHEET

TO: Albie Sachs

FROM: Richard Carver, Africa Region, Research Department

DATE: 9 December 1991

DESTINATION FAX NO.: 010 27 21 222626

TOTAL NUMBER OF PAGES INCLUDING THIS COVER SHEET: 7

If you do not receive all of the pages, or they are not fully legible, please call us as soon as possible on 44 71 413 5617 or 5609 or 5610).

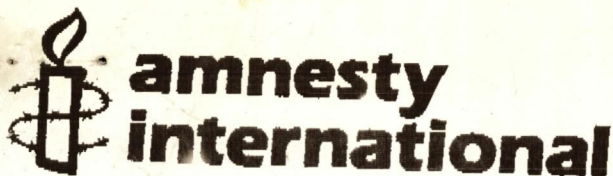
COMMENTS/MESSAGES

Dear Mr Sachs,

Please see the attached letter and document.

Sincerely,

Richard Carver
Africa Region
Research Department



amnesty international

INTERNATIONAL SECRETARIAT,
1 Easton Street, London WC1X 8DJ,
United Kingdom.

MCH 911-14-3-3

Ref.: AFR/RC/SA L10.2

Zola Skweyiya
Chairperson
Constitutional Committee of the ANC
c/o Centre for Development Studies
University of the Western Cape
Private Bag X17
Bellville 7535
South Africa

9 December 1991

Dear Mr Skweyiya,

Richard Carver, a staff member of Amnesty International's International Secretariat, recently had a meeting in London with Albie Sachs to discuss, among other things, our organization's comments upon the ANC's draft Bill of Rights. We understand from Albie Sachs that you are in the process of finalizing a new draft of the proposals and he encouraged us to send you our comments quickly so that these could be taken into account.

Thus the enclosed comments on the ANC's draft were prepared quickly with that in mind. At a later stage we may wish to make public comments on both your draft and the South African Law Commission proposals.

Inevitably the enclosed comments focus upon some of the areas where Amnesty International considers that the draft Bill of Rights could be strengthened. Therefore I wanted to underline in this covering letter how much we welcome the proposals, which provide extensive new protections of human rights falling within our mandate, in particular the abolition of the death penalty.

We hope that you find these comments useful and that they do not arrive too late for consideration. We should of course be very pleased to hear your reaction to them.

Yours sincerely,

Michael Dottridge
Head of Africa Region, Research Department

Comments on the African National Congress's draft Bill of Rights

The draft Bill of Rights contains some strong protections of human rights within Amnesty International's mandate. We particularly welcome the abolition of the death penalty. However, many significant rights, particularly related to fair trial, are not guaranteed and all the rights which are guaranteed are potentially undermined both by the introductory note which says that "[t]he question of the suspension of rights during a state of emergency is not dealt with in the document, since it cannot be adequately treated without knowing what the organs of government will be" and by the limitations in Article 15.

Derogation during a state of emergency

Any provision permitting derogation of human rights during a state of emergency should at a minimum be consistent with the restrictions on derogation in Article 4 of the International Covenant on Civil and Political Rights. Amnesty International welcomes the statement in the ANC's May 1991 discussion document that any constitutional provision for the declaration of a state of emergency will be limited to situations "when the life of the nation is threatened", that the power to declare such an emergency "will be subject to strict controls by parliament and the judiciary" and that the constitution "will provide for the recognition and protection, as far as possible, of fundamental rights during the period of emergency". However, we would have preferred that this be spelled out explicitly in the Bill of Rights. The introductory note states that it was necessary to delay drafting an emergency clause until a decision was reached on who declares an emergency. However, Amnesty International considers that the critical issues are the scope, duration and grounds for such a declaration, which could already be in the draft. Any emergency provision should, at a minimum, contain the following requirements:

- a state of emergency should only be declared in a situation of public emergency which threatens the life of the nation;
- the state of emergency should be proclaimed officially;
- the Secretary General of the United Nations should be notified of the declaration of a state of emergency;
- derogation from rights under the state of emergency should be strictly limited to the exigencies of the situation;
- derogations from rights in a state of emergency should not be inconsistent with South Africa's other international obligations;

¹ African National Congress of South Africa, Discussion Document: Constitutional Principles and Structures for a Democratic South Africa, United Nations Centre Against Apartheid, May 1991, p. 14.

- there should be no discrimination in the application of the terms of an emergency on grounds of race, colour, sex, language, religion or social origin;
- certain core rights (such as the right to life, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment and the right to freedom of conscience and religion) may not be derogated from under any circumstances.

In addition, there is a developing international consensus that the right to habeas corpus is a non-derogable right. Certain basic international standards such as the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (which provides for prisoners invariably to be referred promptly to a judicial authority), the Basic Principles on the Role of Lawyers and the Basic Principles on the Role of Prosecutors are intended to apply in all circumstances at all times.

Limitations

Amnesty International considers that the limitations clauses in Article 15 are inconsistent with these international standards since they permit limitations even in non-emergency situations of all of the rights in the Bill of Rights including non-derogable rights. In addition, some of the limitations go beyond those permitted in other international treaties and do not specify who can limit the rights, whether courts can rule on the lawfulness of such limitations and whether the power of courts to rule on the lawfulness of such limitations can be limited. Although Article 16(1) states that the rights and freedoms in the Bill of Rights "shall be guarantees by the courts", this provision can be limited under Article 15.

