BACKGROUND DOCUMENTATION ON

REPEAL OF DISCRIMINATORY LEGISLATION

IMPEDING FREE AND FAIR ELECTIONS

VOLUME 1

CODESA II DOCUMENTATION

7 SEPTEMBER 1993

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

27 APRIL 1992

1. THE TERMS OF REFERENCE

The Terms of Reference of SGI are the following:

1.1 "Completing the reconciliation process"

a) The finalisation of matters relating to the release of political prisoners 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 SGI meeting on 11 February 19

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 a 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. 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 greed (1112192) 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 1112192, for the proposal that the principle of a general amnesty should be considered.

2.6 'The SG agreed (1112192) 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 (2114192) that, with the exception of the reports on the bilateral meetings between the South African Government and the ANC, any further discussions in SGI 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 multiparty 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 justifiable 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 I

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, 2)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 I July 1963 but before I 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 I 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 I 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 i 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.

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

1. REFUGEES

1.l 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. (a) of the minutes 21/4/92

2.3 The Parties agreed to refer paragraph 5.3.2.2 of the minutes of 21/14/192 to their principals.

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

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 I

Working Group I 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 - Combating 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. Offences and Penalties

The task force could not agree on a suggestion that the ambit of the offences 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.

WGSC	:	10 meetings;
Sub-Group I	:	8 meetings;
Sub-Group 2	:	10 meetings;
Sub-Group 3	:	7 meetings;
Task Group	:	3 meetings

3.2 The following submissions were received:

3.2.1 Internal: 98
3.2.2 External: 102

Oral submissions:

3.2.3 Dr John Hall, chairperson of the National Peace Committee of the NPA.

3.2.4 Dr Antonie Gildenhuys chairperson of the National Peace Secretariat of the NPA.

3.3 Matters discussed, agreed on and outstanding are dealt with below according to the specific Terms of Reference.

4 (a) The finalisation of matters relating to political prisoners and political trials.

4.1 The matter was extensively discussed by Sub-Group I on 11 February 1992.

4.2 It <u>was agreed</u> that the release of political prisoners is a priority in the completion of the reconciliation process.

4.3 It <u>was agreed</u> that, in view of the existing bilateral agreements between the SA 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.

4.4 At subsequent meetings of the SG the SA Government and the ANC reported that discussions between them as envisaged in paragraph 4.4 were continuing satisfactorily and that a report will in due course be made to WG1. To date no such report has been received by WG1.

4.5 It was further agreed that, with the exception of the reports on the bilateral meetings between the SA Government and the ANC, any further discussions on the issue of political prisoners will be conditional on submissions being received on the current existence and detention of political prisoners.

5. (b) The return of exiles and their families

This matter was briefly discussed in SG1 and referred to bilateral discussions between the SA Government and the ANC [refer paragraph 4.4 above].

6 (c) The amendment and/or repeal of any remaining laws militating against free political activity, including the elimination of all discriminatory legislation.

6.1 Laws militating against free political activity.

6.1.1 Approach

It was agreed that the approach to the issue of laws militating against free political activity should be the following:

6.1. 1. 1 Firstly, there needs to be acceptance of the principle of free political activity.

6.1.1.2 Secondly, there needs to be agreement on the definition of general principles underpinning/guidelines for free political activity.

6.1.1.3 Thirdly, attention must be given to specific pieces of legislation.

6.1.2 General principle

Regarding 6.1.1.1 it was agreed that:

6.1.2.1 a climate for free political participation is an essential element of the transitional phase towards and in a democratic South Africa; and

6.1.2.2 the process of democracy requires that all participants in the political process should be free to participate peacefully in that process without fear and on an equal footing and on the basis of equality with other participants.

6.1.2.3 The South African Government and the NP expressed their reservations on paragraph 6.1.2.2 reserving their point of view until a full resolution dealing with principles governing free political activity was debated.

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

6.1.3.1 There was agreement on the necessity to formulate a definition of, or the principles underpinning, free political activity.

6.1.3.2 Various oral and written submissions on the content of such definition/principles were made and a motion tabled.

6.1.3.3 No consensus has yet been reached on a definition of/general principles underpinning free political activity.

6.1.4 Specific measures

Regarding 6.1.1.3 various oral and written submissions were received about legislative measures which may offend against free political activity. The submissions dealt with the following broad categories of legislation:

6.1.4.1 Emergency measures;

6.1.4.2 Security measures;

6.1.4.3 Measures affecting the funding of political Parties and organisations;

6.1.4.4 Measures affecting the freedom of assembly and association;

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

6.1.5 Task group

A task group was appointed to inquire into the reform of Emergency and Security legislation. The task group met several times and made appropriate recommendations.

6.1.6 Emergency Legislation

6.1.6.1 It was agreed that:

6.1.6.1.1 A State of Emergency should only be declared on the advice of a multi-party interim executive/cabinet/interim government council. This would only take effect once such a body has been instituted;

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

6.1.6.1.2.1 whether the factual situation existing at the time justifies the declaration of the State of Emergency or unrest area in terms of criteria laid down in the Public Safety Act, 1953;

6.1.6.1.2.2 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;

6.1.6.1.3 The provision in the Public Safety Act, 1953, that a State of Emergency can be declared retrospectively, should be repealed.

6.1.6.1.4 It is desirable to include in the Public Safety Act, 1953:

6.1.6.1.4.1 Extended provisions for Parliamentary control of a State of Emergency;

6.1.6.1.4.2 A provision for certain non-derogable rights;

6.1.6.1.4.3 Provisions for certain procedural controls over detention without trial.

6.1.6.2 It is <u>recommended</u> that the timing of the implementation of the various agreed proposals be negotiated as a matter of urgency amongst the parties.

6.1.7 <u>Security Legislation</u>

<u>It was agreed that:</u>

6.1.7.1 Special measures are necessary to deal with the threat to the public peace and order during the transitional period;

6.1.7.2 In the light of 6.1.7. 1, the Internal Security Act 1982, and other relevant

legislation be scrutinised with a view to the substitution of the said provisions so as to bring legislation in line with the criteria mentioned in 6.1.7. I., and to remove the emphasis from national security

6.1.7.3 A task group be appointed to undertake the task referred to in 6.1.7.2, taking cognisance of relevant discussions by and submissions to SG1.

6.1.8 Procedure

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

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

6.1.8.2 amendment/repeal of offending legislation combined with the enactment of an interim statute dealing with freedom of association, assembly and speech against which any outstanding offending measures may be tested.

6.1.8.3 the enactment of an Interim Bill of Rights against which offending legislation can be tested;

6.2 Discriminatory Legislation

6.2.1 It was a reed that the following categories of discriminatory legislation can be identified and that individual legislative measures within each category should be dealt with in the manner outlined as being appropriate for that category:

6.2.1.1 Discriminatory legislation which impedes the creation of a climate for free political activity. Such legislation must be identified by WG1 and amended/repealed as soon as possible.

6.2.1.2 Discriminatory legislation which emanates from the nature of the tricameral constitution. This should be dealt with at the time and in the manner decided on by negotiation on the phasing out of the tricameral constitution and the own affairs dispensation.

6.2.1.3 Discriminatory legislation which need to be amended/repealed to support and enhance the process of democratisation. These should be identified as soon as possible and suitably amended/repealed.

6.2.1.4 Discriminatory legislation which needs to be removed in the interests of society. These should be dealt with at the relevant stage of the democratisation process.

6.2. 1.5 Discriminatory legislation which would infringe upon an agreed Bill of Rights. These should be dealt with through the procedures that stand to be created in a new constitution which will include a justifiable Bill of Rights.

6.2.2 The WG received proposals on discriminatory legislation which falls in the above categories and which should be amended and/or repealed. The discussions on these

proposal are incomplete and it was agreed that the task group constituted in terms of para 6.1.7.3 above, or any other mechanism set up by CODESA, discuss the proposals regarding discriminatory legislation which falls within categories 6.2.1.1 and 6/2/1/3 above with a view to making appropriate recommendations. Such task group or appointed body should report to Codesa or any other appropriate executive body that may be set up by Codesa.

7 (d) Political Intimidation "Any action or set of actions committed by an individual, organisation, political party, government represented at CODESA, as well as the self governing territories or any agency of such government or self governing territory, that is designed by the use or threat of use of force or violence to disrupt or interfere with the legal rights of an individual, for instance; the Right to freedom of expression or opinion; the Right of freedom of association; the Right of freedom of movement.

It was agreed that:

7.1 All political disputes between parties be resolved peacefully.

7.2 Political Intimidation be defined as follows:

Any action or set of actions committed by any individual, organisation, political party, government represented at CODESA, as well as the self-governing territories or any agency of such government or self-governing territory, that is designed by the use or the threat of use of force or violence to disrupt or interfere with the legal rights of an individual, inter alia:

7.2.1 the right to freedom of expression or opinion;
7.2.2 the right of freedom of association;
7.2.3 the right of freedom of movement.

7.3 In particular, the following shall be considered forms of political intimidation:

7.3.1 to kill, injure, apply violence to, intimidate or threaten any other person or his/her political beliefs, words, writings or actions;

7.3.2 to remove, disfigure, destroy, plagiarise or otherwise misrepresent any symbol or other material of any other political party or organisation;

7.3.3 to interfere with, obstruct or threaten any other person or group travelling to or from or intending to attend, any gathering for political purposes;

7.3.4 to seek to compel, by force or threat of force, any person to join any party or organisation, attend any meeting, make any contribution, resign from any post or office, boycott any occasion or commercial activity or withhold his or her labour or fail to perform a lawful obligation; or

7.3.5 to obstruct or interfere with an official representative of any other political party or organisation's message to contact or address any group of people;

7.3.6 the possession, carrying or displaying of dangerous weapons or firearms by members of the general public when attending any political gathering or meeting.

8 (e) The termination of the use of military and/or violent means or the threat thereof to promote the objectives/views of a political party or organisation.

ANC SUBMISSIONS TO SUB-GROUP 1 OF WORKING GROUP 1 ON LAWS THAT MILITATE AGAINST A CLIMATE FOR FREE POLITICAL ACTIVITY

One of the main tasks of Working Group 1 is to look into the amendment and/or repeal of any remaining laws militating against free political activity. First and foremost, from the ANC point of view, it is a gross misnomer to talk of "remaining laws militating against free political activity". The regime of repressive legislation reminiscent of the old order of apartheid basically remains intact; all that has happened since the 2nd of February 1990 is that the South African Government has tinkered with some aspects of legal reform with particular reference to the Internal Security Act of 1982. Secondly, it might well be possible that the TBVC territories too have repressive and obnoxious laws that have to be amended and/or repealed if we are to create the requisite political climate throughout the length and breadth of our country.

The ANC believes that most, if not all, the so-called security legislation and generally all laws that violate fundamental freedoms need to be repealed or amended as the case may be. While the ANC acknowledges that even a future government will need some form or the other of security legislation based on universally accepted democratic norms and principles, we believe there is a fundamental distinction between such security legislation and repressive legislation such as might have been required to buttress the system of apartheid.

The remarks that follow hereunder are not intended to be an exhaustive exercise but are merely intended to put across the viewpoint of the ANC in this regard. Due to time constraints, the

situation in the TBVC territories has not been studied in any kind of depth as yet and therefore, wherever possible, the TBVC legislation will only be alluded to in passing.

1. SECURITY LEGISLATION

1.1 The Internal Security Act 74 of 1982 (as amended)

The ANC strongly feels that this Act, in its entirety, should be repealed, for it is not consistent with the emergent concept of a new democratic South Africa. As indicated above, it is also inconsistent with basic universal norms and principles and completely negates the required climate for free political activity. To illustrate this, we look a the following aspects of the legislation:

1.1.1 Banning of Organisations

1.1.1.1 Section 4 (1) (as amended by Section 5 (a) of the Internal Security and Intimidation Amendment Act, No. 138 of 1991) still allows the Minister of Justice to declare by notice in the Gazette any organisation to be an unlawful organisation

1.1.1.2 The Minister of Justice may exercise this awesome power "without notice to the organisation in question". An affected organisation only becomes aware of the Minister's decision to proscribe it when it reads the notice in the Gazette and it is not given notice of the Minister's intention to do so. It thus cannot mobilise the courts and acquire an interdict restraining the Minister from banning it, for instance. The reasons for the Minister's action may be given to any person who proves to the satisfaction of the Minister that he was an office bearer of the organisation in question only subsequently, in terms of Section 10 (1) of the Act (as amended by Section 7 of Act 138 of 1991).

1.1.1.3 The Minister proscribes an organisation if he "has reason to believe" that the affected organisation indulges in certain practices to achieve certain objectives. If, for instance, he has reason to believe that an organisation uses mass action, which causes disturbance of some sort, to "induce the Government of the Republic to do or to abandon a particular standpoint", (eg to cancel VAT or zero-rate certain basic foodstuffs) he can declare it to be an unlawful organisation.

1.1.1.4 The Minister's decision has dreadful implications for both the organisation and the individual members (and non-members) of the unlawful organisation.

1.1.1.4.1 In terms of Section 13 (1) (b) of the Act (as amended by Section 10 of Act 138 of 1991) the organisation in question ceases to have a legal existence and all its property, including its rights and documents, vests in a liquidator designated by the Minster. The liquidator eventually winds up the organisation and whatever balance remaining after the payment of its debts must be paid into the State Revenue Fund in terms of Section 14 (3) of the Act.

