REPORT BY SUBGROUP 1 OF WORKING GROUP 1 OF CODESA ON ITS DELIBERATIONS ON ITS TERMS OF REFERENCE

27 APRIL 1992

1. THE TERMS OF REFERENCE

The Terms of Reference of SG1 are the following:

1.1 "Completing the reconciliation process"

a) The finalisation of matters relating to the release of political prisoners and political trials
b) The return of exiles and their families
c) The amendment and/or repeal of any remaining laws militating against free political activity, including the elimination of all discriminatory legislation
q) Any other matters which the Working Group may consider relevant to its brief

In addition to the above, the SG agreed to discuss the matter of refugees.

2. FINALISATION OF MATTERS RELATING TO THE RELEASE OF POLITICAL PRISONERS AND POLITICAL TRIALS

2.1 The matter was extensively discussed at a SG1 meeting on 11 February 1992

2.2 The South African Government reported on progress made with the release of political prisoners since the agreements reached between the South African Government and the ANC in the Groote Schuur and Pretoria Minutes. It was reported that the South African Government and the ANC had signed an agreement on 30 June 1991 deeming that finality had been reached in the matter of political prisoners. It was further reported that bilateral mechanisms involving the South African Government and the ANC were in place and that meetings were taking place on an ongoing basis.

2.3 The ANC maintained that the issue of political prisoners remained unresolved and called for:

2.3.1 an unconditional amnesty for all remaining political prisoners;

2.3.2 a revisitation of existing bilateral agreements between the South African Government and the ANC within the context of CODESA;

2.3.3 the creation of CODESA - structured mechanism to control and monitor the release of political prisoners;

2.3.4 the granting of permanent indemnity to all persons to whom temporary indemnity had been granted in terms of the Indemnity Act, 1991

2.4 **The SG agreed (11/2/92) that the release of political prisoners is a priority in the completion of the reconciliation process.**

2.5 **There was support, but not consensus on 11/2/92, for the proposal that the principle of a general amnesty should be considered.**

2.6 **The SG agreed (11/2/92) that, in view of the existing bilateral agreements between the South African Government and the ANC, the said Parties should pursue their bilateral talks relating to political prisoners and the return of exiles and report to the SG on progress made. The bilateral discussions should also deal with the matters raised in paragraph 2.3 above.**

2.7 **At subsequent meetings of the SG the South African Government and the ANC reported that discussions between them as envisaged in paragraph 2.6 were continuing and that a report will in due course be made to Working Group 1.**

2.8 **The SG further agreed (21/4/92) that, with the exception of the reports on the bilateral meetings between the South African Government and the ANC, any further discussions in SG1 on the issue of political prisoners will be conditional on submissions being received on the current existence and detention of political prisoners.**

3. **RETURN OF EXILES AND THEIR FAMILIES**

3.1 **This matter was not discussed in the SG except for referring it to bilateral discussions between the South African Government and the ANC - refer paragraph 2.6 above.**

4.2.2, reserving their point of view until a full resolution dealing with principles governing free political activity was debated.

4.3 Definition of/general principles underpinning/guidelines for free political activity

4.3.1 There is general, though not formalised, consensus within the SG on the necessity to formulate a definition of or the principles underpinning free political activity

4.3.2 Various oral and written submissions on the content of such definition/principles have been made and a motion tabled.

4.3.3 The SG has not reached consensus on a definition of/general principles underpinning free political activity.

4.4. The following categories of legislative measures offending against free political activity were identified in the various submissions:

4.4.1 Emergency legislation;

4.4.2 Security legislation;

4.4.3 Measures affecting the funding of political Parties and organisations;

4.4.4 Measures interfering with freedom of assembly and association;

4.4.5 Measures affecting the free flow of information and access to the media.

4.5 The SG appointed a task force (9/3/92) to inquire into the reform of Emergency and Security legislation. The task forces met several times and made appropriate suggestions for consideration by the SG.

4.6 Emergency Legislation

4.6.1 The SG reached sufficient consensus (27/4/92) on the following;

4.6.1.1 A State of Emergency should only be declared on the advice of a multi-party interim executive /cabinet/interim government council this would only be effective once such a body has been instituted..

