

## ADDENDUM B

## WORKING GROUP 4

## SECOND REPORT BY THE RAPPORTEURS - 27 APRIL 1992

**INTRODUCTION**

- 1 This report is an attempt to construct a proposal which might form the basis of consensus for Working Group 4. We need to emphasise three aspects at the outset:
  - 1.1 We believe that the positions put forward by the parties are so divergent that no consensus is possible unless all concerned are willing to make modifications or concessions, as is implied in any process of negotiation. It seems to us that deadlock is the only alternative to a process of mutual concessions.
  - 1.2 We have attempted to accommodate what seem to be the bottom-line positions of all concerned, and have then tried to put together a possible consensus position by suggesting adaptations on issues where there is or may be flexibility. Our proposal can only be accepted if all parties are prepared to modify their positions.
  - 1.3 This proposal does not in any way purport to represent the views of the Working Group. It comprises the views of the rapporteurs on a possible basis for consensus, as mandated by WG4 on 22 April 1992.

**FOUR FUNDAMENTAL STARTING-POINTS**

- 2 All parties accept that a fundamental purpose of Codesa is, as stated in the Declaration of Intent,

'to bring about an undivided South Africa with one nation sharing a common citizenship, patriotism and loyalty, pursuing amidst our diversity, freedom, equality and security for all irrespective of race, colour, sex, or creed; a country free from apartheid or any other form of discrimination or domination.'

The Bophuthatswana government is not a signatory to the Declaration of Intent, and has consistently stated that it reserves its position. This must of course be accepted and respected. However, this does not detract from the fact that the goal set out above is a fundamental goal of Codesa. The Bophuthatswana government will decide on its attitude once it sees what content is given by Codesa to these and other principles in the Declaration of Intent.

- 3 A second fundamental starting-point is contained in the terms of reference of WG4, namely that the signatories to the Declaration of Intent

'recognise the need to provide for the meaningful and democratic participation of all the people living in the TBVC states in the process of drawing up and adopting a new constitution for South Africa as well as in all possible transitional arrangements.'

- 4 A third fundamental starting-point emerges from the discussions in WG4, as was pointed out by the Bophuthatswana government representative on 22 April: since an early meeting of WG4, what has been in issue is not the principle of re-incorporation. None of the parties objects in principle to re-incorporation. What is really in issue is this: if re-incorporation of any TBVC state is to take place, on what conditions is this to happen, at what stage is it to take place, and what will the consequences be.
- 5 A fourth fundamental starting-point emerges from the structure of Codesa itself. This is the premise of the representivity of the parties and their delegates. It has been accepted that the delegates are entitled to speak on behalf of their various constituencies.

#### **THE DECISION WHETHER OR NOT TO RE-INCORPORATE**

- 6 The decision whether or not a TBVC state should be re-incorporated - like the original decision on independence - can not be made unilaterally by the South African government. The active consent of the government of the state concerned is necessary.
- 7 As the attitudes of the TBVC governments are not identical, it follows that the decision whether or not to re-incorporate should be looked at separately in respect of each of the TBVC states.
- 8 The attitude of the RSA government is that the decision whether or not to re-incorporate is that of the government and people of the state concerned. If this approach is followed, the question in each case is:
  - 8.1 what is the attitude of the government concerned? and
  - 8.2 what is the attitude of the people of that state?
- 9 In two cases (Transkei and Venda), the governments concerned have already decided that re-incorporation should take place. They have further stated that in their view, the people of their state have already adequately expressed themselves in favour of re-incorporation.
- 10 The question is then whether this adequately meets the requirements for re-incorporation. This raises the question of who is to determine whether the people of a particular state want re-incorporation. Two options in this regard are:

