

212/1/16/25



CONSTITUTIONAL ASSEMBLY

MEMORANDUM

TO: Members of the Constitutional Committee Sub-committee

FROM: Executive Director

DATE: 26 February 1996

RE: Volkstaat Council Discussion Document on Self Determination and the Working Draft of the New Constitution

We enclose for your consideration the Volkstaat Council's "*Discussion Document on Self-Determination and the Working Draft of the Constitution.*"

The above document to which this *errata* refers was distributed at the meeting of the Sub-committee on Monday 19 February 1996.

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THE NEW CONSTITUTION

VOLKSTAAT COUNCIL

DISCUSSION DOCUMENT ON

SELF-DETERMINATION AND THE WORKING DRAFT OF THE NEW CONSTITUTION, 22 NOVEMBER 1995

WITH THE

CONSTITUTIONAL COMMITTEE SUB-COMMITTEE

27TH FEBRUARY, 1996

1. THE VOLKSTAAT COUNCIL'S MANDATE

- 1.1 In terms of the Accord on Afrikaner Self-determination that was entered into between the Freedom Front, the African National Congress and the South African Government/National Party on 940423, the task of the Volkstaat Council is to investigate and report to the Constitutional Assembly and the Commission on Provincial Government on measures which can give effect to the idea of self-determination, including the concept of a Volkstaat. (Par. 5 of the Accord)
- 1.2 The Parties also agreed that support for the idea of a Volkstaat would be indicated by the electoral support which parties with a specific mandate to pursue the realisation of a Volkstaat, gained in the election of April 27, 1994. (Par. 4 of the Accord)
- 1.3 The Volkstaat Council was established in accordance with Chapter 11A of the Interim Constitution (Act 200 of 1993). Section 184B defines the nature of the Council as follows:

"The Council shall serve as a constitutional mechanism to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat."

- 1.4 Section 184B (1)(c) gives effect to paragraph 5 of the Accord by setting out the Council's mandate as follows:

"to submit representations and recommendations to the Constitutional Assembly and the Commission on Provincial Government with regard to the possible establishment of a volkstaat and any matter in connection therewith."

- 1.5 The Council's view has been that, in carrying out its mandate, cognisance be taken of the provisions of Constitutional Principle XXXIV and of the Accord.

- 1.6 In the execution of its mandate, the Council has

- * heard evidence from supporters and non-supporters of the idea of a Volkstaat, from experts on self-determination and other rights' issues, and from a number of non-governmental organisations;
- * conducted its own investigations, and
- * commissioned research on a number of issues by professional and academic institutions and researchers.

- 1.7 The purpose of this submission is to make recommendations that will facilitate practical expression of the Accord and Constitutional Principle XXXIV in the new constitution.

2. PERTINENT FINDINGS

- 2.1 Self-determination is recognised as a norm of international law; the UN regards it as a prerequisite for human rights, as a foundation for peace, development and co-operation among states, as the basis on which new states are formed and on which the international community of states functions.
- 2.2 Many writers and other authorities regard self-determination not merely as a norm of international law, but as "jus cogens" (a peremptory norm of general international law): withholding self-determination is forbidden, in the same way that genocide and piracy are forbidden.
- 2.3 Furthermore, self-determination is accepted by the international community as a collective right to which communities, minorities and indigenous and other peoples conforming to certain criteria, are

entitled. It enables them to choose their political destiny, as well as the government under which they wish to live:

- * Salient criteria are those of identity, self-awareness and an historical will and ability to survive as a distinct community.
 - * Forms of self-determination are identified as: (a) voluntary assimilation with the surrounding society; (b) incorporation for purposes of cultural, linguistic, educational or religious expression; (c) regional autonomy; (d) self-government; (e) independent statehood; (f) affiliation or unity with other state states.
- 2.4 State practice, UN agencies and conventions, European, African and other charters and conventions and institutions dealing with human rights and minority protection, accept the fact that rights violations are matters of legitimate international concern and are not the exclusive internal affairs of the respective states. They may be investigated and addressed despite the principle of state sovereignty.
- 2.5 Communities conforming to the criteria referred to in paragraph 2.3 above are entitled to self-determination; policies of assimilation and nation-building are making way for explicit recognition; and constitutional provision by governments for the protection of identity and continued existence, even in respect of communities who live dispersed and intertwined with members of other communities.
- 2.6 However, it is internationally accepted that rights of self-determination and their application cannot be absolute:
- * the rights and interests of other affected parties have to be accommodated;
 - * principles of equality and integrity of existing states and of communities must be adhered to;
 - * accords and other binding agreements must be honoured.

