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Susan [a]

A28

**CONSTITUTIONAL
ASSEMBLY**

**THEME COMMITTEE 1
CHARACTER OF
DEMOCRATIC STATE**

26 JUNE 1995

**ROOM M515
09H00**

**EXTRA
DOCUMENTATION**

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REPORT FROM THEME COMMITTEE 1

BLOCK 6 : REPRESENTATIVE GOVERNMENT CITIZENSHIP AND SUFFRAGE

26 June 1995.

1. Summary overview of submissions received and processed by Theme Committee 1 from sources outside the Constitutional Assembly (Volumes [redacted] and [redacted]) - see attachment. 21
2. The Technical Committee conducted an orientation workshop on [redacted] to facilitate the submissions of parties on the subject matter of this Block. [redacted] used at the workshop [redacted]
3. [redacted] None of the submissions received from the public during the CPM's was relevant to the agenda items [redacted]
4. No public hearings were held in respect of the subject matter of this Block.
5. The following constitutional principles are relevant to the agenda items referred to:-

AGENDA ITEM 7: REPRESENTATIVE GOVERNMENT

I.

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

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II.

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter-alia the fundamental rights contained in Chapter 3 of this Constitution.

VIII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

XIV

Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

XVI

At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle XIII.

GENERAL DISCUSSION OF THE MATERIAL

As will be seen hereunder, there was a large degree of consensus amongst the parties as to the system of representative government they would support and the main elements of which they would like to see enshrined in the Constitution.

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NON-CONTENTIOUS ISSUES

1. All parties called for representative government embracing multi-party democracy, regular elections and, in general, proportional representation.
2. The following qualifications and emphasis of the aforementioned non-contentious issues appeared from the submissions :-

Contentious

2.1 The NP emphasised that both the Legislature and Executive are to be representative of the electorate.

Contentious

2.2 The Freedom Front submitted that representative government encompasses the participation of minority parties in government.

note to 2.1

2.3 The ANC submitted that "Parliament" should be representative, and made no reference to "Government".

non-Contentious

Constitutional

2.4 The ANC wants constitutional and proportional representation, with the details thereof being spelt out in legislation.

Contentious

2.5 The ACDP and PAC called for the Constitution to provide for a system of recalling public officials who are remiss in the execution of their functions.

electoral political representatives.

2.6 The ACDP and NP emphasised the need for participatory democracy, encompassing the right to petition (NP and ACDP), assembly and demonstration (ACDP) and the right to information (NP).

non-contentious with qualif. - spirit of Sect 16.

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CONTENTIOUS ISSUES

None.

AGENDA ITEM 8 : CITIZENSHIP

I.

The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

II.

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter-alia the fundamental rights contained in Chapter 3 of this Constitution.

GENERAL DISCUSSION OF THE MATERIAL

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Whilst not all submissions dealt with the matters comprising this agenda item, there appears to be concurrence on the matters referred to in Sections 5 and 20 of the Interim Constitution.

NON-CONTENTIOUS ISSUES

1. The DP, NP and Freedom Front supported the provisions of Sections 5 and 20 of

the Interim Constitution, namely that :-

- 1.1 there shall be common South African citizenship;
- 1.2 legislation is to deal with the acquisition, loss or restoration of citizenship;
- 1.3 citizens are to enjoy all rights, privileges and benefits of citizenship and also to have corresponding duties of citizenship, every citizen is to have the right to enter, remain in and leave South Africa and there is to be no deprivation of citizenship without justification. The ACDP did not address these aspects of citizenship, whilst the ANC and PAC indicated the most important elements thereof, namely that there shall be a common South African citizenship, that the acquisition and loss of citizenship could occur in certain circumstances and that there was to be no arbitrary deprivation of citizenship.
- 1.4 In the circumstances, and in the absence of any stated opposition to the sections of the Interim Constitution and of the Constitutional Principles dealing with citizenship, it is inferred that none of the said matters is contentious.

2. The only qualification to paragraph 1 above is made by the NP, which suggests that the constitution should guarantee the acquisition of citizenship by birth.

CONTENTIOUS ISSUES

None.

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AGENDA ITEM 9: SUFFRAGE

II.

Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter-alia the fundamental rights contained in Chapter 3 of this Constitution.

VII

There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation.

GENERAL DISCUSSION OF THE MATERIAL

- 1.1 There is consensus on the general principle that the right to vote should be entrenched in the constitution and that all citizens shall be entitled to vote. There is however a large degree of disagreement as to the category of persons entitled to vote, and the extension of voting rights to certain categories of persons.
- 1.2 The NP is of the view that only citizens are eligible for political/public office. *deducted political*
The FF wants separate voters' rolls for different provinces, apart from a common voters' roll. The other parties did not address these issues.