- 10.1 The government of a state should determine, according to means decided upon by it, whether its people have adequately expressed their wishes; or
  - 10.2 The RSA government should have the right to determine whether the people of a TBVC state have adequately expressed their wishes.
- 11 In our view, the better course is for the TBVC government itself to decide what means should be used to determine whether its people have adequately expressed their wishes. We say this for the following reasons:
- 11.1 When constitutional independence was granted, the SA government left it to the government of the territory concerned to decide whether its people wanted constitutional independence. The same principle should apply here.
  - 11.2 It would be constitutionally anomalous for the RSA government to decide what the people of a TBVC state really want, to attempt to implement or monitor any testing of the wishes of the people in an independent state, or to decide how their wishes should be established.
  - 11.3 As pointed out above, the premise of the Codesa structure is that the TBVC governments speak on behalf of their people. There is no reason to deviate from this premise when one particular aspect - re-incorporation - is being considered.
- 12 If this view is adopted, it would remain the prerogative of any TBVC state to decide (for example) that it will not be satisfied as to the wishes of its people until a referendum has been held.

#### **RE-INCORPORATION, CONSTITUTION-MAKING AND INTERIM GOVERNMENT**

- 13 The constitution-making process is a matter which is being dealt with by WG2. It is this, more than any question of 'extension of the terms of reference', which makes problematic the proposal that a comprehensive referendum covering the RSA and the TBVC states be held on the new constitution. It would be futile for WG4 to base the entire process of re-incorporation on a comprehensive referendum if in fact no such referendum is contemplated by the Working Group which has been given direct responsibility for this matter [see in this regard WG2 term of reference 2.1.4(d)].
- 14 Indications are that WG2 is likely to agree that constitutional principles are to be settled by Codesa, and the terms of the constitution will be finalised by an elected body.
- 15 WG3 is dealing with the question of transitional arrangements or interim government. While that Working Group has not yet made its decisions, indications are that at some stage the functions of interim government will be exercised by an elected body, but that this will not happen immediately.

- 16 The proposals of WG4 with regard to the role of TBVC governments and citizens in both the constitution-making process and interim government should be harmonised with the likely results of WG2 and WG3.
- 17 With regard to the constitution-making process:
- 17.1 The TBVC governments clearly have a role in determining the principles on which a new South African constitution is to be based. This is already happening in Codesa. It can and should continue. Re-incorporation is not necessary for this to take place.
- 17.2 Once a constitution-making body has been elected to finalise the constitution, the TBVC governments will have no role in this process. The same would in fact apply to the SA government. It will be the elected representatives of the people who have this task.
- 18 With regard to interim government:
- 18.1 The question of the role of the TBVC governments in the non-elected phase of interim government or transitional authority is a matter on which WG4 should liaise with WG3. WG4 can not make its own decision without reference to WG3.
- 18.2 We suggest that WG4 should propose, at such a joint meeting, that TBVC governments should be entitled to participate in the non-elected phase of interim government. In that phase, this is the only way in which effect can be given to the terms of reference of WG4, namely that the people of the TBVC states should participate in all possible transitional arrangements.
- 18.3 Where a TBVC government elects to participate in the non-elected phase of interim government, mutuality would require that the interim government should have the same jurisdiction in that TBVC state as it has in the RSA.
- 18.4 Once an interim government or transitional authority has been elected, the TBVC government (like the RSA government) will in principle have no role in interim government. If some residual role is envisaged for existing government structures, the role of the TBVC governments will be a matter for further discussion.

#### RE-INCORPORATION AND CITIZENSHIP

- 19 While there is an obvious link between the questions of re-incorporation and restoration of citizenship, the two questions are not identical. The key differences are these:

19.1 19.1.1 Re-incorporation of any TBVC state requires the active consent of the TBVC government concerned and its people. In contrast,

19.1.2 Citizenship is a matter for the state concerned, and does not require any action by any other state. South Africa has already, in 1986, restored SA citizenship to a large number of TBVC citizens. The RSA Minister of Home Affairs stated that according to conservative estimates, 1,75 million TBVC citizens were entitled to South African citizenship as a result of the Restoration of South African Citizenship Act. The TBVC governments were not required to take any action, or even to give their consent, to this. Neither was any 'testing of the will' necessary. All that was required was the passing of an Act by South Africa.

