

CISKEI GOVERNMENT

SUBMISSION TO WORKING GROUP 2 REGARDING A CONSTITUTION-
MAKING BODY AND PROCESS

1. The negotiations towards and the drafting of a new constitution for South Africa is a process distinctly separate from the arrangements by which the country should be governed until such time as the new constitution has been finalised and implemented.
2. Working Group 2 has been entrusted with the task of determining, by consensus, the general principles of the new constitution. Despite the many weeks which have been devoted to this mandate, a majority of key issues remain to be addressed and many of the issues which have ostensibly been dealt with need to be revisited if recommendations of real substance, rather than vague generalities are to be formulated.
3. The Ciskei Government is becoming increasingly concerned about this Group's reluctance to report - or even merely to minute - more than a bare minimum of agreement on any key issue. It should, in our opinion, urgently resolve to pursue a maximum of consensus on all important principles and on as many matters of so-called detail as time will allow. In particular, agreement should be secured on the material content of a future Bill of Rights, for there is hardly any significant aspect of the future constitution, from the relationship between the organs of Central Government and the devolution of regional powers to the protection of community and a diversity of individual rights, which will not, to a greater or lesser extent, have to be constitutionally entrenched and judicialised.
4. The decision which has been taken that this Group should now debate its second Assignment is, in our opinion, an unfortunate diversion from its principal task. We also perceive the proposals that the constitution-making assignment should be handed on to an elected constituent assembly or constitutional conference as an attempt to remove the process to the field of political contest and to abort, over hastily, the process of negotiation by consensus. Codesa, and this Working Group in particular, has not remotely reached the stage where negotiation has been exhausted and where the resolution of intractable disagreement has to be surrendered to majority decision-making.
5. The fact that the negotiation process has^{not} been exhausted is indeed fortunate, for there is no prospect, under the prevailing conditions of violence and civil unrest, of a free and fair election being held for a constitutional conference or, for that matter, any interim legislative assembly. An election during the present state of violence, unrest and intimidation will not only exacerbate

existing tensions but would also force and lock the parties at Codesa into fixed positions which would stultify the already limited flexibility which we have experienced in our deliberations. Any elected constitution-making body would, moreover, also tend to be more exclusive than CODESA and could not be expected to honour the spirit of negotiation to which all parties have thus far subscribed.

6. The TBVC countries, unless they are prematurely re-incorporated, would probably be excluded from participation in the finalisation of a new constitution by a South African constitutional conference. On this account as well, albeit it one of self-interest, the Ciskei Government cannot but urge this Working Group to proceed as far as possible with the formulation of a new constitution. If this Group is somehow not regarded as sufficiently competent or legitimate to undertake and complete the assignment, Codesa should appoint another representative task force.
7. No one, to our knowledge, has questioned the legitimacy of the formulation of the general principles of the new constitution by this Working Group. Since, in the prevailing political climate, there have to be serious doubts concerning the attainability and efficacy of a representative elected constitution-making body, Working Group 2 of Codesa should return with the greatest vigour to its First Assignment. The legitimacy of its efforts and results, like those of an elected constitutional conference, will ultimately be legitimised by popular referendum.

24 March 1992