1.1.1.4.2 In terms of Section 13 (1) (a) (read with Section 56 (1) (a)) of the Act), it is a criminal offence to carry on the activities of the organisation in question, or to perform certain prescribed

acts which would constitute a continuation of its affairs. Under Section 56 (1) (a) (as amended by Section 22 of Act 138 of 1991) this offence carries a sentence of imprisonment of up to ten years.

1.1.1.5 The ANC is fully aware that the Minister's action under Section 4 (1) of the Act is subject to some sort of judicial review. This, in terms of Section 12 (1) (as amended by Section 9 of Act 138 of 1991), can now be done within three months from the date of the Minister's notice under Section 4 (1). However, in terms of Section 12 (2), the courts have no jurisdiction to suspend or in any manner postpone the operation of the Minister's notice declaring an organisation to be an unlawful organisation under Section 4 (1). No matter how long the court proceedings take, the organisation in question remains banned, with all the consequences and implications referred to above.

1.1.1.6 Section 46 of the Act empowers the Minister and magistrates to ban and/or impose restrictions on meetings and gatherings. This, among a few other laws, gives government officials extensive, if not absolute, powers of control over meetings, gatherings, processions and other forms of assembly.

1.1.1.7 Sections 47 and 48 respectively give power even to low-ranking police officers of the rank of Warrant Officer to close places to prevent banned meetings and disperse crowds, and the latter (see sub-section (2) read with Section 49 of the Act) the victims of police brutality in the townships, know best what this license to injure, maim and even kill entails and will argue that the internal Security Act in its entirety must go. The same applies to the Gatherings and Demonstrations Act, Number 52 of 1973 and the Demonstrations In or Near Court Buildings Prohibitions Act, Number 71 of 1982.

1.1.1.8 The effect of all these laws is that one political player, the government, is legally entitled to make deep inroads into the freedom of assembly, thus making it the final arbiter of the right to gather in public or private places.

1.1.2 Detention of Individuals

1.1.2.1 The ANC takes note of the fact that in terms of Section 12 of Act 138 of 1991, Section 28 of Act 74 of 1982, which granted the Minister power to issue a notice for the detention of any person for such a period as he may deem fit, has been repealed. In short, this severe power of indefinite preventive detention, which was used even in times of peace and without any need for the declaration of a state of emergency, has since been done away with. We further note that Section 50A of the Act, which allowed for the so-called 180-day detention at the instance of the SA Police, has since been repealed by Section 18 of Act 138 of 1991.

1.1.2.2 However, the Act still retains the power of detention. People who have committed or intend or intended to commit so-called security offences or who withhold from the SAP information relating to the commission of such offences, may, under Section 29 (1) of the Act (as amended by Section 13 of Act 138 of 1991), be arrested without warrant and be detained for

interrogation for a period not exceeding ten days, and, with the approval of judges of the Supreme Court, for such further period or periods not exceeding ten days or not exceeding ten days each.

1.1.2.3 A cursory reading of this provision shows that, far from intending to reinstate habeas corpus, the Supreme Court is expected, in terms of Section 29 (3) (a) (as amended) merely to affected persons. No appropriate judicial remedy is created for the victims or for those who have an interest in their welfare to challenge the decision and action of the SAP in this regard. Furthermore, once such applications are made, the detainees are detained, pending the outcome of the applications, as if such applications had been granted, according to Section 29 (3) (c) of the Act. In short, the procedure is capable of abuse by the SAP.

1.1.2.4 Besides, this insidious semblance of the involvement of the judiciary in matters of detention of persons requires the Supreme Court to act contrary to the basic principle of audi alteram partem (hear the other side) and creates the illusion rather than the substance of judicial protection.

1.1.2.5 The Act retains short-term preventive detention under Section 50 (1) and (2), which allows a police officer of or above the rank of Warrant Officer to arrest or cause the arrest of any person without warrant and cause such a person to be detained for an initial period of 48 hours and thereafter, with a warrant from a magistrate, for a period not exceeding 14 days, including the initial period of 48 hours. This serious invasion of a citizen's right to personal freedom at the instance of a low-ranking police officer cannot be allowed. From a due process point of view, the procedure for the extension of detention provided for in this Section is not satisfactory at all. The Act makes no provision for the detainees to be heard, and the magistrate's decision to issue a warrant for further detention is based essentially on the subjective opinion of the arresting police officer.

1.1.2.6 The Act retains the provision for the detention of witnesses at the instance of the attorney-general under Section 31. As should be obvious, this form of detention covers even people whose only offence, if any, is to be thought to be knowing about subversives, though they themselves are entirely innocent. The person so affected is also subject to a "no-access" provision in terms of Section 31 (4) of the Act. Section 31 (7) excludes the courts' jurisdiction in respect of the person detained in terms of Section 31 (1).

1.1.2.7 In terms of Section 30 of the Act, a person arrested on a charge of having committed crimes specified in Schedule 3 of the Act may, at the instance of the attorney-general, be denied release on bail or warning. In such cases the power of the courts to release people on bail or warning is removed. This is a gross violation of both personal freedom and the right to a fair trial, all at the instance of a non-judicial official.

1.1.3. Security Offences

1.1.3.1 Section 54 of the Internal Security Act has created special security crimes (such as Terrorism, Subversion and Sabotage) that cover almost the entire spectrum of political, social and economic activity, most probably on the assumption that the established common-law crimes for the protection of the state are inadequate for securing the apartheid constitutional and political

order. The Section seems to have criminalised virtually all possible activity, including strikes, school boycotts and even ordinary malicious damage to property that may ensue in the context of a call for mass action. As South Africa struggles to emerge from the quagmire of apartheid, it is imperative that these crimes should be abolished so that we can revert to the old common-law crimes intended to protect the new representative and democratic state.

1.2. The Public Safety Act, Number 3 of 1953

1.2.1 This Act empowers the State President to declare by proclamation in the Gazette that a state of emergency exists within the country or within any part thereof. In terms of Section 2 (1) of the Act, he may issue such a proclamation if, in his opinion, there is a serious threat to the safety of the public or the maintenance of public order which cannot be dealt with by the ordinary law. The power to issue or withdraw the proclamation is within his discretion and is not subject to legal challenge in the absence of bad faith on the part of the State President. He is also entitled to make such regulations as he may deem necessary or expedient to deal with, as well as terminate the state of emergency. The State President thus assumes extreme powers to qualify or nullify basic human rights and freedoms, and the security forces are, from experience, literally freed to act indiscriminately and with impunity, with very little external control over the activities of the state.

1.2.2 This Act too should go in its entirety. The ANC submits that, in the interim, a law could be passed to deal with the issue of emergencies much more broadly, as opposed to leaving such matters within the subjective discretion of the State President and his government.

1.2.3 The same applies to the Public Safety Amendment Act, Number 67 of 1986, which authorises the Minister of Law and Order to declare areas to be unrest areas and to apply in such areas such regulations as he may deem necessary to control the situation. The declaration and the regulations are effective for three months and may be renewed with the consent of the State President. This Act and the principal Act produce two near-absolute despots in respect of the macro- and micro-emergencies.

1.3 The Situation In The TBVC Territories

1.3.1 With regard to the TBVC territories, only the situation in Boputhatswana has been looked into so far.

1.3.2 Boputhatswana has the Internal Security Act, Number 32 of 1979, which, in many respects, is similar to the old South

1.3.3 In terms of Section 31 (5) of the (Boputhatswana) Internal Security Act, all political activity, including the holding of meetings and gatherings, is dependant on registration as a political party under the Electoral Act. Those organisations and political parties that are not registered as political parties should apply to the Minister of Law and Order to hold meetings.

1.3.4 Furthermore, all people who are not citizens of Boputhatswana are not allowed to participate in political activity. If they attend, address, speak at or in any way whatever participate in a

meeting, the meeting is unlawful and both the convenor thereof and the non-citizens are liable to pay a fine of R6 000,00 or to a sentence of imprisonment of five years or both.

1.3.5 One major implication of this is that all the participants at CODESA, with the exception of the ruling Christian Democratic Party, are banned in Boputhatswana and can therefore not have access, legally, to their supporters and potential voters, unless they acquire permission from the Minister of Law and Order. Otherwise, they will be guilty of an offence.

1.3.6 It is clear that unless and until this Act is repealed in its entirety or is at the very least substantially amended, it would be absurd to talk of a climate of free political activity where all parties and organisations participate on an equal footing and without fear.

2. THE MEDIA, INFORMATION AND LEGISLATION

2.1 The Publications Act of 1974

2.1.1 The main statute affecting the free flow of information and opinion is the Publications Act, Number 42 of 1974. This Act allows for the banning of material on the grounds, inter alia, that it is prejudicial to the safety of the state, to general welfare or to peace and good order. The material may also be declared undesirable if, according to the Act, it causes harm to the relations between any sections of the inhabitants of the Republic of SA. Banning of material on the basis that it is undesirable is within the discretion of a committee consisting of not less than three persons drawn from a list compiled by the Minister of Home Affairs. In other words, the government in power, through its nominated committees and through its appointment of the members of the appeal board which deals with appeals against committee decisions, is in control of the awesome power of censorship.

2.1.2 Production, importation, distribution and even mere possession of undesirable material are criminalised by the Act. Political materials are the hardest hit of all the targets of the banning orders allowed under this Act.

2..2 Other laws that severely restrict the free flow of information and opinion are, among others, the Defence Act, Number 44 of 1957 (Section 101 (1) introduced by Section 7 of the Defence Amendment Act, Number 35 of 1977, as well as Section 118 (1) (a) and (b), and Section 118 (2)), the Police Act, Number 7 of 1958 (Section 27B (1)) and the Prisons Act, Number 8 of 1959 (Section 44 (1) (f)).

2.3 The Protection of Information Act, Number 84 of 1982, has negated both the freedom of expression and the right to information as its general effect is to punish the unauthorised disclosure of virtually the whole range of official government information. To disclose, publish, retain and neglect and/or fail to take care of official government information, or to act so as to endanger its safety, constitutes an offence under section 4 (1) of the Act. If the accused is found guilty, he is liable to a fine of up to ten thousand Rand or imprisonment of up to ten years or both a fine and imprisonment. Section 3 of the Act creates the offence of espionage which relates to gathering

certain information for the purpose of transmission to a foreign state. The penalty for such an offence is imprisonment for up to twenty years.

2.4 The National Key Points Act, Number 102 of 1980, is another anti-disclosure statute. It empowers the Minister of Defence to declare any place or area to be a National Key Point or a National Key Points Complex as the case may be. The Minister of Defence need not make public his decision to declare a place or an area to be a National Key Point or a National Key Points Complex. In general, the disclosure of information relating to a National Key Point, or the gathering of such information with the view to foreign communication, carries the drastic penalties provided for by the Protection of Information Act of 1982 referred to above.

2.5 Numerous other anti-disclosure provisions exist. Section 11A of the Armaments Development and Production Act, Number 57 of 1968, Section 8A of the National Supplies Procurement Act, Number 89 of 1970, and Sections 68, 69 and 70 of the Nuclear Energy Act, Number 92 of 1982, are examples of such provisions.

2.6 The ANC is of the view that all the laws that negatively impact upon the free flow of information and opinion should be repealed entirely or amended as the case may be.

3 **FUNDING OF ORGANISATIONS AND THE LAW**

3.1 The SA statute book contains laws and provisions that prohibit the reception of funds by organisations.

3.1.1 The first such statute is the Prohibition of Foreign Financing of Political Parties Act, Number 51 of 1968. Section 4 of this Act criminalises the foreign financing of political parties.

3.1.2 The next important statute is the Affected Organisations Act, Number 31 of 1974. The main purpose of this Act is to prevent organisations declared "affected" under its terms from receiving funds from foreign sources. This is done by the State President under Section 2 of the Act. It is an offence under the Act to ask for canvass foreign money for an affected organisation, or to receive or deal with foreign money for and on behalf of such an organisation. The Minister of Justice is authorised to appoint an officer under Section 6 (1) who has extensive powers of entry, search, seizure and questioning under Section 6 (2). Obstructing or refusing to assist such an officer is an offence punishable under Section 7 of the Act.

3.1.3 The Fund-raising Act, Number 107 of 1978t is also of particular interest. First and foremost, it provides in Section 1 (2) that for the purposes of the statute, the funds solicited, accepted or obtained from any person or organisation being outside the RSA shall be deemed to be collected from the public within the RSA. Secondly, a collection of contributions without permission or a collection not done in accordance with this statute, is strictly prohibited by Section 2. The granting of the requisite permission is left to official discretion. Political organisations can collect only from their own member in terms of Section 33 (e) of the Act. Political parties (which

are not defined in the Act) are also exonerated from the provisions of this Act in terms of Section 33 (f), and can therefore, presumably, raise funds through collecting from the public.

3.1.4 In 1989 the tri-cameral Parliament passed the Disclosure of Foreign Funding Act, Number 26 of 1989, the aim of which is to regulate the disclosure of funding of certain organisations from sources outside the RSA. In terms of Section 3 (1) of the Act, organisations and persons may be declared reporting organisations or persons as the case may be. Section 8 creates offences around failure and/or refusal to comply with the provisions of the Act, which carry heavy penalties.