In each case the circumstances have to be investigated, and a suitable form of self-determination and procedures and instruments for its implementation, have to be devised.

- 2.7 Those who oppose the idea of self-determination in a Volkstaat or other territorial form, argue as follows:
- (a) The idea has to be reconciled with a democratic South Africa: one country, one citizenship, one sovereignty, based on principles of equality and non-discrimination.
 - (b) Human rights imply certain collective responses, sufficient to ensure that the identity and continued existence of communities are protected.

- (c) Territorial self-determination will lead to demands for external self-determination and secession. Such demands will undermine state- and nation-building, stimulate other similar demands and jeopardise the viability of the existing state.
- (d) South Africans are so free and equal that communities do not need additional protection over and above those contained in the Interim Constitution and in the Working Draft.
- (e) Separate or additional protection for communities may lead to a revival of unacceptable policies and practices such as apartheid.

2.8 Afrikaners constitute a community entitled to self-determination in terms of the Accord referred to in paragraph 1.1 above and of Constitutional Principle XXXIV and international covenants, UN resolutions and state practice relating to individual and collective rights.

2.9 The points raised in paragraph 2.7 (a) and (e) above, and conditions imposed by the Interim Constitution, for example "proven support", have been addressed in the Accord. Paragraph 3 of the Accord includes *inter alia* the following:

"They (the parties to the Accord) agree that their negotiations shall be guided by the need to be consistent with, and shall be governed by, the requirement to give due consideration to Constitutional Principle XXXIV, and other provisions of the Constitution of the Republic of South Africa, Act 200 of 1993 as amended ..."

Such considerations shall therefore include matters such as:

"3.1.2 the principle of democracy, non-racialism and fundamental rights;

3.1.3 the promotion of peace and national reconciliation."

2.10 As is the case in subordinate communities in other parts of the world, Afrikaners are not of one mind about the form self-determination should take or the government under which they wish to live:

- (a) some are satisfied with human rights and require no further protection;
- (b) some regard "cultural rights" or corporate forms of self-determination as adequate;

- (c) others regard territorial forms of self-determination as essential.
 - (d) Supporters of territorial forms of self-determination fall into two categories:
 - (aa) those who seek empowerment in a province or independent territory in the short term;
 - (bb) those who view self-determination as a process, starting with corporate or other internal autonomy in designated areas that may develop into a province or a state in the long term.
- 2.11 Proponents of a Volkstaat do not consider human rights as sufficient to ensure their continued existence as a people. In common with communities, minorities, or indigenous and other peoples elsewhere, they need special rights and measures to ensure that fundamental rights apply equally to them, that they are not outvoted by majority decisions and that their condition of forming neither a majority, nor a substantial proportion of the population in their area be remedied.
- 2.12 Language, education, land matters, affirmative action and feelings of estrangement are major issues of concern among Afrikaners in all the categories listed above (Par. 2.10). They expect that present conditions will increase in severity and complexity in the future. The solutions that they pursue are not identical. In this respect they react similarly to subordinate communities elsewhere in the world.
- 2.13 Whilst Afrikaners in general subscribe to concepts of patriotism and co-operation, they differ in their evaluation of the feasibility and value of nation-building. They also differ in their assessment of the prospects for stability and sustained development under the present policies of nation-building (forced assimilation) and do not foresee that negotiations will come to mutually acceptable solutions.
- 2.14 The Council has researched almost the entire land area of South Africa in order to identify areas where different forms of territorial self-determination could be achieved. The areas are listed in the Council's First Interim Report. Their main features are as follows:
- (a) Some of them, those in metropolitan areas, have a majority of Afrikaners, whereas those in sparsely populated rural areas have a minority of Afrikaners.
 - (b) It may be possible to increase the Afrikaner component by means of border adjustments, but it does not seem that any significant deviations from the proposals contained in the report will be achieved. There are no new areas recommended for consideration.

- (c) Considerable numbers of non-Afrikaners live in all the areas.
- (d) Research on the history of the areas concerned is in progress.
- (e) Research to establish support for Volkstaat or other territorial solutions is also under way.

3. CONCLUSIONS

3.1 It would seem that:

- (a) Afrikaners of different persuasions want self-determination in one form or another;
- (b) a meaningful proportion support territorial forms;
- (c) striving towards a Volkstaat is likely to continue in the future;
- (d) even if present generations should accept something less, experience world-wide has taught that resumption of the struggle by future generations is to be expected.

3.2 From an Afrikaner perspective there exists a sense of expectation that general provision for self-determination will be made in the new constitution.

3.3 Provision for territorial forms of self-determination for Afrikaners is the subject of bilateral negotiations, the outcome of which is awaited.