19.2 19.2.1 Re-incorporation is a complex process, which may well take a considerable period before it is completed, as is shown by the work done by sub-groups 3 and 4. It is very likely that the process of establishing a new constitution will be well advanced before re-incorporation is completed. In contrast,

19.2.2 The restoration of citizenship can be speedily achieved by the enactment of South African legislation.

This difference is directly relevant to the second fundamental starting-point (paragraph 3 above). If the agreed participation by the people (as opposed to the governments) of the TBVC states in drawing up and adopting a new constitution and in transitional arrangements is to await re-incorporation, the people will be excluded from a very large part of the process.

19.3 There is no necessary inconsistency between the continued existence of the TBVC states, and restoration of citizenship. Dual citizenship is a well-known phenomenon, and is already common in South Africa, as a result of the Restoration of South African Citizenship Act.

20 If South African citizenship is now restored to TBVC citizens:

20.1 The people concerned will be able to participate in the constitution-making process and in transitional arrangements, as stipulated by the terms of reference; and

20.2 This will have no consequences for the constitutional status of the TBVC states.

All TBVC citizens will then be placed in the same position as those who have already had their citizenship restored by the Restoration of South African Citizenship Act.

- 21 At the time when constitutional independence was conferred on the TBVC states, the affected South African citizens had no choice whether or not they were to remain South African citizens. Their citizenship was removed by Act of the South African Parliament.
- 22 It would be logically consistent to restore the citizenship of TBVC citizens by a similar mechanism.

### **THE PRACTICAL IMPLICATIONS OF THIS APPROACH**

- 23 If this approach is followed, the practical implications in general are as follows:
- 24 The TBVC governments will continue to participate in the constitution-making process, probably through Codesa, until an elected body is created to finalise the new constitution.
- 25 A constitution-making body will be elected by all South African citizens, which will include citizens of the TBVC states.
- 26 Some or all of the TBVC states will participate in the first (non-elected) phase of interim government. It is likely that only those governments which have already decided in principle in favour of re-incorporation would participate in this phase of interim government, because the interim government would also have jurisdiction in their areas. [This paragraph is entirely tentative, and depends on the outcome of the joint discussions between WG3 and WG4.]
- 27 Once an elected body has taken responsibility for interim government, a key question is the area over which the interim government will exercise authority. This would presumably include all those states which have decided upon re-incorporation. The governments concerned, like the South African government, would have to have the necessary legislation enacted to give effect to this.

### **THE EFFECT OF THESE PROPOSALS ON THE GOVERNMENTS AND CITIZENS OF THE TBVC STATES**

- 28 The Transkei government would
- 28.1 make a formal decision to re-incorporate.
- 28.2 participate in the settling of constitutional principles.
- 28.3 participate in the first phase of interim government, which would also have jurisdiction over Transkei. [Note: Again, we assume for the sake of illustration that this would be the outcome of the discussions between WG3

and WG4. Other options are possible, and the proposals could be modified accordingly.]

- 28.4 participate in the elected phase of interim government
- 28.5 enact the necessary legislation to give effect to 28.3 and 28.4 above.
- 29 The Bophuthatswana government would
- 29.1 participate in the settling of constitutional principles. These principles would contain the basic principles and values of a new constitution, which it wishes to see before making any decision.
- 29.2 then decide whether it wishes to re-incorporate. Unless there is a change in its attitude, it would hold a referendum before making this decision.
- 29.3 decide whether to participate in the first phase and/or the elected phase of interim government, as set out in 28.3, 28.4 and 28.5 above.
- 30 The Venda government would participate on the same basis as Transkei [para 28].
- 31 The Ciskei government would
- 31.1 participate in the settling of constitutional principles.
- 31.2 decide whether, and if so when, to hold a referendum.
- 31.3 decide whether to participate in the first phase and/or the elected phase of interim government on the basis set out in 28.3, 28.4 and 28.5 above.
- 32 The citizens of the TBVC states would participate in the election of the constitution-making body, and in the election of the second phase of interim government, as prescribed in the terms of reference for WG4.

### CONCLUSION

- 33 We submit this report as a possible basis for consensus in Working Group 4. We would be very happy to answer questions on the thinking behind this report, and to explain it further.

Rapporteurs  
27 April 1992