3.1.5 The ANC is of the view that all these laws were designed to cripple the enemies of the apartheid state by frustrating their efforts to raise funds internally as well as externally. What is disturbing is that the ruling party, a participant in the unfolding political processes, reserves the right to decide which organisations shall, for instance, be declared to be affected and/or reporting organisations for purposes of these laws.

3.1.6 At the same time, tucked away amongst all these laws is the Secret Services Account Act, Number 56 of 1978. This Act provides for the creation of a funds out of moneys appropriate by Parliament, to support secret government schemes and activities. Access to vouchers, auditing and even the auditor-generals report in respect of funds from such an account among others, may be severely restricted/limited by administrative fiat. There is a perception that such funds are being, and have always been, used to cripple and undermine the enemies of the apartheid state within the mass democratic movement; there have also been allegations that such funds have also been used to fan the flames of violence that are currently engulfing our black townships.

3.1.7 Needless to say, all these laws will have to be repealed in their entirety or, at the very least, amended so that we can have a climate where all parties and organisations can operate freely, without fear, and on an equal footing. Left in the hands of one participant here at CODESA would provide such a party with a lethal weapon it can be tempted to use when the chips are down. To level the playing field and also allay the fears and concerns of the victims of the nefarious secret schemes and activities of the state, it is important that this be done as a matter of extreme urgency.

GROUP 1, SUB-COMMITTEE I SUBMISSION BY THE DEMOCRATIC PARTY TO CODESA, WORKING

RE : REPEAL OF ANY REMAINING LAWS MILITATING AGAINST FREE POLITICAL ACTIVITY

1. The current negotiation process aimed at creating a non-racial democratic South Africa, presupposes the transformation of armed resistance against the apartheid state into peaceful political activity aimed at the successful conclusion of the negotiation process and the creation of a non-racial government. For this to be achieved successfully, political parties and organisations within the broader South Africa must be able to operate freely and without hindrances.

2. Far political organisations to operate freely, they must be able operate freely, they must

be able to:

(i) organise freely

(ii) raise funds from whatever source they can legitimately according to generally accepted obtain such funds.

(iii) secure for their members freedom from harassment by the state or other political organisations.

(iv) have free access to information

(v) have free access to the media and the freedom to communicate their policies in whatever way they deem fit, including the freedom to assemble.

Legislative measures which inhibits political organisations in these functions, must be abolished or amended to reflect internationally accepted norms.

3. The Democratic Party believes that the following principles should thus be accepted as guidelines in the evaluation of existing legislation inhibiting political activity:

(i) Every political organisation should have the freedom to organise and raise funds from whatever sources it deems fit.

(ii) Freedom of association and assembly must be available to all.

(iii) There must be a free flow of and access to information and all political organisations must have equitable access to the media.

(iv) Political organisations and their members must be free from harassment by the state or other political organisations.

(v) The due process of law must not be excluded by any legislative measures affecting political organisations.

4. The following are examples of statutes or sections in statutes which may militate against the above principles. (It does not endeavour to be an exhaustive catalogue and further submissions will in due course be made to this Working Group).

FREEDOM TO ORGANISE AND RAISE FUNDS

1. Disclosure of Foreign Funding Act, 26 of 1989.

This Act provides for the declaration by the appointed Registrar of any organisation or person as a reporting organisation or person. When so declared, that organisation or person is obliged to report any money received from outside the Republic to the Registrar and also inform him about the purpose for which that money is to be used.

2. Affected Organisations Act, 31 of 1974

This Act provides for the prohibition of the receipt of money from abroad by organisations declared by the State President to be affected organisations and for the confiscation of such monies already possessed by such organisations which have been declared affected organisations.

3. The Prohibition of Foreign Financing of Political Parties Act, 51 of 1968

This Act prohibits the receipt of financial assistance by political parties from sponsors abroad.

FREE FLOW OF INFORMATION AND ACCESS TO THE MEDIA

1. Correctional Services Act, 8 of 1959, s.44(1) (f) and (g).

Sub-section (f) places an onus on anyone who writes anything about prisons to prove the truth thereof. The equivalent section in the Police Act has already been repealed. Sub-section (g) prohibits the publishing of any statement etc. by a prisoner unless such was admitted as evidence during his trial or unless the Commissioner has given his approval.

2. Criminal Procedure Act, 51 of 1977, Section 205.

Section 205 can be used to force reporters to disclose information or confidential sources relating to any alleged offence or to face imprisonment.

3. Newspaper and Imprint Registration Act, 63 of 1971, ss.3, 8A.

The relevant sections deal with the registration of newspapers and the lapse, under certain circumstances of that registration. The Act creates the possibility that prohibitive registration fees can be prescribed by the relevant minister.

4. Registration of Newspapers Amendment Act, 98 of 1982.

Section 1 of this Act gives certain powers to the minister to cancel the registration of a newspaper published by a publisher who is not a member of the Newspaper Press Union of South Africa.

5. Electoral Act, 45 of 1979, Section 143.

This section prohibits the publication of opinion polls during elections.

6. Armaments Development and Production Act, 57 of 1968, s.11A.

This section contains a prohibition on the disclosure of certain information relating to the acquisition, development, etc. of armaments.

7. National Key Points Act, 102 of 1980, Section 10.

   Prohibition on publication of certain information relating to places declared as National Key Points.

8. Petroleum Products Act, 120 of 1977, Section 4A.

   Prohibition on disclosure of information relating to the source, storage, etc. of petroleum products.

9. Broadcasting Act, 73 of 1976, Sections 11 and 27(g).

10. Post Office Act, 44 of 1958, Section 24, 27, 29 and 113.

11. Defence Act, 44 of 1957, Section 118.

FREEDOM OF POLITICAL PARTICIPATION AND ASSEMBLY

1. Demonstrations in or near Court Buildings Prohibition Act 71 of 1982.

   The prohibition of gatherings in this Act is too widely formulated.

2. Internal Security Act, 74 of 1982, Section 46.
   This contains a magisterial and ministerial power to prohibit gatherings.

FREEDOM FROM HARASSMENT

1. Prevention of Public Violence and Intimidation Act, 139 of 1991.

   The ministerial power to issue regulations should be more narrowly defined.

2. Admission of Persons to the Republic Regulation Act, 59 of 1972.

   This Act regulates, inter alia, admission into and removal from the country of certain persons. Section 11 ousts the courts' jurisdiction in determining whether one is a prohibited person or not. Section 13 lists amongst the prohibited persons, one who is unable to read and write any European language.

3. Secret Services Account Act, 56 of 1978.

This Act enables the Minister of Finance to make money available in a secret account for services of a secret nature of determined from time to time.

4. Internal Security and Intimidation Amendment Act, 138 of 1991, Sections 4 and 29.

   Section 4, as amended, still provides for the banning of organisations by the Minister if he has reason to believe that the organisation behaves in a certain manner.
   Section 29 provides for detention without trial for a period of 10 days, which period can be renewed by a judge on application by the Commissioner of Police.

5. Internal Security Act, 74 of 1982, various sections.

6. Public Safety Act, 3 of 1953.

7. Security, Intelligence and State Security Council Act, 64 of 1972.

8. Bureau for State Security Act, 104 of 1978.

Legislation of a discriminatory nature is not included in the above catalogue.

AFRICAN NATIONAL CONGRESS

Submission to Sub-Group 1 of Working Group I
"Completing the Reconciliation Process" - Levelling the Political Playing Fields:
The amendment and/or repeal of laws militating against free political activity including the elimination of all discriminatory legislation.

DO WE NEED AN INTERIM BILL OF RIGHTS?

1. This Sub-Groups has spent three sessions identifying the areas where existing legislation may need the intervention of the Codesa process. In this exercise, particular pieces of legislation have been identified and some broad principles concerning the approach to different areas have been projected by some delegations. The African National Congress has submitted a document which identifies areas of intervention and has proposed the extent of changes in the law to ensure that there is a proper climate for free political activity.

2. Two different approaches can be identified as to the manner and approach to the repeal of or amendment to illiberal or racist legislation.

3. Firstly, there is a group of delegates which would support the identification of as many provisions of the existing law and regulations as possible and propose their repeal or amendment. This group recognises that such an exercise cannot be comprehensive in its

sweep and could be immensely time-consuming because a discussion in the Sub-Group would be required on each item of legislation.

4. Therefore, this group of parties and organisations proposes that provision should be made for broad legislation for certain agreed civil and political rights and freedoms during the transition period.

5. The African National Congress fully supports this approach. However, it considers that it would be unfortunate to refer to this as an Interim Bill of Rights, which is the second approach, propounded in this Sub-Group and in another Working Group. Our reasons are as follows:

6. The issue of a bill of rights belongs to the stage of constitution-making and not to the interim period which is generally expected to be of limited duration. Codesa has no authority to draft a document of a constitutional nature; it can only set out constitutional principles, a task which it is performing with credit. Extensive constitutional amendments can only confuse the public and create the impression that Codesa is doing the work that the Constituent Assembly ought to do.

7. A Bill of Rights is a complex and complicated package and should not be pre-empted at this stage. It is a key structure of the Constitution and its adoption requires open debate, where the public can be involved through their submissions. As one testimony to the Law Commission put it, "Unless the people take it to their hearts, no Bill of Rights will serve or even survive ... To work, the Bill of Rights must gain acceptance from the broad majority of South Africa's [people] and the way it is drafted, presented and legislated must at all times take this need into account."

8. The issue of legitimacy cannot be escaped. Since the Bill of Rights will provide for fundamental or a higher law, it can only be promulgated as part of a constitution-making process where a written constitution received a popular mandate. It does not mesh easily into the present constitutional order with its reliance on parliamentary sovereignty and would necessitate a radical departure from the underlying philosophy of the present order. Public discussion in a Constituent Assembly would assist in the creation of the culture which would make legislators, the public and even the judiciary recognise the way the Bill of Rights operates and the extent of the radical departure from the present system.

9. The debate about an Interim Bill of Rights and what categories of rights should be incorporated in the Bill would unnecessarily enmesh the Sub-Group and Codesa in a lengthy, divisive and inconclusive exercise which would delay the process of identifying the process of the repeal/amendment of offending legislation.

10. The most fundamental objection is that as long as we in South Africa have racial discrimination in parliament and in the government itself, reflected in the Tricameral approach, a bill of fundamental rights is an absurdity. A Bill of Rights, even in a rudimentary form must be associated with and provide the impetus for equality, non-

discrimination and democracy. Dr F. van Zyl Slabbert, in his evidence to the Law Commission, with which the majority of witnesses, concurred and said: "I can think of nothing more calculated to destroy the positive good that a Bill of Rights can bring about to us than to be seen and function as part of discriminatory legislation."

11. A Bill of Rights needs a proper system of enforcement enjoying general support. We will therefore need a Constitutional Court - on which there is now a consensus - which will emerge from and not precede the Constitution. The important power of judicial review of the Bill of Rights cannot be vested in the current judiciary whose composition, orientation and functioning reflect the current state of political inequality and distortions. The true guardians of such a Bill can only be the Constitutional Court.

12. For the levelling of the political playing field, in the transitional phase, a reasonable amount of certainty and clarity is required so that parties and activists know their rights and obligations in advance of any proposed activity. By their very nature, the provisions of a Bill of Rights are drawn in broad terms, rather than in the precise language of legislation. In the long term, courts provide specificity to the standards laid down in the Bill of Rights. But in the transitional phase, a Bill of Rights will provide for uncertainty as only litigation, especially to strike down offending legislation, could clarify whether a law - notorious or not - offends against the provisions of a particular part of the Interim Bill of Rights. To resolve such controversies you need concrete cases before the courts, for which plaintiffs armed with adequate resources and time are required. It cannot be seriously contended that such an approach can speedily and comprehensively provide for an adequate protection of rights.

13. Conversely, administrations, the police and public servants must also have speedy access to the extent of their rights and obligations. This is especially true in relation to the regulation of meetings, assemblies, access to voters and party members, broadcasting and the myriad activities associated with an election. These officials specific provisions to which they can turn to. After all, this is the way that civil servants have been trained. Only when we have established a culture based on a proper Bill of Rights can we envisage public servants anticipating what the Constitutional Court will say and do. In the meantime, laws must be changed so that these public officials recognise the concrete limits to their power.

14. An Interim Bill of Rights is also a contradiction in terms. Fundamental rights cannot be interim or provisional. It is precisely because the African National Congress values a Bill of Rights so much that we guard zealously the name and concept.

15. The African National Congress therefore recommends to the Sub-Group that as we cannot anticipate the principal debate on the Constitution, we should therefore not entertain the idea of an Interim Bill of Rights.

16. Instead, we should concentrate on identifying those laws which require repeal or amendment and which would be included in a General Law Amendment Act. Security and emergency legislation which requires change would also be included in this general act. In

addition we propose a Freedom of Expression, Association and Assembly Act which would strengthen the civil and political rights and whose speedy enforcement could partly be vested in the Independent Election Commission and partly in the courts.