Detention and fair trial

Amnesty International welcome Articles 2(8) and (9) prohibiting administrative detention without trial. However, you may wish to incorporate a provision indicating how illegal immigrants and the mentally-ill who are dangerous to themselves or others will be treated.

Articles 2(8) and (9) should also prohibit arbitrary detention.

Amnesty International welcomes the procedural safeguards in Article 2(10) protecting persons who are arrested. The United Nations Special Rapporteur on Torture, Peter Kooijmans, has said that all detainees should have access to lawyers and family within 24 hours as a protection against torture and other international standards require prompt access and notice. Amnesty International considers that this article would be strengthened by a reduction in the 48-hour time limit stipulated. The draft has no requirement of prompt or confidential access to a lawyer and is silent on notice and access to families and access to independent medical attention (provided for by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 18 and 19).

In addition, the Bill of Rights contains no guarantee of that essential bulwark of liberty, the right to habeas corpus (see Article 9(4) of the International Covenant on Civil and Political Rights). Article 2(24) does not provide the same protection as habeas corpus.

Amnesty International welcomes Article 2(11), which provides that persons awaiting trial should be granted bail, and appears to contain the presumption in Article 9(3) of the International Covenant on Civil and Political Rights that a person should be released before trial.

Article 2(12) might add the requirements that courts be impartial and competent, as well as being independent.

Article 2(14) might add "beyond a reasonable doubt according to law" as the standard of proof recognized as mandatory by the Human Rights Committee (established by the International Covenant on Civil and Political Rights).

Article 2(15) should contain all the guarantees in Article 15 of the International Covenant on Civil and Political Rights. That is, it should provide that the offender shall benefit if provision is made subsequent to the offence for imposition of a lighter penalty; it should also provide for the punishment of any conduct which was criminal according to the general principles of law recognized internationally.

Article 2(16) should also guarantee that no one be tried again for an offence for which he or she has been finally convicted or acquitted.

Article 2(17) should guarantee adequate facilities as well as time for a defence to be prepared.

Article 2(18) should make clear that everyone is entitled to the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

Article 2(19) should provide that the accused has the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her, and also guarantee the accused's right to confidential access to counsel.

Article 2(22) should permit the use of evidence obtained through torture solely for the purpose of establishing that the statement was made in a prosecution of a person accused of obtaining the statement by torture or other cruel, inhuman or degrading treatment or punishment.

Article 2(23) should also provide that unconvicted prisoners should be segregated from convicted prisoners.

Article 2(24) does not guarantee the right to appeal against a judicial decision. It should guarantee the right to appeal to a higher tribunal according to law on grounds of both law and fact. Although the right to seek a pardon or commutation of sentence is guaranteed in

international law only for those sentenced to death, it might be desirable to extend this right to other cases.

Protected freedoms

Articles 2(32) (freedom of conscience), 4 (freedom of speech, assembly and information), 5(1) (freedom of association), 5(2) (freedom of religion), 6 (trade union rights) and 7 (gender rights), like all other rights guaranteed in the Bill of Rights, can be limited under Article 15. Article 14(3 to 4) appears to go beyond the restrictions on freedom of expression permitted under Article 20 of the International Covenant on Civil and Political Rights.

Right to asylum

Article 2(31) guarantees the right to movement, but not the right to seek and to obtain asylum. Amnesty International considers that this should be explicitly protected.

Role of the judiciary

Amnesty International welcomes Article 16, which establishes the justiciability of the rights guaranteed in this draft, but the Constitution should guarantee the independence and impartiality of the judiciary and should make clear that the powers of the courts to rule on the constitutionality of derogations and limitations may never be restricted.

Human Rights Commission and Ombudsman

Amnesty International welcomes the proposal for specific bodies, in addition to the judiciary, with powers to investigate allegations of human rights violations. Amnesty International considers that the Human Rights Commission should be composed of individuals known for their integrity and impartiality who are independent of any of the bodies that they might be called upon to investigate. Possibly they could include nominees of independent bodies such as legal or medical associations, trade unions or non-governmental human rights organizations. Both the Commission and the Ombudsman should have immunity from prosecution with regard to their official functions, as well as guarantees of security of tenure. They should have powers to compel the attendance of witnesses and the production of evidence, as well as to conduct on-site investigations. Both institutions should have an adequate budget, which they should administer independently. Amnesty International considers that the working methods and findings of the Human Rights Commission should be made public, along with the government's response to its recommendations. The Commission should also have the discretion to publicize its investigations at any stage of proceedings if it believes that this will assist its work. Given the reluctance of victims of human rights violations to submit complaints in many instances, the Commission should have the power to conduct

investigations on its own initiative. There should be no requirement that complainants have to exhaust all other legal remedies before submitting a complaint to these bodies. The provision that both the Commission and the Ombudsman will be empowered to initiate legal proceedings is an important one. Although the details of the structure and powers of the Human Rights Commission and Ombudsman will clearly be spelt out in separate legislation, we would consider it important that an outline, such as that we have given here, should be enshrined in the Constitution.

International human rights law and standards

To ensure greater protection of human rights, the Bill of Rights should acknowledge international human rights law and standards as a source of law and interpretation. It should also provide, with regard to international treaties to which the state becomes a party, that nothing in the Constitution or other law shall be interpreted to exclude any of the rights contained in those treaties or limit them to a greater extent than is provided for in the treaties. The Constitution should also require all courts to enforce such treaties in litigation even if the parties do not invoke them.

Amnesty International
December 1991