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NON-CONTENTIOUS ISSUES

All citizens shall have the constitutional right to vote for all levels of government.

CONTENTIOUS ISSUES

1. Whether non-citizens should have the right to vote.

1.1 The ACDP submits that the vote should be extended to work and residence permit holders, whilst the DP, NP and Freedom Front submit that only South African citizens shall have the right to vote.

1.2 The DP qualifies its submission by stating that only citizens shall be entitled to vote at the National and Provincial levels, thereby suggesting that non-citizens, or certain categories thereof, would be entitled to vote at the level of local government.

1.3 The PAC submits that the vote should be extended to persons who have stayed in the country for at least 5 years and who declare their intention to *stay* say permanently in South Africa.

1.4 The NP wants legislation to deal with permanent residents acquiring citizenship and thereby acquiring the right to vote.

2. The minimum voting age.

2.1 The ACDP, DP and NP want the constitution to provide that the minimum age for voting shall be 18.

- 2.2 The PAC submits that a voter should be "of age", without defining the term.
- 2.3 The Freedom Front does not want the constitution to determine the minimum age, but to retain the word "adult", which it says has been determined internationally, in the context of voting, to be 18 years of age.
- 2.4 The ANC does not want the constitution to provide for the minimum voting age, submitting that this should be a matter that should be legislated on. In its oral submission to the Theme Committee, it intimated that it was considering proposing that the minimum voting age be 16 years.
3. Criteria for disqualification.
- 3.1 The ANC, PAC and FF did not specifically address themselves to the categories of persons who would be disqualified from voting.
- 3.2 The ACDP proposes that no person should have the right to vote whilst being in prison for serious offences. It does not distinguish between convicted or awaiting trial prisoners or define what serious offences are.
- 3.3 The DP refers to the disqualifications as they presently exist in electoral legislation and believe that legislation should continue to deal with the categories of disqualification.
- 3.4 The NP wants grounds for disqualification to be incorporated in the constitutional text. It supports the grounds for disqualification contained in present electoral legislation (Section 16 of Electoral Act No. 202 of 1993), save for paragraph (d) thereof, in that the NP proposes disqualifying a

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who is in prison
~~convicted person from voting, irrespective of the crime committed or sentence imposed (Section 16(d) disqualifies a person who is in prison, having been convicted and sentenced without the option of a fine in respect of offences such as murder, robbery with aggravating circumstances and rape, or any attempt to commit such offence).~~

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NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	CONTENTIOUS ASPECTS	NON-CONTENTIOUS ASPECTS	REMARKS
1.	I, II, VIII, XIV, XVII	Representative government	None	<p>Government to be representative</p> <hr/> <p>Multi-party democracy</p> <hr/> <p>Regular Elections</p> <hr/> <p>Proportional representation, in general</p>	<p>1. Representivity in Legislature and Parliament. (NP)</p> <p>2. Representivity in Parliament. (ANC)</p> <p>3. Minority parties to participate at all levels of government. (FF)</p> <p>4. Within jurisdiction of TC2.</p> <hr/> <p>1. Participatory democracy to be provided for, in form of right to petition, assemble and demonstrate (NP and ACDP).</p> <p>2. Right of recall to be provided for (ACDP and PAC)</p> <hr/> <p>Within jurisdiction of TC 2 and TC 3</p>

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 EDUARDO NAIHIN FRIEDLAND
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NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	CONTENTIOUS ASPECTS	NON-CONTENTIOUS ASPECTS	REMARKS
2.	I, II	Citizenship	None	<p>Common S.A. citizenship</p> <hr/> <p>Acquisition, loss or restoration to be legislated</p> <hr/> <p>Citizens to enjoy all rights, benefits and privileges of citizenship</p> <hr/> <p>Citizens to abide by duties of citizenship</p> <hr/> <p>Citizens to have right to enter remain in and leave South Africa</p> <hr/> <p>No arbitrary deprivation of citizenship</p> <hr/>	<p>Constitution to guarantee acquisition of citizenship by birth (NP)</p> <hr/> <p>Within jurisdiction of TC4.</p>