23 March 1992

PRINCIPLES CONCERNING EMERGENCY POWERS

1. In deciding whether, in the short term, an interim or transitional government, or, in the longer term, a future government, should be entrusted with emergency powers, four principles will have to be decided, namely -

   (a) whether there is a need for powers to declare a state of emergency and to promulgate emergency measures;

   (b) whether legislation providing for such powers should be of a temporary or permanent nature;

   (c) whether any or all actions taken in terms of such legislation should be made objectively justifiable by the Supreme Court; and

   (d) whether legislation providing for emergency powers should provide for the inviolability of certain fundamental rights.

1.1 These four principles or questions will be dealt with seriatim hereunder.

Ad (a)

2.1 It is a generally recognised principle that in times of emergency, extraordinary measures are not only justified but essential to safeguard the national security and to ensure the safety of the public and the maintenance of public order. The Public Safety Act, 1953 (Act No. 3 of 1953), presently empowers the State President to declare a state of emergency in the whole of the Republic of South Africa or in a specified area, as the case may be, and to make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or the maintenance of public order and for terminating the state of emergency.

2.2 Subject to what is said down below, these powers should be retained and subject to further discussions the basis of declaring a state of emergency could be -

"if there is a grave threat to the sovereignty or national defence of the Republic, or if circumstances have arisen which seriously threaten the safety of the public or the maintenance of public order and the ordinary law of the land is inadequate to enable the Government to ensure the sovereignty or national defence of the Republic, or the safety of the public or to maintain public order".

2.3 Presently, in terms of section 19 of the Republic of South Africa Constitution Act, 1983, (Act No. 100 of 1983), the executive authority of the Republic, in regard to general affairs, is vested in the State President acting in consultation with the Ministers who are members of the Cabinet. In Nkwinti v Commissioner of Police and Others 1986(2) SA 421 (ECD) it was aptly pointed out that in declaring the state of emergency the State President acted, not on the advice of the Cabinet, but after consultation with the Cabinet. Therefore, whether the State President is required to consult with whoever, he will still have to apply his own mind to the matter. He should not become a rubber stamp to anybody.

2.4 With a view to an interim period, it is foreseen that provision will have to be made for consultation with the interim or transitional Cabinet or relevant body of authority. What degree of representation of interests outside of the normal governmental channels is warranted is a matter which will have to be discussed.

Ad (b)

3.1 It is generally accepted that emergency measures should:

(a) Be in force only as long as necessary, in other words be temporary.

(b) Commensurate with the gravity of the circumstances necessitating it.

(c) Commensurate with the geographical extent of the emergency situation.

3.2 To ensure that the declaration of a state of emergency and emergency measures are temporary, there are basically two models:

3.2.1 Legislation which are temporary and which can be put into operation by an authority (such as the State President) for a limited period of time (for example 6 months or 12 months). Usually the additional powers granted by such legislation is spelt out in that legislation and no or very limited provision is made for promulgating further additional powers. (The British Prevention of Terrorism (Temporary Provisions) Act 1989 is an example in this regard). The reason why the extraordinary powers are spelt out in the Act itself, is that the legislator should consider the extension of the operation of the Act from time to time and at the same time ensure that the provisions commensurate with prevailing circumstances.

3.2.2 Legislation which is permanent on the statute book, but provides for the declaration of a temporary state of emergency and the issuing of emergency regulations. (E.g. the Public Safety Act 3 of 1953). From the State's point of view the power to issue emergency regulations gives a very flexible instrument.

3.2.3 In both systems mentioned in paragraphs 3.2.1 and 3.2.2 respectively, a system of ratification e.g. within 30 days by the governing body should be built in e.g. that two thirds of the governing body should be in favour of -

(a) the putting into operation of the temporary Act; or

(b) the declaration of a state of emergency and the regulations issued in respect thereof.

3.2.4 A disadvantage of the system of temporary legislation is that if circumstances changes dramatically within a short period and the Act is inadequate, it would require the legislator to convene if it is not in session at that stage. On the other hand ratification in either system would require the legislator to convene if it is not in session at the time that ratification should take place as stipulated.

3.2.5 It appears that, provided that the necessary checks and balances are built in, there is not much difference between the two systems. It is, however, important at this stage to decide on one of the systems in order to formulate any legislation in this regard.

4. Ad (c)

4.1 Presently in the Public Safety Act, 1953, apart from containing a so-called ouster clause in section 5B, the powers conferred on the State President are in subjective terms, such ***as "if in the opinion of the State President"*** or ***"as appear to him to be necessary or expedient".***

4.2 In various cases the Appellate Division held that in cases where the subjective test applies the objective existence of the fact or state of affairs, is not justifiable in a court of law. The court can interfere and declare the exercise of the power invalid only where it is shown that the repository of the power acted mala fide or from ulterior motive or failed to apply his mind to the matter. In the case of the objective test, the objective existence of the jurisdictional fact as a prelude to the exercise of the power in question is justifiable in a court of law. If the court finds that objectively the fact or state of affairs did not exist, it may declare invalid the purported exercise of the power.

4.3 Regarding the Public Safety Act, 1953 in its present form and the regulations promulgated in terms thereof it was held -

(a) that whether the jurisdiction of the courts is impaired in legislation by an indemnity clause or a direct ouster, the courts will still review actions to decide whether the action taken was indeed taken in terms of the empowering legislation;

(b) that, as a result of section 5B of Act 3 of 1953, the issuing of vague regulations is permissible;

(c) that the power of the State President to issue emergency regulations, although it may be equated to the powers of Parliament to legislate, is not for that reason beyond the review of the courts.

4.4 With a view to preventing any abuse of emergency powers, the Public Safety Act, 1953, could be amended by repealing the ouster clause in section 5B, and by amending the remaining provisions in order that in future not only the declaration of a state of emergency, but also the exercise of any powers in terms of emergency regulations, will be objectively justifiable by the Supreme Court.

Ad (d)

5.1 Regarding the question whether it should be stipulated in the emergency legislation which rights may not be derogated from, this aspect should be developed in tandem with a bill of rights. A future bill of rights should stipulate which rights may not be suspended or circumscribed even during war or an emergency. The bill of rights proposed by the Law Commission for example provides that -

> **"Legislation relating to the state of emergency or regulations made thereunder shall not permit, authorise or sanction the cruel or inhuman treatment of persons, the retroactive creation of crimes, detention without trial, indemnity of the state for acts done during the state of emergency or the subjective discretionary use of force by an officer of the state or government".**

5.2 The Public Safety Act, 1953, presently provides that retroactive offences may not be created and that regulations may not be issued in respect of elections, lawful trade-union activities and military service.

5.3 Regarding detention without trial, it is internationally accepted that such a practice is permissible during times of extreme emergency, but must be subject to proper control and review, and must permit access by lawyers and family. Notification to relatives should be obligatory as well as the provision of reasons for detention and a limitation of the period of detention.

6. The Government's position must be borne in mind in considering the above, namely that adaptation to Security Legislation including the powers governing emergency situations are to be developed in accordance with the needs of the moment in tandem with transitional arrangements.

INYANDZA NATIONAL MOVEMENT

INYANDZA SUBMISSION ON THE REMAINING DISCRIMINATORY LEGISLATION AND ITS VIEW WITH REGARD TO REPEAL, AMENDMENTS AND/OR

It is our strongest view and belief that almost 99% of the Country's Legislation was enacted to oppress and restrict the disenfranchised majority on the one hand and advance and uplift the standard of living of the white electorate on the other. This status quo therefore barred the voteless masses from active participation in all the means of production of our country.

Our strongest conclusion therefore is that all the legislation of the land are discriminatory in nature and therefore have to be repealed. However there are those least ones which need amendments during the interim.

The legislation identified is divided into those dealing with :

(a) LAND
(b) EDUCATION
(c) THE CONSTITUTION

(a) LAND

1. DEVELOPMENT TRUST AND LAND ACT NO. 18 OF 1936 - This Act places restrictions on land transactions between blacks and other persons.

2. NATIONAL STATES CITIZENSHIP ACT NO. 26 OF 1970 - This Act provides for citizenship by certain blacks of territorial authority areas of self-governing black territories i.e. creating black national states.

3. SELF-GOVERNING TERRITORIES CONSTITUTION ACT NO. 21 OF 1971 - This Act provides for the establishment of legislative assemblies and executive councils in black areas and provides for the powers, functions and duties of such assemblies and councils.

   The Act provides that the State President may declare any area for which a legislative assembly has been established to be a self-governing territory.

   Self-governing territories may only legislate on matters specified in schedule 1 of the Act and on no other matters. Their legislation on schedule 1 matters has to be sanctioned by the State President.

   2 and 3 specifically were made for the purpose of granting citizenship to blacks in those national states or self-governing states so as to exclude them from S.A. Citizenship. Those areas so set aside are not reliable regions and confer no self-determination on those states. If Codesa is to decide on regions to form part of a Federation state, then these regions or units will have to be based on viability.

4. BLACK LOCAL AUTHORITIES ACT NO. 102 OF 1982 - This Act provides for the establishment of local committees, villages, councils and town councils for black persons in certain areas and for the appointment of a Director of Local Government.

5. BLACK AUTHORITIES ACT NO. 102 OF 1982 - This Act provides for the establishment of certain black authorities including tribal authorities, regional authorities and territorial authorities.

6. CONVERSION OF CERTAIN RIGHTS TO LEASEHOLD ACT 46 OF 1984 - Need for full ownership by blacks.

Related acts: -

7. BLACK ADMINISTRATION ACT NO. 38 OF 1927 - to be repealed.

8. BLACK COMMUNITIES DEVELOPMENT ACT 4 OF 1984 - to be repealed.

9. BLACK LABOUR (TRANSFER OF FUNCTIONS ACT) 88 OF 1980 - to be repealed.

10. PROVINCIAL GOVERNMENT ACT 33 OF 1986 - to be repealed.

(b) EDUCATION

Acts which provide for the creation of black schools, universities and segregated education are to be abolished as Education must be placed under one body to ensure equal opportunity and equal learning.

1. Education and Training Act No. 90 of 1979 as amended by Act No. 52 of 1980 - This act provides for the control of education for blacks by the Department and Training.

2. Education Affairs Act (House of Assembly).

(c) CONSTITUTION

THE REPUBLIC OF SOUTH AFRICA CONSTITUTION ACT NO. 110 OF 1983 should be abolished in its entirety as well as legislation incidental thereto as it is the pillar of apartheid.

CITIZENSHIP ACTS :

1. THE SOUTH AFRICAN CITIZENSHIP ACT NO. 44 OF 1949 should also be abolished as it gives foreigners a right to acquire citizenship easily more than South Africans.

2. NATIONAL STATES CITIZENSHIP ACT NO. 26 OF 1970 also provides for citizenship of a homeland being conferred on any black person by virtue of his ethnic group irrespective of the location of that person.

PUBLICATIONS ACT NO. 42 OF 1974 also needs to be repealed as it creates an anonymous body which is responsible for censorship without disclosing the membership of such a body. This may lead to the censorship being used against any organisation for purposes of silencing it.

AFFECTED ORGANISATIONS ACT NO. 31 OF 1974 makes provision for the declaration of affected organisations which are prohibited from asking for and receiving funds from abroad for political reasons. It naturally follows that since all political parties have been unbanned, this statute no longer serves its intended purpose.

DISCLOSURE OF FOREIGN FUNDING ACT NO. 26 OF 1989 :

This Act makes provision for certain organisations which are to seek permission to canvass for funds for any purpose whatsoever and the said funds are to be used only for the purpose they were given. This law makes it an offence not to get the permission or to fail to furnish any further information required from the organisations.

THE PROHIBITION OF FOREIGN FINANCING OF POLITICAL ORGANISATIONS ACT NO. 51 OF 1968 : It is imperative that this Act be abolished as it prohibits political parties from receiving foreign funds for purposes of campaigning for elections inside South Africa. Obviously this legislation would not be in the interests of all South Africans with due regard to the imminent elections.

THE INTERNAL SECURITY ACT NO. 74 OF 1982 AND NO. 44 OF 1950 have to be revised entirely and Section 29 of Act 74 of 1982 which deals with detention without trial must completely be abolished as it has been the scourge of all South Africans since it was enacted.

TRANSKEI'S PERSPECTIVES ON THE TERMS OF REFERENCES - W.G. 1

INTRODUCTION

The apartheid ideology is by its very nature violent and is not and was never meant to be conducive to a climate for free political participation. For as long as such a system obtains, no such climate will ever exist.

Although the apartheid state has the capacity and resources to stem the tide of violence that has characterised our country, it has failed to do so. The impression created is that it collaborates in the perpetuation of violence or it has lost control over its security forces.

Therefore we are convinced that the immediate installation of an Interim Government during the transition period is the only viable option and the most decisive step towards the speed creation of the desired climate for free political participation. However as a means to achieve the above objective, we lay emphasis on the following issues raised in the terms of reference.

COMPOSITION AND ROLE OF SECURITY FORCES .

The legacy of apartheid ideology has permeated throughout state structures especially the security forces. The majority of South Africans never regarded and still do not regard the security forces as serving the National interests. Because of the status of the present Government, the perceptions of the majority is that the security forces serve sectional and minority interests. They are an instrument for maintaining the status quo.

Therefore joint control of the security forces from the top echelons to the bottom during this period of transition, would in our view greatly enhance the prospects for the creation of a climate for free political participation.

DEMOCRATISATION OF STATE - CONTROLLED MEDIA (SATBVC) .