4.6.1.2 The proclamation of a State of Emergency or an unrest area and any regulations issued in terms thereof should be objectively justiciable in a court of law on, inter alia the following grounds;

4.6.1.2.1 whether the factual situation existing at the time justify the declaration of the state of emergency or unrest area in terms of criteria laid down in the Public Safety Act, 1953;

4.6.1.2.2 whether the exigencies of the situation justify the powers conferred by regulations made in terms of the proclamation of the state of emergency or unrest area.

4.6.2 Support and opposition were expressed for the desirability of retaining the power conferred in the Public Safety Act, 1953 to declare a state of emergency retrospectively. Parties will refer this to their principals with a view to reaching consensus.

4.6.3 **The SG reached sufficient consensus on the desirability of including in the Public Safety Act:**

4.6.3.1 **Extended provisions for Parliamentary control of a state of emergency;**

4.6.3.2 **A provision for certain non - derogable rights;**

4.6.3.3 **Provisions providing for certain procedural control in respect of detention without trial.**

4.7 **Security Legislation**

4.7.1 **The SG discussed a report by the task force on the reform of security legislation and agreed to refer the said report to principals with a view to facilitating consensus at a meeting of Working Group 1**

4.8 **Procedure**

Regarding the procedure to be followed in the repeal and/or amendment of legislative measures militating against free political activity, the SG agreed (17/2/92) that the following three options (not necessarily exhaustive or mutually exclusive) should be examined:

4.8.1 **separate pieces of legislation amending/repealing individual statutes or the use of a General Law Amendment Act;**

4.8.2 **The enactment of an Interim Bill of Rights against which offending legislation can be tested;**

4.8.3 **Amendment/repeal of offending legislation combined with the enactment of a statute dealing with freedom of speech, assembly and association against which any outstanding offending measures can be tested.**

4.9 **Questions**

The following written questions were tabled:

4.9.1 **ANC to the South African Government and all other Parties or organisations that support an Interim Bill of Rights (17/2/92);**

4.9.1.1 **How long will an Interim Bill of Rights be in effect?**

4.9.1.2 **Who will provide assistance to test legislation?**

4.9.1.3 **What mechanism will be used?**

4.9.1.4 **South Africa is a country without a history of a Bill of Rights, where judges have worked under a sovereign system, how will the judiciary suddenly address the issues that arise before them?**

4.9.1.5 **Who will take initiative to bring the action to invalidate the whole list of laws?**

4.9.2 **ANC to the South African Government (21/4/92);**

4.9.2.1 Are persons who entered the territory of the Republic of South Africa originally as migrant labourers but who have since become long term residents in the Republic, as well as their offspring, ever accorded South African citizenship, or eligible for citizenship by naturalisation or their children by virtue of their birth?

4.9.2.2 What is the status of alien women who are married to South African citizens and the right of such women (either as migrants or permanent residents) to become South African citizens?

4.9.3 No reply was yet made to 4.9.1

4.9.4 The South African Government replied to 4.9.2 as follows:

4.9.4.1 Reply to 4.9.2.1

Former migrant labourers who have obtained permits for permanent residence in South Africa or who have been exempted from holding such permits are at liberty to apply for naturalisation as South African citizens provided that they meet with the residential qualification of 5 years subsequent residence.

As far as obtaining the right of permanent residence by such migrant labourers are concerned the following must be pointed out:

4.9.4.1.1 **Citizens of Zimbabwe, Zambia, Malawi, Mozambique, Lesotho, Swaziland and Botswana (the traditional sources of migrant labour) who entered South Africa before 1 July 1963 and who are still resident in the country qualify, on application for exemption from holding a permit for permanent residence. the date mentioned is relevant in that citizens of Lesotho, Swaziland and Botswana became subject to aliens control on that date.**

4.9.4.1.2 **Citizens of the afore-mentioned countries who entered South Africa on or after 1 July 1963 but before 1 July 1986 and who are still resident in South Africa, may also be considered for exception from holding a permit for permanence residence depending on the merits of each case.**

4.9.4.1.3 **Citizens of the counties mentioned who entered South Africa after 1 July 1986 , like all other aliens obliged to apply for permanent residence if they wish to reside in South Africa permanently.**

4.9.4.1.4 **When a child is born in the Republic from a father who is exempted from holding a permit for permanent residence, or is a South African citizen, such a child is South African citizen by birth.**

4.9.4.2 **Reply to 4.9.2.2**

No person is by virtue of marriage to a South African citizen

automatically entitled to either the right of permanent residence or South African citizenship.
An alien spouse qualifies for naturalisation after a period of two years residence after having being either exempted from holding a permit for permanent residence or having obtained such a permit.