3.4 Thus far only Afrikaners have advanced claims for external self-determination. Therefore, prospects that the integrity and viability of the existing South African state will be threatened by an abundance of such claims, seem unlikely.

3.5 Bearing in mind the growing international concern for the rights of national or ethnic, religious or linguistic minorities and indigenous peoples or communities, it would seem that such rights are becoming increasingly internationalised and are being considered for protection under international law. Governments can no longer deny or circumvent claims in this regard.

3.6 Members of communities or minorities or indigenous and other peoples have the right to exercise their human rights and fundamental

¹ Principle VIII of the Helsinki Accord, 1975 and reaffirmed by the Paris Conference, 1990; Par. 19-20 of the African Charter on Human and Peoples' Rights, 1991; Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, UNGA Resolution 47/134, 1992; Par. I: 19-20 and II: 25-32 of the Vienna Declaration, 1993, and others.

freedoms effectively without any discrimination and in full equality before the law. However, beyond the formal equality of treatment, they would need the following kinds of protection:

- (a) material equality in terms of equal opportunities (small minorities in particular are going to need measures of affirmative action);
- (b) equal opportunities should be guaranteed through special measures that conform to the principles of equality and non-discrimination with respect to other citizens, and shall not be considered as acts of discrimination (UN Declaration on the Rights of Persons Belonging to National Minorities, 1992);
- (c) such special protective measures should be provided with respect to language, education, associations and organisations, admission to the public service, political representation, appropriate forms of autonomy;
- (d) arrangements with neighbouring states to ensure that assistance, especially in the cultural sphere, to members of a community settled in those states, shall not be considered interference in the internal affairs of those states.

3.7 Peaceful constitutional efforts to realise Afrikaner self-determination could be facilitated by the parties agreeing that the objective is legitimate and mutually advantageous, and by commitment to settle all issues through negotiation.

4. RECOMMENDATIONS

- 4.1 Reference to self-determination as racism or apartheid cause concern and frustration among many leading Afrikaners. Instead, it should be recognised as a legitimate aim, an historical and world-wide phenomenon, a major international issue of the nineties and the century to come. State machinery should be set up to deal with existing and future issues of self-determination.
- 4.2 As immediate empowerment of any community in its own territory, for instance before the promulgation of a new constitution in May, 1996 seems impractical, it is recommended that constitutional provision be made for communities who qualify and ask for it, to exercise their right of self-determination within the provisions of the Constitution.
- 4.3 In the light of the findings in section 2, particularly paragraph 2.1 above, self-determination should be recognised in the new constitution as a right to which communities, minorities and peoples conforming to certain characteristics, are entitled.

4.4 In general communities should be given recognition as collectivities entitled to protective measures or to some or other form of self-determination.²

4.5 Recognition should be given to the interrelatedness of democracy, self-determination and human rights.

4.6 At present language and education, in particular mother tongue and religious instruction, seem to bind the different categories of Afrikaners together. The vast majority appear to be dissatisfied with the way the government, the SABC and the business sector are handling these matters. According to the Working Draft the provisions in this regard still need to be negotiated.

4.6.1 In view of the above, the Council wishes to emphasise that

- (a) linguistic communities the world over are extremely sensitive about the treatment and status accorded to their languages by their governments;
- (b) communities demanding collective rights want control of their education;
- (c) evidence before the Council has shown that the situation is not different in South Africa;
- (d) perceived language and educational discrimination is an important binding factor among Afrikaners of all persuasions.

4.6.2. The Council recommends that in addition to proposed forms of territorial self-determination, the following issues be agreed to:

- (a) that care should be taken to ensure equal treatment of the different national languages;
- (b) that the provision for private education proposed in the Working Draft should include subsidisation;
- (c) that parents should have the right to ensure the religious and moral education of their children in conformity with their own convictions;
- (d) that a person may not have his rights restricted in any way, or be granted any privileges, on the basis of sex, race, nationality,

²

A community is composed of citizens, fewer in number than the rest of the population, settled compactly or dispersedly, sharing ethnic, linguistic or cultural features different from the rest of the population, and guided by the will to safeguard these features.

language, origin, social status, religion, convictions, or opinions;

- (e) that members of communities should have the right to foster their language, culture and customs collectively;
- (f) that provision be made for communities to administer the affairs of their culture, education, organisations, charities and mutual assistance independently, and that the state should support communities. The Council's recommendations on Cultural Community Councils refer.

5. CONSTITUTIONAL PROPOSALS

Constitutional phrasing of the above recommendations is contained in a submission to the Constitutional Assembly. It can be made available for this discussion.