We believe that the state-controlled media in the SATBVC, like other state institutions, served the narrow interests of the ruling minority. It has contributed in promoting violence by reporting selectively and favourably on some political parties, while distorting the view points of those forces it does not favour. Its monopoly of the air-waves contributes negatively to the creation of a climate for free political activity. We will therefore argue strongly not only for the restructuring of the state-controlled media, but also for independent or joint control of the SATBVC state-controlled media, during this transition period.

NATIONAL PEACE ACCORD AND OTHER ACCORDS .

While we recognise the NPA as an important historic attempt by traditional antagonists towards the politics of peace and reconciliation, the elaborate structures, and the ultimate authority of the process remains in the hands of one party i.e. the State President and Senior Police Officers, are in our view its major weaknesses. The aims and objectives as enshrined in the NPA remain useful as a public relations exercise. It has so far failed to put an end to violence or bringing the perpetrators of violence to Courts. In fact in our view the NPA has an element of shifting the responsibility of policing violence from the state to the political parties, while ensuring that elements of the security forces involved in promoting violence remain protected.

Accords such as the NPA, Groote Schuur and Pretoria minutes, inevitably remind us of the famous and so-called historic NKOMATI ACCORD which favoured one party and led to the increased violence and killings in Mozambique culminating in the death of Comrade SAMORA MACHEL, himself. We will argue that if NPA is to be taken seriously it must be a CODESA project or subjected to close monitoring to ensure proper and effective implementation of NPA without much bureaucratic procedures. But if this Accord is to regain credibility it must be seen to be effective not only by its architects but by the victims of violence.

FUNDING OF POLITICAL PARTIES

The secret use of public funds to further party political objectives is highly immoral, irregular and unacceptable. It is even worse when such funds are used to promote violence in order to gain political ascendancy over other parties.

We will demand that those who happen to be in power, though illegitimately, and therefore control state resources must level the playing field by allocating resources equitably to all parties.

ROLE OF INTERNATIONAL COMMUNITY

The system of apartheid was declared as a crime against humanity by the international community. The South African political conflict affected communities even beyond the borders of this country. It created deep divisions among South Africans, resulting in deep distrust. The culture of failure to honour bilateral and multi-lateral agreements in the past by the government suggests the need for the international community to play a role in the resolution of the South African conflict.

We therefore believe that the international community can contribute in the management of the transition to democracy in South Africa by playing a number of roles which we will suggest later.

We would wish to state that whatever role is played by the international community, should be determined by what happens in the negotiation process.

[**EDITOR'S NOTE:** Document titled: "FURTHER DETAILS ABOUT THE VARIOUS TRIALS ARE GIVEN BELOW" is unclear and therefore not able to be scanned].

Listed below is a summary of the public trials of which MAREF is aware.

CHARGE	TOTAL NUMBER OF CASES
1. Murder / Attempted murder	6.
2. Public Violence	4.
3. Unlawful Gathering	99.
4. Public Violence and Malicious Damage to Property	36.
5. Arson/Attempted Arson	5.
6. Illegal Distribution of pamphlets	3.
7. Public violence and unlawful gathering	8.
8. Contravention of Internal Security Act	9.
9. Charges not known	6.

TRANSKEI SUBMISSION TO WORKING GROUP 1.
SUB-GROUP 2: NATIONAL PEACE ACCORD.

1. INTRODUCTION.

The National Peace Accord is, as far as Transkei is concerned, an important and, in fact, historic document which saw South Africans for the first time coming together to identify some of the causes of the violence sweeping our country and to look at ways of bringing it to an end.
It is in this respect that the codes of conduct for the security forces and political parties, and the section dealing with political intimidation are significant.

And yet the Transkei is not a signatory to the accord although we did lend our fullest support to the initiative. The fact of not signing the document was not because we did not have an interest in peace and stability, nor did it mean that we would not play our part in bringing about peace. On the contrary, we are as committed to peace as those who are signatories.

In not signing the document, the Transkei felt that there were more fundamental issues and some of what we perceived as the basic causes to the violence which the Accord did not address and which, when it addressed, it did so in an unsatisfactory way. In our submission, therefore, we will make an attempt to have our sub-group focus on some of what we see as the weakness of the National Peace Accord.

2. ENFORCING THE NATIONAL PEACE ACCORD.

2.1 POLITICAL PARTIES/ORGANISATIONS.

In our view some political parties/organisations though signatories to the Accord continue with acts of intimidations and violence irrespective, and we believe that it is precisely because there are no legal implications provided for in the Accord that would result from such acts. In a sense, though the Accord provides for investigation of causes of violence and into political intimidation, we ask the question: so what after they have been identified?

Over and above giving the Accord legal "teeth" we are of the view that there should also be political sanctions applied against parties or organisations that violate it's provisions. This could be done outside the Accords parameters by CODESA as part of creating and promoting a new political culture in our country. An example of such sanctions could be denial of air-time on radio or television for a specified period of time to that party or organisation guilty of such violation.

2.2. SECURITY FORCES.

Firstly, we would like to make the point that it is and has always been our perception that the role of the security forces in the on-going violence is highly questionable. We need ask only one

question as to why the security forces have, since February 2 in 1990 lost their efficiency, swiftness, high-mobility and capacity in dealing with law enforcement when prior to that they were the pride of status quo politicians by the manner in which they suppressed demonstrations and activities of extra-parliamentary organisations.

Curiously, however, these security forces whom we find very controversial, they are so central to the implementation of the Accord to the extent that they are even entrusted with the task of investigating themselves. We believe that the special investigation units make a mockery of pronounced attempts to bring to book members, notorious for their activities against free political activity and specifically against extra-parliamentary organisations.
With the benefit of hindsight, we have found a reluctance or slowness in getting the security forces to sign the National Peace Accord, whereas we believe that it (the Accord) should, in the circumstances of today, be part of the police code.

2.3 **POLICE REPORTING OFFICERS.**

Against this background, the very method of appointment of police reporting officers should be reviewed. As it is these are appointed solely by the Minister of Law and Order. In order to ensure confidence in such Officers there should be multi-party input in these appointments or perhaps appointment by a multi-party body.
We also believe that the powers of these Officers should be extended to include independent investigations and playing a more pro-active role to ensure publicly accepted standards of conduct.

2.4 **TRIBAL / LOCAL AUTHORITIES.**

The National Peace Accord does not bind tribal and local authorities while evidence continues to mount about chiefs denying free political activity by allowing only political parties of their choices to participate in their areas of jurisdiction.
The Accord should be broadened to include these authorities under whose jurisdiction millions of our people live.

2.5 **GOVERNMENT RESPONSIBILITY.**

2.5.1 **DANGEROUS WEAPONS.**

We call upon government to prohibit totally the carrying of dangerous weapons of all kinds in public. The legislation passed recently still falls short of this and we call on government to amend it to this effect. We further wish to say that the disarming of the right-wing in last weekends gathering was a positive step and it is such decisiveness that we would like to see all round.

2.5.2. **GOVERNMENT INSTITUTIONS AND VIOLATIONS.**

It is government responsibility to ensure that none of its institutions violate the provisions of the Accord and when such violations occur, tough measures should be taken. Police or army officers who are found to have committed such violations should be dismissed from the forces.

2.6 STATUTORY STATUS TO NPA.

We believe that the National Peace Accord should be given statutory status so as to make it and its provisions more enforceable to all, political parties/organisations, local/tribal authorities and security forces alike. Such an endeavour, however, considering the realities and processes of present day South African political life, should be a joint effort of all parties or in consultation with them. In this regard we propose a moratorium on the draft Bill on Internal Peace Institutions and that our sub-group is given an opportunity to study it to see if it meets our desired goals as far as the Accord is concerned.

2.7 MONITORING.

We believe that the work of the National Peace Accord structures would be greatly enhanced by monitoring of its implementation. compliance with it's provisions, it's signatories vis-a-vis it's provisions.

In this respect we propose that a relationship be established between the National Peace Accord and CODESA through a mechanism to be worked out by both.

Should it be deemed necessary for the success of the implementation of the Accord, CODESA should facilitate outside or international assistance for this purpose.

PERSPECTIVES ON TERMS OF REFERENCE WORKING GROUP 1. VENDA GOVERNMENT SUBMISSION

1. INTRODUCTION.

The apartheid system has so ravaged the political scenery that any inclination towards the perpetuation of the status quo is viewed with the utmost suspicion. For W.G.1 to be seen to have accomplished its aim it must be able to come up with ways and means of creating and fostering trust without the possibility of even a reversal of the status quo which may lead to fear for the future in the minds of all Codesa participants.

It is exactly these considerations which necessitate the immediate implementation of an interim authority which will allow all participants to have a say in the making of a new democratic non-racist, non-sexist S.A. At the same time all these processes, must be stressed, need to be conduced by an atmosphere of free political activity. The terms of reference of W.G.1 can be categorised into two main categories namely: The determination of the role of the international community vis a vis the transformative processes.

2. CREATION OF A CLIMATE CONDUCE TO FREE POLITICAL PARTICIPATION.

2.1 **The release of political prisoners and the return of exiles and their families.**

The S.A. Government having already committed itself to redress in the best possible way the evils occasioned by apartheid policies should feel duty bound to refrain as much as possible from stalling on the question of blanket indemnities. It is our view that these aspects should be addressed to ensure progress in the whole transformative process because when the New South Africa is in the making, we cannot afford to have a situation where fellow South Africans are barred from participating from the onset. Any further delay in this aspect can simply be interpreted as a ploy to use both political prisoners and exiles as bargaining chips in the negotiation process and it vitiates against the very spirit of trust that we so badly need for purposes of our future, more especially in the light of the Groote Schuur and Pretoria Minutes between the S.A. Govt and the A.N.C.

2.2 **Political intimidation.**

Political intimidation has assumed different levels in the S.A. political scenario. It must be stressed from the onset that both Overt and Covert political intimidation will have very adverse effects on the question of a speedy political settlement and in a way which is more likely to torment the spirit of sectarianism and consequently a civil war.

2.2.1 **Overt Intimidation**

We hear of allegations of security forces disrupting peaceful projects by some of the political organisations which is unacceptable and counterproductive because, mainly within black communities it leads to the marginalisation of members of such forces an sometimes to unwarranted hostilities. Under this aspect we call upon the authority controlling such forces to refrain from:

(i) The parading of military forces and implements in a way that induces anger and frustration on the part of unarmed masses.

(ii) The clear condemnation of unprofessional behaviour on the part of members of the security forces.

(iii) The preferential handling of masses in accordance with political affiliation on the part of the security forces whenever there are political gatherings.

(iv) The lackadaisical approach towards bring to trial members of the security forces who have clearly offended the law which in turn leads to the disappearance of witnesses and evidence due to the passage of time.

In the same breath due and considerate attention should be given to the question of traditional weapons. We submit that traditional weapons should not in the normal course of events be phased out of the lifestyles of black South Africans.

But in view of the fact that noble as they are they are being clearly misused by some people to perpetrate political murders, clear rules legislated to avert these atrocities should be enforced. It must be remembered that there is not a single black South African clan to which the spear is not a traditional weapon. Whereas its traditional value must always be recognised its misuse must equally be avoided at all costs.

2.2.2 **Covert Intimidation.**

Whereas political bargaining is and should always be acceptable, the use of state resources for the purpose of political arms-twisting should not be continued.

2.3 **Fair Access to State Media.**

Apartheid has been labelled as a crime against humanity by the international community. It would not have survived as long as had it not been vehemently facilitated by complete bias or the part of some of the media. It is our submission that the political window dressing that has been implemented thus far may be a step in the right direction but if falls by far short of being adequate. There is an unavoidable need for these facilities to be under the control of neutral authorities if fair rules are to be applied to the political games involved in seeking a negotiated settlement with a view to the New South Africa.

2.4 **Access to Potential voters and the question of refugees.**

2.4.1 **Farm Workers.**

The farming industry is mainly in the hands of whites, some of whom are not only conservative but are also intent on maintaining the status quo. These people are consequently employers to thousands and thousands of black farm workers and they may do everything in their power to see to it that these farm workers, are not qualified to vote when the time arrives. They may also make sure that these people though qualified, do not vote or are intimidated into voting in accordance with the employer's wish.

We therefore recommend a speedy arrangement that will ensure that all political parties have fair access to such workers. We also recommend the constitution of a select committee from all Codesa participants to be monitoring the question of qualificative logistics which have to do with voting. This should culminate in timeous registration of voters in general.

2.4.2 **Political refugees.**

The issue of political refugees should be addressed in a way that it does not cause conflict and prevent misuse in the election process. the continued imprisonment of political refugees should also be stopped because there are allegations that such actions facilitate the easy corruption of such refugees into covert groups and organisations and again it should be viewed as a violation against human rights as defined in international law. Their exploitation on farms should also be avoided and they should be accorded their rightful refugee status.

3. THE ROLE OF THE INTERNATIONAL COMMUNITY.

The status quo in South Africa today has been an area of concern to the international community for a long time. However the problems within South Africa can best be addressed by the South Africans themselves. If the international community is involved and has veto role, CODESA will have no power.

The international community has no thorough knowledge of South Africa. CODESA knows all the problems facing this country and is the best instrument to use to solve such problems.