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NO.	CONSTITUTIONAL PRINCIPLES	ISSUES	CONTENTIOUS ASPECTS	NON-CONTENTIOUS ASPECTS	REMARKS
3.	II, VIII	Suffrage	<p>Whether non-citizens should have right to vote</p> <hr/> <p>Minimum voting age.</p> <hr/> <p>Whether age requirement to be in constitution</p> <hr/> <p>Criteria for disqualification (particularly relating to prisoners).</p>	<p>All citizens to have constitutional right to vote</p> <hr/>	<p>1. Divergence of opinion as to grounds on which citizenship, and therefore right to vote, acquired.</p> <p>To be spelt out in legislation</p> <hr/> <p>Different views as to what minimum voting age should be and whether to legislate thereon or deal within constitution</p> <hr/> <p>1. No agreement as to what grounds of disqualification should be.</p> <p>2. NP wants grounds of disqualification to be provided for in constitution</p>

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PARTY SUBMISSIONS
BLOCK 8

**AFRICAN CHRISTIAN DEMOCRATIC PARTY
SUBMISSION TO THE CONSTITUTIONAL ASSEMBLY
THEME COMMITTEE ONE**

**FOREIGN RELATIONS,
INTERNATIONAL LAW AND THE
CONSTITUTION**

One of the key questions that any developing country has to face today, South Africa, being no exception to this rule, is how to slot into the international community.

Due mainly to the legacy of apartheid, South Africa was denied fully-fledged membership of international organisations and even treaties and conventions leading to international isolation across a wide spectrum.

The ACDP recognises that a country's foreign policy depends greatly on its domestic policies. Currently, there is a very real desire to break with the past internally and to include, rather than exclude, accommodate rather than deny. It follows that this philosophy will tend to repeat itself in non-domestic matters.

This is clearly evidenced in the light of the numerous treaties agreements and conventions that the new government entered into between 27 April 1994 and the 3rd of March 1995, or is about to enter into.

This shows that the national political power-bearers are keen to be as inclusive and accommodating in matters of foreign relations as with domestic negotiation politics. We see ties being formed (and where it previously existed, strengthened), with the United Nations and its organs, the International Labour Organisation, the World Health Organisation, the World Bank and the International Monetary Fund.

And yet, South Africans at grass-roots, the very individuals who entrust their lives and those of their families to those in power, knows precious little, if anything about the impact these agreements and instruments will have on their daily existence.

The ACDP is concerned when articles such as appeared in the Sunday Tribune, dated January 29th of this year, mentions that included in a treaty on inter-state relations, between South Africa and India, affirmations of "the shared principals of the two countries on secular governance, their common resolve to fight against...religious fundamentalism..."

✂ In terms of Sec.14 of the interim constitution, (Act 200 of 1993), religious freedom is guaranteed. Several cabinet ministers tried to allay the suspicions of Christians in this country only weeks ago, that their religious rights and freedoms were secure.

✂ The ACDP proposes that the new constitution, in line with the right to access to information, demands from national government to also include citizens in its decision-making as the international agreements have a direct and indirect influence on every individual person in this country.

Some sound principles of proper foreign policy was set forward by George Washington in his Farewell Address in 1796 - this by a man who was solidly grounded in Biblical teaching and principles (Quoted in *Liberating the Nations*, McDowell & Beliles, Va):

1. Cultivate peace with all nations and maintain impartiality

"Observe good faith and justice towards all nations; cultivate peace and harmony with all. Religion and morality enjoin this conduct...It will be worthy of a free, enlightened, and ...great nation to give to mankind the...novel example of a people always guided by an exalted justice and benevolence..."

"Harmony, liberal intercourse with all nations, are recommended by policy, humanity, and interest."

2. With trading, keep political connections to a minimum.

"The great rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little political connections as possible...But, even our commercial policy should hold an equal and impartial hand; neither seeking nor granting exclusive favours or preferences; consulting the natural course of things...constantly keeping in view, that it is folly in one nation to look for disinterested favours from another; that it must pay with a portion of its independence for whatever it may accept under that character..."

3. **No long-term entangling alliances.**

"It is our true policy to steer clear of permanent alliances with any portion of the foreign world...taking care always to keep ourselves by suitable establishments, on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies."

A nation that shows impartiality toward all nations and does not engage in long-term enlarging economic, political, or military alliances would be in a position to be an example to other nations and the ACDP states this to be a goal of central importance in matters of foreign relations: to positively affect all other nations by treating all nations equally, ready to provide sound advice and judgement, when called upon by other nations to do so.

In terms of section 23 of the interim constitution, international agreements and public international law are incorporated into municipal law as to substance. The Constitutional Principles only require that "universally accepted" human rights principles be incorporated in the new constitution. This implies that the framers of the constitution left the incorporation of the rest of international human rights principles to the national representatives.