Alien Black women who entered South Africa before July 1986 and who are either legally or by custom married to a South African citizen can apply for exemption from holding a permit for permanent residence. (This concession only applies to Black women.) Those who entered on or after 1 July 1986 must however first obtain a permit for permanent residence and meet the residential qualification before they can naturalise.

Special arrangements apply in respect of alien spouses of political exiles who return to South Africa. they are exempted from holding a permit for permanent residence from the date of their entry into the country and qualify for naturalisation after a period of one year.

5. REFUGEES

5.1 The issue of Mozambican refugees in South Africa was raised by the Venda government. The SG agreed to discuss the matter.

5.2 There was substantial support, within the SG for the following:

5.2.1 That an appeal be made to the South African government to consider:

5.2.1.1 Whether the UNHCR could play a constructive role in the resolution of the Mozambican refugee problem;

5.2.1.2 Making suitable appeals for international assistance to deal with the refugee problem;

5.2.1.3 Whether the registration of refugees would assist to ameliorate the problem in the interim period;

5.2.1.4 Investigating allegations regarding the abuse of refugees and arms smuggling by refugees

5.2.2 That an appeal be made to concerned Parties and governments to make direct submissions to the South African government regarding problems experienced by them in respect of refugees and that they suggest possible solutions

5.3 There was sufficient consensus within the SG that a joint task force of the South African government and other involved Parties and governments be formed to address the problem of Mozambican refugees.

5.4 Questions:

The ANC posed the following questions to the South African Government on 23/3/92:

5.4.1 Whether the government is practising racism with respect to the Mozambican refugees who are black?

5.4.2 **Is the South African Government treating the present refugees in the same way that they treated the Portuguese and white Zimbabwean refugees when those countries became independent?**

5.4.3 **Is there a difference between the South African Government's treatment of white and black refugees and immigrants?**

5.4.4 **How does the South African Government relate to the UN system that guides the treatment of refugees?**

The South African government has not yet responded to the above questions.

SG1 of WG1 of CODESA reports as follows on its meeting of 27 April 1992:

1. REFUGEES

1.1 There was substantial support , within the SG for the following:

1.1.1 That an appeal be made to the South African government to consider:

1.1.1.1 Whether the UNHCR could play a constructive role in the resolution of the Mozambican refugee problem;

1.1.1.2 Making suitable appeals for international assistance to deal with the refugee problem;

1.1.1.3 Whether the registration of refugees would assist to ameliorate the problem in the interim period;

1.1.1.4 Investigating allegations regarding the abuse of refugees and arms smuggling by refugees

1.1.2 That an appeal be made to concerned Parties and governments to make direct submissions to the South African government regarding problems experienced by them in respect of refugees and that they suggest possible solutions

1.2 There was sufficient consensus within the SG that a joint task force of the South African government and other involved Parties and governments be formed to address the problem of Mozambican refugees.

2 EMERGENCY LEGISLATION

2.1 The SG reached sufficient consensus on paragraph 5.3.2.1. (a) of the minutes of 21/4/92 adding the following sentence thereto : "This would only be effective once such a body has been instituted"

2.2 The SG reached sufficient consensus on paragraph 5.3.2.1. (b) of the minutes 21/4/92

2.3 The Parties agreed to refer paragraph 5.3.2.2 of the minutes of 21/4/92 to their principals.

2.4 The SG reached sufficient consensus on paragraph 5.3.2.3 of the minutes of 21/4/92.

3. **SECURITY LEGISLATION**

The SG discussed a report by the task force on the reform of security legislation and agreed to refer the said report to principals with a view to facilitating consensus of Working Group 1

Working Group 1 SubGroup 1 27/4/92

The Working Group task force mandated to investigate Emergency and Security legislation reports as follows on their meeting held on 26/4/92:

SECURITY LEGISLATION

Regarding security legislation the task force suggests, without committing individual delegates, that consideration be given to the following:

1. Desirability of Measures

That special measures to deal with threats to the public peace may be necessary during the period of transition.