The international community should keep an observer status. Various political parties and organisations should have access to the international community for inputs and to seek advice. The international community can only be involved if there is a deadlock.

REPORT FROM MAFIKENG ANTI-REPRESSION FORUM (MAREF) FEBRUARY 1992.

REPORT: POLITICAL TRIALS IN BOPHUTHATSWANA

Although this report covers political trials in Bophutatswana, it is difficult to gather information on such trials and it is therefore possible that many cases have not yet been documented. This report then covers only those trials which we have been informed of in the following regions: Thaba Nchu, Mafikeng, Lehurutse, and Rustenberg.

The "official" charges range from Theft and Assault to Public Violence, Illegal Gathering, and Murder. However, these trials are in all cases viewed as political since the events leading to the arrest and trial of most of the accused revolve around their political activities. These activities would be perfectly legitimate in any democratic country. However, the Bop regime finds such activities detrimental to their homeland aspirations. In some cases people have been arrested and charged for no other reason than contravening the Internal Security Act in terms of Illegal Gathering, (i.e. a meeting of more than two people).

It must be emphasised that the existence of the Bill of Rights in Bophuthatswana is entirely farcical. The last section, Section 18 (?) reads as follows:

> The rights and freedoms referred to in Sections 9 to 17 may be restricted only by a law of Parliament and such law shall have a general application.

In addition, there are laws which render the Bill of Rights ineffectual. Of particular significance are the following three acts:

1. The Internal Security Act no. 32 of 1979 as amended March 1991.
2. The Security Clearance Act no. 40 of 1985.
3. The Public Service Act.

LAWYERS FOR HUMAN RIGHTS

NATIONAL DIRECTORATE

January 6, 1992

As an organisation we have been involved during the past year in the process relating to the release of political prisoners. We have, during this period, submitted numerous applications for pardon and release of political prisoners. We pardon and release on behalf of a variety of prisoners, made representations to the Indemnity Committees and launched court applications where all else has failed. A significant number of our clients remain imprisoned.

In October this year we made submissions to the UN Committee against Apartheid and the Special Group of Experts on Southern Africa, and we have attached a copy of these submissions for your information.

There have been certain changes to the status quo since the publication of this document, and we will detail these briefly.

1. The situation in Boputhatswana has to a large extent been resolved, with mass releases having taken place during December. A number of people remain imprisoned, including Timothy Phiri, but we understand that their release is expected soon.

2. In South Africa itself the release process has remained deadlocked since the publication of our report. During November and December there were a couple of releases (including two additional members of the Sharpeville Six, and the last Robben Island prisoner). However, the bulk of those persons detailed in the attached document, including the members of Umkhonto we Sizwe, remain in prison.

3. With the changes detailed above we would not estimate there to be approximately 280 - 300 prisoners who should be released in terms of agreements reached between the government and the ANC as well as precedents set through the pattern of releases thus far. We are unfortunately only in a position to estimate numbers, as we are not being provided with the relevant figures by the Department of Correctional Services and Justice.

4. We would refer you to the section in the paper dealing with right wing violence, in which we predicted that the failure to resolve the political prisoner issue would of necessity result in an increase in right wing violence. Our theory in this regard was that perpetrators of this violence believe that they too will be regarded as political prisoners while there are still other political prisoners who have not been released, and that at some stage they will fall into a broad based general amnesty. Looking at recent events, our predictions sound a horrible note of truth.

   We would urge all members of this Working Group to study the attached document with care. It appears bulky, but we believe it will provide those of you new to this process with an insight into the history of the problem now presented to you.

We believe that the solution to this problem is a relatively easy one and that you could dispose of it in a matter of weeks. We would request that a delegation from our organisation be permitted to make oral submissions to the Working Group on this issue, in order to elaborate on the information contained in the report submitted to the United Nations. We would be available to do this as soon as it is convenient to you.

BRIAN CURRIN

SUBMISSION TO THE UNITED NATIONS COMMITTEE OF EXPERTS
THE RELEASE OF POLITICAL PRISONERS

'RODUCTION

South Africa there are two major issues which continue to bedevil the political process, both of which have ere implications for the future of our country. The first is the issue of the release of political prisoners and the ond is the ongoing violence and the role of the security forces within this.

government has, over the past few months, expended great effort in attempting to persuade the international mmunity that the political prisoner issue has in fact been resolved. Their motivation for this is reasonably ightforward - the continued imprisonment of political offenders has serious implications for the anti-sanctions oy and for the government's relations with foreign countries. However, what I aim to show in this paper is that implications of this issue are far greater - that in fact the inability of the government and the ANC to resolve could derail the entire process of negotiations now underway.

issue remains unresolved and I will attempt to identify the reasons for this in my paper. If I am to deal with issue properly, it will be necessary for me to examine the history of the process in some length, I trust you will with me. I believe that this background is essential to your understanding of the severe implications a tinued lack of resolution will have.

REEMENTS AND RESOLUTIONS

E HARARE DECLARATION

1989 when the Harare Declaration was adopted by the African National Congress, one of the major conditions was the unconditional release of all political prisoners and the safe return of exiles.

E GROOTE SCHUUR MINUTE

owing the unbanning of the African National Congress and other liberation movements on 2 February 1990 Groote Schuur Minute was entered into by the Nationalist government and the ANC [ANNEXURE A-OOTE SCHUUR MINUTE]. The intent of this first agreement was to work towards the resolution of existing tacles to constitutional negotiations and, in doing so, to establish a climate conducive to reconciliation and ce. In Paragraph 1 the parties agreed to the formation of a Joint Working Group to " make recommendations a definition of political offences in the South African situation". It was envisaged, at that stage, that their ussions would be completed by 21st May 1990.

ST JOINT WORKING GROUP MINUTE

report of the Joint Working group established under Paragraph 1 of the Groote Schuur Minute was completed 21 May 1990. [ANNEXURE B - REPORT OF THE WORKING GROUP ESTABLISHED UNDER RAGRAPH 1 OF THE GROOTE SCHUUR MINUTE] This report formed the basis of the Government ette of November 7th and has therefore played a central role in the approach to this problem.

rief, the most significant aspects of this report are as follows:

That the power to pardon or indemnify is vested solely in the State President by virtue of

That the recommendations on a definition of political offences in the South African situation were based upon se used by Professor Norgaard in the Namibian situation. The Working Group proposed the use of these as delines to meet the South African situation, not criteria. These guidelines would be used in as assessment of ain common law offences (including murder) committed with political motive.

The agreement would relate to those people already sentenced, subject to a suspend sentence, awaiting cutive of a sentence or where the case is on appeal or review. In addition that it would apply to those liable to secution, awaiting or undergoing trial or in detention.

hat the government may (in its discretion) consult other parties or bodies with a view to pardon or indemnity offences and, if need be, establishment of guidelines applicable to members of such organisations.

he creation of a mechanism to provide the executive with wise advice re. the granting of pardon or indemnity, rder to demonstrate that " the interests of all parties are being taken into account in as objective a manner as sible.

ETORIA MINUTE

6th August 1990, the African National Congress and the government met again and committed themselves to it has become known as the Pretoria Minute [ANNEXURE C - PRETORIA MINUTE]. For our purposes, the st important aspects of this agreement are as follows:

hat the abovementioned report of the Joint Working Group was accepted by both parties.

hat the Consulting Bodies (as referred to in Paragraph 8.2 of the Report) would be constituted by 31 August 990.

hat the latest date envisaged for the completion of the total task as set out in the Joint Working Group Report would be completed by not later than 30 April 1991. Plan for the release of ANC related prisoners Hereinafter) referred to as Paragraph 2 Working Group)

hat the ANC suspended all armed actions with immediate effect.

REPORT OF THE WORKING GROUP ESTABLISHED UNDER PARAGRAPH 2 OF THE PRETORIA MINUTE

his Working Group (which consisted of five members of the ANC and fourteen member of government) drew p a plan, inter alia, for the administrative release of ANC related prisoners [ANNEXURE - REPORT OF HE WORKING GROUP ESTABLISHED UNDER PARAGRAPH 2 OF THE PRETORIA MINUTE] The eport recommended the following:

1. That ordinary remission of one-third of determinate sentences be granted to all sentenced prisoners presently regarded as ANC related. [NOTE: Prior to this, political offenders, unlike criminal offenders, did not qualify for ordinary remission of sentences.]

2. Special remission of one year was granted to all ANC related prisoners, in terms of the Prisons Act No. 8 of 1959 which gave the State President the power to authorise the release of any prisoner, either conditionally or unconditionally through the use of parole or remission.

3. That sentenced prisoners will be considered for release in terms of the adopted guidelines and the recommendations of the Consulting Bodies where appropriate, and that this process would commence on 1st October 1990.

4. That these consulting bodies would consist of a convenor with ad-hoc appointments from concerned groups, and would provide wise advice to the Executive when dealing with particular offences.

5. That all applicants for pardon and indemnity should provide the Office for Indemnity and Release with certain information regarding the nature of their offences and the motivation for regarding such offences as political.

The guidelines and information contained in the above agreements were later published in two separate Government Gazette of November 7 th and 9th 1990 [ANNEXURE E AND F RESPECTIVELY] with certain changes.

The Gazette of November 7th ratified the guidelines established by the first working group as well as the initial categories for unconditional indemnity. Of significance here is that the Gazette stated that "Recommendations relating to the identifications of further categories may be made by interested parties and shall be considered by the Executive in accordance with the guidelines."

The Gazette of November 9th dealt with the establishment of Indemnity Committees. (aforementioned Consulting Bodies) and was based very loosely on ideas raised in both Joint Working Group Reports. Of significance here is the following:

1. The fact that these bodies were establish with the intention of ensuring representation of interested parties in the decision making process with regard to indemnity or pardon.

2. That the Gazette gave wide ranging powers to the State President (with regard to the appointment of Chairman and the make-up of particular committees) and to the Chairman themselves, subject of course to the President's powers.

3. That those participating in these committees should take an oath of secrecy before so doing.

4. That the committee investigates matters referred to the committee by the State President of a Cabinet Minister and submits a written report and recommendation thereof to the State President. The decision to grant indemnity or pardon remains with the State President.

se various agreements and undertakings then formed the basis upon which political prisoners were to be ased.

the time that these agreements were being drawn up, Lawyers for Human Rights formed part of an ad hoc up of interest lawyers which commented on the agreements. A copy of the comment was submitted to the ican National Congress and later directly to the government.[Annexure G - MEMORANDUM HANNESBURG AD HOC LAWYERS GROUP]

In brief, our input at this stage was around the following provisions:

1. NEW CATEGORIES OF PERSONS WHO QUALIFY FOR UNCONDITIONAL INDEMNITY

Our recommendation here was for the range of categories to be substantially extended, with a focus less on the " events" more on the category of persons.

We recommended that unconditional indemnity/pardon should be granted to:

* all acts committed by persons upon the instructions of within the policy of the ANC or Umkhonto we Sizwe

* those persons who have committed purely political offences, including treason, sedition, subversion, terrorism and other offences under the Internal Security Act.

* person who have participated in act of civil unrest out of opposition to Apartheid, excluding the robbery and rape.

* persons who have participated in unlawful gatherings

* persons who have committed breaches of Section 126A of the Defence Act

* persons who have incited others to commit any of the above, or who have attempted to commit any of the above.

We also looked at more specific categories, to deal in particular with the whole area of acts related to civil unrest where persons did not act under direct instruction from an organisation, and within this highlighted the following possibilities.

* persons who committed acts of violence against town councillors

* persons who committed acts pursuant to boycotts, strikes and stayaways

* persons who committed acts pursuant to conflict witching civilian areas with the security forces.

We believe that has these categories been adopted in November last year, the process of releases (and the return of exiles) would have been finalised by April this year, if not earlier. These categories were however not adopted.

2. PROCEDURES FOR INDIVIDUAL APPLICATIONS

We believe that the process of application and release was under the unilateral control of the government, with applications going to the Indemnity Office (staffed entirely by the Department of Justice and Prisons officials) where a report was drawn up, with applications going to the Indemnity Officials) where a report was drawn up, then to the Minister of Justice and finally to the State President for a decision. If this application was rejected it was then referred to a consulting body and this was the first (and only) stage in the process where the ANC would be permitted some form of representation.

We recommended to the ANC that they negotiate representation within the Office for Indemnity so that the initial process of rejection of applications was not left entirely in the hands of government officials.

We believe that these initial agreements into which the government and the ANC entered were inadequate. However, as they represent the first stages of the negotiation process and the flaws contained with them were therefore inevitable. Notwithstanding these flaws and mistakes, we believe that the only way in which these agreements can be examined is within the intent of both parties.

The stated intent of both the Pretoria and Groote Schuur Minutes was a reconciliatory one. Both the government and the ANC committed themselves towards the " .. resolution of the exiting climate of violence and intimidation form whatever quarter as well as .. to stability and a peaceful process of negotiations." With specific reference to the release of political prisoners, the intent of the mechanisms established was, we believe, to ensure the speedy release of all political prisoners in order to open the way for substantive constitutional negotiations. Acted with criminal intent.

At around the same time, fifteen Umkhonto we Sizwe operatives and a number of " unrest related" prisoners were released, NOT in accordance with the Pretoria Minute or subsequent agreements but on parole in terms of the above-mentioned one-third amnesty for first offenders.