The ACDP calls for an openness in international dealings due to the fact that the lives of South African families are impacted upon. One way to do this would be to constitutionally oblige government to inform the South African republic through the electronic and print media of the text and most importantly, of the impact the particular instrument due to be ratified will have, to widely publicise this and request feed-back even before the matter is brought up to the Houses for ratification. This will ensure that South Africans will be much more aware of the trend of international law, the Spirit behind it and how it will affect them daily.

The ACDP further sees an incorporation along the lines of Sec.231(4) as prudent to provide that rules of customary international law will not be binding on the Republic of South Africa if it is inconsistent with the new constitution. This is a necessity due to the two postulations on the religious nature and the source of power inherent in all law.

While it may sound cultured to talk of "the global village" or "the international community" truth be that these so-called entities are comprised of a multitude of unique and individual societies with widely divergent customs and culture.

This is the way the Lord meant it when, according to Genesis 11:4, the descendants of Noah, having one language and one culture, decided that they would build a tower which could have been seen from afar, so that they would not move away from that one location.

But that was against God's design and so he gave them different languages, and so the different groups formed the different cultures in different settings across the globe.

The ACDP states that the sovereignty and autonomy of this nation must not be sacrificed in order to become what in effect is only a mere state in the larger confederation of the earth.

20th June 1995
[FOREIGN.WPS]

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AGENDA ITEM 11 : FOREIGN RELATIONS AND INTERNATIONAL LAW

(a) Head of State's powers and responsibilities:

Under the interim constitution these powers and responsibilities are defined under Clause 81 and 82. The D.P. is in agreement with these provisions as defined. There could, of course, be an amendment to Clause 82(2) in the event of there being a change in the number of Vice Presidents.

(b) Employment of military apparatus for external purposes:

The functions of the National Defence Force with regard to the above item are spelled out in the interim constitution Clause 227. The D.P. has nothing to add to these provisions.

(c) International law and treaties:

Rights and obligations under international law are dealt with under Clause 231 of the I.C. The question that needs to be asked is whether or not there is a need for any particular article of international law or treaty to be included in the constitution, or whether it could be dealt with satisfactorily under normal legislation. Only if it were deemed necessary for good reason to include such laws or treaties in the constitution should this be done.

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NATIONAL PARTY PRELIMINARY SUBMISSION

THEME COMMITTEE 1

Block 8: Agenda Item 11: Foreign Relations and International Law

1. Introduction

1.1 Foreign relations and international law are dealt with in the Constitution in relation to three issues: the powers of the head of state to conduct foreign relations, the deployment of the military beyond South African borders and international law and treaties.

2. Constitutional principles

2.1 Constitutional Principle I states that the Constitution shall provide for the establishment of one *sovereign* state.

2.2 Constitutional Principle XXI(3) provides that where there is necessity for South Africa to act as a single entity, as is the case in respect of foreign relations, powers should be allocated to the national government.

3. Head of State's powers and responsibilities

3.1 Section 82(1)(i) of the Constitution of the Republic of South Africa, Act 200 of 1993 ("the Constitution") states that the President may "negotiate and sign international agreements", whilst section 82(1)(f) empowers him or her to appoint and receive diplomatic representatives.

3.2 Section 35(1) *inter alia* directs courts of law to have regard to public international law applicable to the fundamental rights entrenched in the Constitution when adjudicating the charter of fundamental rights. Indirectly, therefore, functions exercised by the head of state having relevance to fundamental rights will need to be exercised in accordance with regard to public international law.

3.3 The principle relating to the head of state having to exercise his or her powers in consultation with the Executive Deputy Presidents and Cabinet is not at present in issue, as this matter more properly should be dealt with by Theme Committee 2, although the exercise of powers and performing of functions by him or her in respect of foreign relations needs to be assessed subject to consensus on the principle of consultation between the President and other functionaries. Subject to the National Party's submission to Theme Committee 2, it is sub-

mitted that the present situation in this regard be retained, so that the President shall exercise his or her powers vis-à-vis foreign relations after consultation with the Executive Deputy Presidents.

3.4 It is submitted that the so-called royal prerogatives previously contained in South African constitutions have been replaced by the statutory provisions of section 82. There is no need to retain these prerogatives as the powers listed in section 82 adequately provide for the effective performance of duties by the head of state.

4. Employment of the military beyond South African borders

4.1 Section 82(4)(a) of the Constitution states that the President is the Commander-in-Chief of the SANDF. This provision, as well as paragraph (b) which lists the President's powers in this respect, should be retained in principle.