2. Amendment or Substitution

There was no agreement on a suggestion that the Internal Security Act 1982, be repealed and suitable legislation substituted. It was however agreed that certain amendments to the powers contained in the said Act be recommended.

3. Temporary nature of Security measures

3.1 That the Internal Security Act be suspended on the formation of an Interim Government. Thereafter it may be activated upon the approval of Parliament, such invocation to be reviewed on a regular basis.

3.2 That Security legislation subsequently be reformed to bring it in line with a proposed Bill of Rights.

4. Declaration as an Unlawful Organisation

4.1 That the efficacy of the declaration of an organisation as an unlawful organisation in terms of the Act be subject to an application to a court of law;

4.2 That the grounds for such a declaration should include the threat or use of violence.

5. Detention without trial - S.29

That, as part of the fostering of a culture of human rights in South Africa, and in anticipation of a Bill of Rights, the power contained in S.29 of the Act to detain persons without a warrant and without duly being charged, should only be invoked on the approval of Parliament (such approval hereinafter referred to as the "trigger mechanism") The task force could not agree on a suggestion regarding the reduction of the initial period of detention provided for in S.29 as amended.

6. Detention of Witnesses - S.31

6.1 That the detention of witnesses in order to coerce them to give evidence is unacceptable and that witnesses should not be detained against their will;

6.2 That, should it be found that provisions contained in the Criminal Procedure Act contain sufficient powers to satisfy the needs of the judicial process, S.31 should be considered for repeal or suitable amendment.

7. Prohibition of Bail - S.30

That the repeal of the power of the Attorney General,contained in S.30 of the Act, to prohibit the release of persons on bail or warning, be considered within the wider context of related provisions in the Criminal Procedure Act and a reassessment of the legitimate needs of the transition period.

8. Prohibition /Control of Gatherings and Processions

That the power of the Minister to prohibit gatherings:

8.1 should be curtailed pending the formation of an interim government, the said power to be entirely localised once an Interim government is formed;

8.2 should be limited to "the maintenance of public peace or order":

8.3 should be exercised with due consideration to Chapter 2 of the National Peace Accord

9. Section 50 - Combatting of State of Unrest

That Section 50, which confers certain powers on the police to combat a state of unrest, may be brought within the ambit of the trigger mechanism referred to in paragraph 5 above.

10. Procedural Aspects - Sections 58-61

That the powers conferred in Sections 58-61 of the Act be considered for repeal

11. Offenses and Penalties

The task force could not agree on a suggestion that the ambit of the offenses contained in S.54 of the Act be narrowed. It is however suggested that this section be addressed with a view to allow the common law to take a more neutral course of development.

12. Ouster Clauses

That the Act should contain no provisions ousting the jurisdiction of the courts.

CODESA WORKING GROUP I : THE POSITION OF THE SOUTH AFRICAN GOVERNMENT ON THE ROLE OF THE INTERNATIONAL COMMUNITY

The success of the negotiations towards a new constitutional dispensation provides clear evidence that the people of South Africa are responsible for, and fully capable of, deciding for themselves on the nature of their future government. Their right to do so has been attested by the international community, for example in successive resolutions of the United Nations General Assembly. South Africa is an independent and sovereign state.

South Africa is nevertheless aware of the interest of the international community in the success of the current negotiations and of its willingness to promote the process, without interfering in the country's domestic jurisdiction.

The participants in the process have taken a conscious and voluntary decision that their negotiations should be transparent. It follows that the negotiations may be observed, not only by the country's inhabitants but also by acceptable representatives of the international community without the right to speak or vote, as was the case at CODESA I.

It can accordingly be submitted that from an internal viewpoint there is no further practical role for the international community to play in the process than to continue to observe the plenary meetings of CODESA, should it choose, on the same terms as it observed the first plenary meetings during December 1991 and to encourage all South African parties to take part in the negotiations.

With regard to elections The Government suggests the appointment of a task group to submit proposals on the desirability of inviting neutral international observers to satisfy themselves of the fairness of the process. Details of the observer role can be worked out once this principle is accepted. The advantage of such observer presence is the opportunity for independent observation of the electoral process thus eliminating any doubts in the minds of the international community.