Amongst those released were the following:

1. " Delmas 2" trialists - who had received multiple death sentence (later commuted to twenty five years) for a variety of activities resulting in the death of three people and serious injury to others.
2. Ronnie Maboa and Stephen Vilikazi (both Umkhonto we Sizwe operatives) who were convicted of three counts of murder following a bomb blast in which three civilians died.

3. Alan Mamba - convicted of the murder of a civilian who died after picking up a limpet mine placed outside a bank.

Their release in this manner was agreed to by members of the National Executive Committee of the African National Congress, in the belief that this may be the only way in which they could get the prisoners released. All of those released in this manner had had their applications for release/ indemnity rejected by the Indemnity Committee.

It is interesting here to compare the cases of those members of Umkhonto we Sizwe who were released and those who remain imprisoned until today.

Umkhonto we Sizwe operatives still imprisoned are as follows:

ROBERT JOHN McBRIDE	Life sentence
MTHETHELELI MNCUBE	Death sentence
MZONDELELI NONDULA	Death sentence
SIBUSISO MASUKA	Thirty years

There are additional members currently awaiting trial, and I will return to them later. We believe that the case of Robert McBride (our client) is the case where the government has proved most recalcitrant during negotiations. I wish to compare his case to Ronnie Maboa and Stephen Vilakazi, released as part of the group of fifteen during July this year.

ROBERT MCBRIDE

He was convicted in 1987 and sentenced to death - he spent four years on Death Row and his sentence was commuted in April this year to life. His convictions arose out of activities as a member of Umkhonto we Sizwe and at all times he acted under their instructions. He was convicted of three counts of murder as a result of a bomb blast in which three (white) civilians were killed. In addition, he was convicted of Terrorism and further the aims of the ANC. It is interesting here that one of the charges of Terrorism and Attempting to overthrow the State. The ANC entered into the agreements believing this. They would not have endorsed agreements or mechanisms which would have the net effect of keeping their members in jail. In this way, while we believe that the blame for the current impasse can be laid at the door of both negotiating parties, it is the government which has demonstrated bad faith throughout the process. We will motivate this later.

In Lawyers for Human Rights we involved ourselves fully in the implementation of these agreements, in an attempt to facilitate the process. We established (in December 1990) a Political Prisoner Release Programme staffed by two Attorneys with the aim of ensuring that all those who qualified for release would be in a position to apply. I have attached a short description of this project for your attention [ANNEXURE H - POLITICAL PRISONER RELEASE PROGRAMME]

The initial stages of our intervention were beset by problems caused by uncooperative government departments. We detailed these problems in a memorandum which we submitted to the Minister of Justice in a meeting held with him in Cape Town in March 1991. Amongst the problems we detailed were the following:

* a three month delay by the Prisons Department in giving us permission to place notices in prisons explaining our programme and giving contact addresses.

* In addition, we continued to be refused access to prison in order for us to consult prisoners and assist in the filling in of forms. As late as the first week of April we were still experiencing problems in getting access to prisoners.

* The government failed to supply us with lists of prisoners which it believed were eligible for release - we had to rely on information supplied by the Human Rights Commission and IDAF.

After the meeting with the Minister of Justice we established joint Audit Committee which was to function as forum for comparison and exchange of information regarding lists prisoners eligible for release. The Human Rights Commission ourselves and Prison Department officials sat on this committee. While the committee had not decision making powers it was able to evaluate the various lists and numbers and exchange user information. However, this committee was disbanded after agreement was reached between the ANC and the government on the establishment of a Scrutiny Committee. The proposed function of this committee was to evaluate applications received and rejected by the office for indemnity - to date we have information as to progress made in this committee.

In our meeting with the Minister we also raised some of our objection to the manner in which the agreements were being implemented. Here we highlighted the following problems:

* Referrals to the Indemnity Committee - lack of information to the reasons for such referrals, and the failure of government to gazette the names of the ANC nominees to the committees.

* the problem of Death Row political prisoners in that the government was refusing to deal with their cases until such time as their sentences were commuted. This was not part of the original agreement - no distinction had been made between prisoners serving long sentences and those on Death Row.

* the failure of the government to extend the number of the government to extend the number of categories for unconditional release of indemnity.

We reached no finality on any of these issues in the meeting.

We followed up this meeting with further letters to the Minister of Justice and the State President detailing our concerns and yet we have received no responses of any substance, other than acknowledgement of receipt.

On April 24th two Gazettes were published. The first dealt with an extension of categories for unconditional release to include a number of offences, excluding those where people were convicted of serious offences such as murder and assault with the intention to commit grievous bodily harm. [ANNEXURE 1 GOVERNMENT GAZETTES 24 APRIL 1991] while we welcomed these agreements and the provisions therein, we believe that the exclusion of offences involving murder and serious injury was unhelpful. There had been a number of people convicted of murder who had already been released in terms of the Pretoria Minute, and these cases could have been used to define categories for release.

In a memorandum handed to the Minister of Justice on June 24 1991. We reiterated our concern about this fact, and urged him to create further categories. This was not done. In the same memorandum [ANNEXURE J PROBLEMS EXPERIENCED BY LAWYERS FOR HUMAN RIGHTS IN THE POLITICAL PRISONER RELEASE PROCESS] we raised the problems we were experiencing with regard to the indemnity Committees, Death Row prisoners and Bophuthatswana prisoners. None of these issues were resolved during our meeting.

With reference to the condemned prisoners, our contention was that there had never been any agreement to the effect that these prisoners would be dealt with any differently to other prisoners. If the government had interpreted such agreements to mean this, then it was within their power (the State President's in particular) to commute with immediate effect the death sentences of all those prisoners whose actions were political in nature. To date, this has not been done and we have two members of Umkhonto we Sizwe still on Death Row a year and two months after the Pretoria Minute. In their case, the matter has been with the State President since the failure of their Appeal in March this year and he has not yet extended clemency to them.

On raising the question of political prisoners in **B**ophuthatswana, we were informed that Bophuthatswana was an independent state and that the South African government therefore had no jurisdiction over its internal affairs. As you know, there are still 147 political prisoners being held in Bophuthatswana jails. We will return to this issue later.

The indemnity committees were established following a joint decision of the ANC and the government to create a mechanism which would demonstrate that in the consideration of certain cases "the interests of all parties were being taken into account in as objective a manner as possible." Those persons nominated by the ANC to participate in these committees withdrew for a variety of reasons: that they were not prepared to take the oath of secrecy, that they government gazette of 9th November was .... [page has been cut off - words are illegible]

... specifically related to the planting of the bomb which resulted in the deaths. He has now spent four and half years in prison.

RONNIE MABOA AND STEPHEN VILAKAZI

These two men were also Umkhonto we Sizwe operatives who acted at all times under the instructions of their superiors. They were convicted and sentenced in early 1990. They were convicted of three counts of murder as a result of a bomb blast in which three (black) civilians were

killed. They were sentenced to an eighteen year term of imprisonment by a Judge who remarked during the judgement that he handed down this sentence having taken into account the changing political climate in South Africa and the need for reconciliation.

I wish here to make the following comments:

1. There are two differences between the two cases - the colour of the victims (which has played a major role in sentencing practices in our country) and the length of the sentences handed down. The difference in the race of the victims is one of the reasons that our client has had such a high profile in the media, and we would cite this as the reason for his continued imprisonment. The government (and I have been told this by members of the cabinet) is considering the reaction of their constituency to his release.

2. The life sentence given to Robert McBride was imposed on him by State President de Klerk - he commuted McBride's sentence in April 1991 and has the discretion to make that sentence as long or as short as he wishes. He chose the longest possible - a life sentence without parole, unless the Minister of Prisons or the State President interferes and alters such sentence. In the Maboa case, a year earlier, a Judge of the Supreme Court had taken into account the changing political situation - yet the State President, hailed as the instigator of that change, fails to do so.

We must also look at the cases of Mzondeleli Nondula and Mthetheleli Mncube, still on Death Row. They were both sentenced in 1988 following a series of landmine deaths in the Northern Transvaal and the death of a policeman as a result of an escape from custody. Earlier this year their Appeal against the death penalty failed and since March they have been awaiting clemency. As you know, the State President has the prerogative to grant clemency - he has to date chosen not to utilise this. Again, in the interests of reconciliation and peace, he would have been well advised to commute the sentences of these two men after the failure of their Appeal as this would have enabled him to proceed with plans for their release. He has failed miserably on this score.

In addition to the sentenced Umkhonto we Sizwe members, Dieter Gerhardt, who was convicted in 1983 of High Treason for his activities on behalf of the Soviet Union, remains imprisoned. His application for release in terms of the Pretoria Minute was rejected by the State President. We find it extraordinary that as the Cold War ends in the rest of the world, the South African government feels obliged to keep Mr. Gerhardt in prison. His conviction ....[illegible] liberation movements to overthrow the State. His case is very clearly a political case, and Lawyers for Human Rights is in the process of preparing a court application for his release.

Currently there are four members of Umkhonto we Sizwe whose trials are ongoing or scheduled to start within the next month. Of these, Sipho Mabena who is being held in Pretoria local prison, has not yet been granted bail. The other three, Joseph Koetle, Jacob Rapholo and Jeremy Seeber are all out on varying amounts of bail. They have all been refused indemnity from prosecution by the State President and their trails will proceed within the next month. Again, specific provision was made within the agreements between the ANC and the government for the indemnity provisions to

apply to those people awaiting trial. Instead, more than a year after the signing of the Pretoria Minute, we will be faced with high profile political trials.

Apart from the identified Umkhonto we Sizwe trialists and prisoners and Dieter Gerhardt, there are a significant number of 'unrest related' prisoners still behind bars. These are mainly young people who through their involvement in United Democratic Front (UDF) structures became involved in the internal uprising in South Africa during the eighties. We do not have as yet exact figures on the number of people in this category who remain in prison, as the government is refusing to release figures to us. As an estimate we would say there are approximately three hundred who remain in prison. Again, there are numerous mechanisms at the disposal of the government which would enable them to release these people. They choose not to use these mechanisms.

AFRICAN NATIONAL CONGRESS N.E.C. MEMBERS

While there are no NEC members imprisoned, it is of great significance that most of the people holding these senior positions in the ANC are in fact still here under temporary indemnity. The very people with who de Klerk and his cabinet are negotiating are still here at the government's whim. Looking at last year's incident where a senior NEC member, Mac Mahara) was arrested and detained for many months under Section 29 of the Internal Security Act after entering the country under the same temporary indemnity, NEC members could justifiably feel insecure. From our perspective, we wonder what possible motive the government has in continuing to grant only temporary indemnity - at the beginning of this month this was again extended for another four months.

BOPHUTHATSWANA

There are currently 147 prisoners still being held in Bophuthatswana whose offences would fall within the guidelines as gazetted on November 7 1990. Of these, 120 were involved in the coup attempt which was effectively suppressed through the intervention of the South African Defence Force. An additional four are members of Umkhonto we Sizwe who were tried and sentenced in Bophuthatswana (Frans Mokomane, Rodney More, Petrus Mothupi and John Pilane). The remainder are persons who were involved in various actions arising out of e.g. forced removals. On the 15 October one of these prisoners died in hospital and we understand that this was largely as a result of neglect by prison and medical authorities. We have approached the South African government on this issue, and they remain adamant that they are not able to interfere in the internal affairs of an independent state. The President Lucas Mangope, continues to insist that there is no such thing as a political prisoner in Bophuthatswana.

Our position in Lawyers for Human Rights (and we believe that this position is one shared not only by the major political organisations in our country but by foreign governments and international agencies as well) is that Bophuthatswana, like the rest of the homelands is an illegitimate political entity. We also believe that as we move towards proper negotiations, Bophuthatswana must (and will) be reincorporated back into South Africa. The continued existence of separate and 'independent' states within South Africa remains the cornerstone of the Apartheid grand plan. While we recognise that the process of reincorporation will be a difficult one, we do require (at the

very least) an unequivocal statement from the South African government that this is their intention. To date we have only been informed that the issue is subject to negotiations.

If the manner in which the Nationalist government has handled the issue of political prisoners in Bophuthatswana is an indication of their attitude towards reincorporation, the outlook is gloomy.

RIGHT WING PRISONERS

The current situation has been exacerbated by the presence of a new brand of prisoner - right wing, racist extremists who have carried out various actions (including mass murder) in opposition to move towards a negotiated settlement. These people believe that they have the right to be treated in the same way as, for example, Umkhonto we Sizwe operatives and this expectation has been fed by the media attention granted to them.

We feel that the release of political prisoners arose out of negotiations between he ANC and the government and formed part of agreements on a number of issues, inter alia the suspension of the armed struggle. The Right Wing groupings in this country have not committed themselves to peaceful negotiations, and in demanding their release in terms of the Pretoria Minute they have merely extracted from that Minute a portion which is to their advantage. We regard this as politically opportunistic and unacceptable. The agreements reached between the two negotiating parties made provision for other groups to negotiate similar guidelines which could secure the release of their people. What has happened is that a number of right-wingers have in fact been released in terms of the Joint Working Group documents, and these prisoners have emerged from prison and continued to agitate for and involve themselves in violent, racist actions. We believe that if the release of any of these persons is even to be considered, their organisations should commit themselves fully to participation in multi-party talks and become part of the peaceful negotiations process.