4.2 Section 227 of the Constitution lists the functions of the SANDF. Subsections (1)(a) and (b) state that the SANDF may be employed for service in the defence of the Republic, for the protection of its sovereignty and territorial integrity and for service in compliance with the international obligations with regard to international bodies or other states. Section 228(4) provides for the President having to inform Parliament of his or her decision to employ the SANDF under the aforementioned circumstances.

4.3 It is submitted that these provisions be retained in principle, as they provide for accountability of the President's decisions and as the separation of powers between the Executive and the Legislature is also re-emphasized.

4.4 Section 227(2)(d) and (e) provides that the SANDF shall not breach binding international customary law relating to aggression, and that it shall in armed conflict comply with binding international customary law and treaties. Reflecting the values underlying an open and democratic society based on freedom and equality and respect for the rule of law, these measures should be retained.

5. International law and treaties

5.1 The retention of this section 231 of the Constitution is of vital importance. The increasing role that bi- and multilateral relations play in the South African agenda, the global nature of many problems and the need for South Africa to deal with other nations underlines the necessity for a measure dealing with international agreements. It is also important that the Legislature have a say in something which directly affects the progress of the country and its people. In support of the concepts of openness and accountability which permeates the

Constitution, it is important that the power to enter into or accede to international agreements be balanced by empowering Parliament to ensure that checks and balances are placed on the exercise of the Executive (and the President in particular) of its powers in this regard.

5.2 Certain changes to section 231 are however proposed.

5.2.1 Subsection (1) can remain as it is except for the deletion of the words "within the meaning of the previous Constitution". These words no longer have any significance in view of the changed position in respect of the territory of the Republic.

5.2.2 Subsection (2) can remain as it is except for the deletion of the words "negotiated and signed in terms of section 82(1)(i)". Many (multilateral) international agreements are no longer open to negotiation and signature, but only to accession. Furthermore, a number of international agreements are in their particular nature not law-making, but create a platform for good relations between countries and therefore do not need ratification. The retention of the above-mentioned phrase in those circumstances creates a contradiction. Furthermore, Parliament need not be occupied with non-law-making agreements, or pro forma agreements establishing diplomatic and consular relations. Parliament would therefore be competent to ratify agreements where a particular agreement requires accession or ratification to bring it into force on an international plane.

5.2.3 Subsection (3) can largely be retained. It might, however, be useful to qualify the word "expressly" by adding the phrase "by Act of Parliament", thereby removing any doubt which may exist.

5.2.4 Subsection (4) can be retained without amendment.

6. Ancillary matters

6.1 Section 218(1)(e) of the Constitution provides that the National Commissioner of the SAPS shall be responsible for international police liaison. This provision should be retained.

6.2 Section 116(2) of the Constitution provides that the Human Rights Commission shall report to a relevant legislature any legislation which may be contrary to the relevant norms of international human rights law. This measure should be retained in principle.



Ref No.

12 June 1995

PRELIMINARY SUBMISSIONS OF THE PAC ON FOREIGN RELATIONS AND INTERNATIONAL LAW.

All states which engage in foreign relations and want to be taken seriously by other states or nations, have to abide by a certain code of conduct which requires, *inter alia*, that they,

1. Respect international Law and international obligations they have undertaken.
2. Observe principle of non-intervention in domestic affairs of other states.
3. Prohibition on the use of force to settle conflicts unless it is in self defence.
4. Respect the principle of equality of states, their sovereignty and territorial integrity.
5. Peaceful co-existence of all states.
6. Promotion of the need to observe and protect Human Rights.

These are some of the principles that should guide foreign relations and can be found in the United Nations Charter and the United Nations' Resolution 2625, 1970 on principles of international law concerning friendly relations. These are part of customary international law and bind all states.

International Law and the **FINAL** South African Constitution.

The **FINAL** Constitution will be Supreme Law of the country. What about its relationship with International Law?

The PAC subscribes to the notion that our country should respect national law but should also ensure that our law is in line with international law, International norms and those obligations we have undertaken under international law.

It is within the above context that we can support the Constitutional position that international law shall apply to South Africa as long as it is not in conflict with the constitution or Statute law. (see S231(4) of the interim constitution). We also support the notion that there is an assumption in this regard that the law makers will not deliberately legislate so as to violate international law or obligations undertaken under international law. So, courts should seek to find an interpretation that reconciles, where possible, national law with international law.

However, it must be said that we do accept the Jus Cogens doctrine. This means that there are certain norms of international law which would not accept any limitation by national law. These norms include, the rule against torture and genocide and the non-discrimination principle. Our constitution should reflect this position.

M Dyani
MP