THE REASONS FOR THE FAILURE TO RESOLVE THE POLITICAL PRISONER ISSUE

It is apparent that the de Klerk government has failed to honour the intent of the agreements reached between itself and the African National Congress, and we can speculate as to why this is so.

On one level, the government has its own Security Force members and agents imprisoned in some of the Frontline states for acts of terror against the ANC and citizens of the various states. To our knowledge, there are currently five South African agents being held in Zimbabwe (three of whom are on Death Row), four SADF members being held in Botswana and one person in Mozambique. We believe that some of the remaining prisoners in South Africa (particularly ANC members who have a reasonably high public profile) are being held hostage as a way of pressurising the ANC to use their influence over Frontline leaders to release South African agents.

In addition, as the release of all political prisoners was a precondition to constitution talks the failure to resolve this issue inevitably delayed the start of such talks. As has been seen through the

continuing violence, such delays have only served to enhance the prospects of the Nationalist Party in any future election. The delays have caused further confusion and disarray in the ranks of ANC supporters this disorganising the major opposition to the Nationalists.

We believe also that the way in which the government has handled this issue is also a clear indication of the way in which they perceive themselves. Our opinion is that they do not believe that as a country we are in a period of transition, they do not see themselves as a government on the way out. As time has passed since the 2nd February speech, it has become increasingly obvious that they have their sights set on winning the first non-racial election in this country. The agreements reached (with regard to the political prisoner issue) ensured that the decision making rested firmly in the hands of President de Klerk and his cabinet. At no stage did the ANC have anything remotely resembling joint decision making powers in this process. This is most clearly evidenced by the fact that those people who the government decides fall within the definition of a political prisoner have all been released - yet there remain in prison hundreds of people whom the ANC regard as political prisoners. Here the fault lies not only with the government, but with the ANC itself in allowing final decision making to rest solely with the present government.

As raised earlier in the paper, we believe that the government continues to pander to the wishes (or perceived wishes) of its white constituency, and is using the prisoner releases to do this. It therefore placed its own political future far above the future of the country and need for reconciliation.

From the above, we believe that the government entered into these agreements in bad faith and abused the trust placed in it by its negotiating partner the African National Congress. Again, while the blame can be apportioned to both parties, the intention of the ANC was clearly to resolve the issue while the intention of the Nationalists was to control the issue. To put it quite simply, if they had negotiated in good faith they would have asked the ANC for a full list of all those people they regarded as political prisoners and released such persons. They have the mechanisms to do it (as shown by their release this year of thousands of criminals) and it could have been resolved many months ago. As an alternative they could have created categories of offences covering a much broader spectrum and released persons in terms of these categories.

The media, right wing organisations and government have created the perception that right wing prisoners are worthy of the same treatment as anti-apartheid fighters. With increasing right wing violence in our country it is not an appropriate time to release right-wingers and we believe that this is a further factor delaying the resolution of the problem. The release of political prisoners is being delayed to prevent a right-wing outcry if they are released while right winners remain inside.

THE CONSEQUENCES OF THE FAILURE TO RESOLVE THE POLITICAL PRISONER ISSUE

In Lawyers for Human Rights we believe that the consequences of the current impasse are many and frightening.

As long as the debate about political prisoners continues in South /Africa we will have what we would term a 'political prisoner psychosis'. Within this, right-wingers will continue to commit acts of terror in the belief that one day, somehow they will be part of a general amnesty and/or prisoner swop. This needs to be discouraged at all costs. Until this issue is resolved the 'political prisoner psychoses' will continue, enabling every person (from the Left or the Right) who commits violent actions with some kind of political motive, to believe that they will be indemnified or released. The only way to end this kind of psychosis is to clear the jails of all those persons who are imprisoned as a result of their actions (violent or otherwise) in the struggle against apartheid. If the government wishes to enter into some arrangement with the Right Wing organisations, that they can do. The Right Wing issues should not however, be allowed to delay the release of those people whose organisation entered into the Groote Schuur Minute and subsequent agreements.

We know that much of the membership of these right wing organisations is drawn from disaffected Security Force members,. They have immense potential to cause irreparable harm to the political process and this should not be underestimated. This potential is only increased by the failure to resolve the prisoner issue and the failure of the government to draw right-wing groupings into talks.

Earlier this year following the 'Inkathagate' scandal, the National Executive Committee took a decision that the government was not the main obstacle to a peaceful transition. This has meant that the obstacles (as detailed in the Harare Declaration and following statements) have in effect been downgraded. This has a number of important spin-offs. The government now more confidently expresses the view that the political prisoner issue has been resolved, and they are able to state (as they have done in recent months during media briefings) that they have won this round. However, more importantly this decision could well have a negative impact amongst the support base of the African National Congress. To the ANC membership the remaining ..[line on top of page obliterated].. and fellow Umkhonto we Sizwe members are extremely unhappy that the political prisoners will not be released. This will have the effect of further dividing and weakening the organisation, something which may well be to the advantage of the government but is unhelpful to the political process.

There is a deep sense of frustration amongst prisoners and we fear that they well resort to desperate actions - hunger strikes being the least of these. Such actions will inflame emotions and cause further turmoil in a country already torn apart by the terrible violence. We have already seen in Bophuthatswana the terrible consequences of hunger strike action. If such action was to take hold in South African jails, the consequences would possibly be worse as the political prisoners inside have a higher public profile, particularly amongst the membership of the ANC. These prisoners have been awaiting their release since February 2 1990. They have spent that time in prison seeing criminals released, seeing their fellow prisoners (with identical charges) released and being told early last year by their leadership that they too would be released within a matter of months. We fear that the frustration has finally become too much for them to bear. This could have tragic consequences.

CONCLUSION

I have presented this lengthy submission with the intention of informing you that this issue remains not only unresolved but highly volatile. We became involved in this issue as a way of playing a positive role in ensuring that obstacles were overturned and the parties concerned could get down to substantive negotiations. As an organisation we are deeply concerned that at this late stage the parties have not succeeded in resolving what is essentially a simple issue. This does not give us a great deal of hope for the future pattern of negotiations.

Be that as it may, there is a simple solution. As pointed out earlier, the government has at its disposal numerous mechanisms through which it could effect the remaining releases - whether such mechanisms fall within or without the political agreements reached. They are not using these mechanisms and their failure to do so is creating unnecessary tensions. Their public pronouncements on the issue are dominated by legalistic and bureaucratic justifications for the fact that there are no political prisoners left and that the issue is resolved. They know, and they express this privately, that the issue is not resolved and that they have not fulfilled the intent of the Groote Schuur and Pretoria Minutes.

It has become obvious that more pressure is needed ion the government to ensure that the issue is resolved, and sadly we believe that the ANC is unable to do this on its own. Within this, we believe that you should encourage the national leadership of the African National Congress to participate more forcefully in the resolution of the problem. Without their pressure on the government, the issue will not be resolved. It is here that the international community has a vital role to play. If the international community, as represented by bodies like you own, accepts the government's assertion that the issue is resolved, we believe that this would represent an abandonment of the disenfranchised people of South Africa. As we have pointed out, and we hold political brief here) there are a substantial number of political prisoners in prison, both here and in Bophuthatswana. This assertion is backed up by the liberation movements within the country, other Human Rights Monitoring bodies and interested parties. If the government feels that it has succeeded in persuading foreign governments that the issue is indeed resolved, it is able to ignore calls from within the country for the release of the remaining prisoners. We need your assistance.

With special reference to the Bophuthatswana issue, we have found for example the United States insistence that all political prisoners have been released in South Africa quite extraordinary (even by their own very limited definition) given the fact that they do not recognise the independence of the 'homelands'.

The issue we face is political in nature, not legal. Attempts to seek legalistic solutions will not help us, we re quire political intervention and we require it as a matter of urgency.

BRIAN CURRIN
LAWYERS FOR HUMAN RIGHTS
October 17 1991

THE GROOTE SCHUUR MINUTE

The government and the African National Congress agree on a common commitment towards the resolution of the existing climate of violence and intimidation from whatever quarter as well as a commitment to stability and a peaceful process of negotiations.

Following from this commitment, the following was agreed upon:

1. The establishment of a working group to make recommendations on a definition of political offences I the South African situation, to discuss, in this regard, time scales and to advise on norms and mechanisms for dealing with the release of political prisoners and the granting of immunity in respect of political offences to those inside and outside South Africa. All working group will bear in mind experiences in Namibia and elsewhere. The working group will aim to complete work before 21st May 1990. It is understood that the South African government, in its discretion, may consult other political parties and movements and other relevant bodies. The proceedings of the working group will be confidential. In the meantime, the following offences will receive attention immediately.

   (a) The leaving of the country without a valid travel permit
   (b) Any offences related merely to organisations which were previously prohibited.

2. In addition to the arrangements mentioned in paragraph 1, temporary immunity from prosecution for political offences committed before today, will be considered on an urgent basis for members of the National Executive Committee and selected other members of the ANC from outside the country, to enable them to return and help with the establishment and management of political activities, to assist in bringing violence to amend and to take part in peaceful political negotiations.

3. The government undertakes to review existing security legislation and to bring it into line with the new dynamic situation development in South Africa in order to ensure normal and free political activity.

4. The government reiterates its commitment to work towards the lifting of the state of emergency. In this context the ANC will exert itself to fulfill the objectives contained in the preamble.

5. Efficient channels of communication between the government and the ANC will be established in order to curb violence and intimidation from whatever quarter effectively.

The government and the ANC agree that the objectives contained in this minute should be achieved as early as possible.

CAPE TOWN
4 MAY 1990

PRETORIA MINUTE

The Government and the ANC have held discussions at the Presidency, Pretoria today 5 August 1990.

1. The Government and the ANC have again committed themselves to the Groote Schuur Minute.

2. The final report of the Working Group on political offences dated 21 May 1990, as amended, was accepted by both parties. The guidelines to be formulated in terms of the Report will be applied in a phased manner. The Report makes provision for formulation of guidelines which will be applied in dealing with members of all organisations, groupings or institutions, governmental or otherwise, who committed offences on the assumption that a particular cause was being served or opposed. The meeting has instructed the Working Group to draw up a plan for the release of ANC-related prisoners and the granting of indemnity to people in a phased manner and to report before the end of August.

   The following target dates have in the meantime been agreed upon:

   * The body or bodies referred to in paragraph 8.2 of the Report of the Working Group will be constituted by 31 August 1990

   * The further release of prisoners which can be dealt with administratively will start on 1 September 1990.

   * Indemnity which can be dealt with in categories of persons and not on an individual basis will be granted as from 1 October 1990. This process will be completed not later than the end of 1990.

   * In all cases where the body or bodies to be constituted according to paragraph 8.2 of the Report of the Working Group will have to consider cases on an individual basis, the process will be expedited as much as possible. It is hoped that this process will be completed within six months, but the latest date envisaged for the completion of the total task in terms of the Report of the Working Group is not later than 30 April 1991.

   This programme will be implemented on the basis of the Report of the Working Group.

3. In the interest of moving as speedily as possible towards a negotiated peaceful political settlement and in the context of the agreements reached, the ANC announced that it was now suspending all armed actions with immediate effect. As a result of this, no further armed actions and related activities by the ANC and its military wing Umkhonto We Sizwe will take place. It was agreed that a working group will be established to resolve all outstanding questions arising out of this decision to report by 15 September 1990. Both

sides once more committed themselves to do everything in their power to bring about a peaceful solution as quickly as possible.

4. Both delegations expressed serious concern bout the general level of violence, intimidation and unrest in the country, especially in Natal. They agreed that in the context of the common search for peace and stability, it was vital that understanding should grow among all sections of the South African population that problems can and should be solved through negotiations. Both parties committed themselves to undertake steps and measures to promote and expedite the normalisation and stabilisation of the situation in line with the spirit of mutual trust obtaining among the leaders involved.

5. With due cognizance of the interest, role and involvement of other parties the delegations consider it necessary that whatever additional mechanisms of communication are needed should be developed at local, regional and national levels. This should enable public grievances to be addressed peacefully and in good time, avoiding conflict.

6. The Government has undertaken to consider the lifting of the State of Emergency in Natal as early as possible in the light of positive consequences that should result from this accord.

7. In view of the new circumstances now emerging there will be an ongoing review of security legislation. The Government will give immediate consideration to repealing all provisions of the Internal Security Act that -

   (a) refer to communism or the further thereof;
   (b) provide for a consolidated list;
   (c) provide for a prohibition on the publication of statements or writings of certain persons; and
   (d) provide for an amount to be deposited before a newspaper maybe registered.

   The government will continue reviewing security legislation and its application in order to ensure free political activity and with the view to ...[illegible] amending legislation at the next session of Parliament. The Minister of Justice will issue a statement in this regard, inter alia calling for comments and proposals.

8. We are convinced that what we have agreed upon today can become a milestone on the road to true peace and prosperity for our country. In this we do not pretend to be the only parties involved in the process of shaping the new South Africa. We know there are other parties committed to peaceful progress. All of us can henceforth walk that road in consultation and co-operation with each other. We call upon all those who have not yet committed themselves to peaceful negotiations to do so now.

9. Against this background, the way is now open to proceed towards negotiations on a new constitution. Exploratory talks in this regard will be held before the next meeting which will be held soon.