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**A20**

**CONSTITUTIONAL  
ASSEMBLY**

**THEME COMMITTEE 1**

**CHARACTER OF  
DEMOCRATIC STATE**

**19 APRIL 1995**

**ROOM M515  
14H00**

***DOCUMENTATION***



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# CONSTITUTIONAL ASSEMBLY

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## MEETING OF THEME COMMITTEE 1

### CHARACTER OF THE DEMOCRATIC STATE

Please note that a meeting of the above committee will be held as indicated below:

**Date:** Wednesday, 19 April 1995

**Time:** 14h00 - 18h00

**Venue:** Room M515

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#### AGENDA

1. Opening
2. Apologies
3. Adoption of Previous Minutes for the meetings held on the 27 March and 3 April
4. Matters arising
5. Finalization on Draft Report for Block 2
6. Orientation workshop for Block 4  
*[Input by Prof. Corder]*
7. Public Participation Programme
8. General
9. Closure

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H EBRAHIM  
EXECUTIVE DIRECTOR:  
CONSTITUTIONAL ASSEMBLY

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**CONSTITUTIONAL ASSEMBLY**

**THEME COMMITTEE 1  
CHARACTER OF THE DEMOCRATIC STATE**

**MINUTES OF THE MEETING OF THEME COMMITTEE 1  
MONDAY 3 APRIL 1995 09H00 ROOM M46**

**Present**

**Marais P G (Chairperson)**

**Ally A  
Booi M S  
Chiba L  
Chikane M M  
Cwele C S  
Dyani M M  
Ferreira E T (Alternate for Mr Zondi)  
Gumede D M  
Hangana N E  
Janse Van Rensburg A P  
Kekana N N  
Lekgoro M K  
Mabuza M C  
Macozoma S J  
Mahlangu N J  
Marais A  
Mngomezulu P G**

**Mohale M  
Momberg J H  
Moorcroft E K  
Mtshali L P H M  
Mulder P W A  
Ripinga S S  
Schoeman E A  
Seaton S  
Shope N R  
Sisulu A N  
Streicher D M  
Van Deventer F J  
Williams A J**

**APOLOGIES:**

**Niehaus C G, Nzimande B E, Vilakazi B H, Zondi M K**

**Technical Experts present:**

**Corder H  
Husain Z**

**Leola Rammable and Susan Rabinowitz were in attendance.**

**1. OPENING**

The meeting was opened by the Chairperson at 09h05.

**2. ADOPTION OF PREVIOUS MINUTES**

The minutes of the Theme Committee meeting of 27 March 1995 contained in Document A19 were tabled.



The IFP raised an objection on Page 4 the last paragraph of the minutes. They stated that the minutes did not reflect the full discussion on the issue of One Sovereign State with regard to internal arrangements and suggested that the tapes be referred to and this be recorded.

It was agreed that the Technical Experts would assist the Secretary in reformulating this item and that the Minutes would then be placed before the next Theme Committee meeting for adoption.

**3. MATTERS ARISING**

None

**4. TABLING AND DISCUSSION ON DRAFT REPORT ON BLOCK 2**

The Draft Report from the Sub-Committee to the Theme Committee for Block 2 was tabled.

Prof Corder spoke through the document, describing how the document had been drafted, following the guidelines laid down in the memorandum from the Executive Director of 16 February 1995. He noted that the last two pages had been substituted by two corrected pages. He further explained that Part 1 was not complete.

With regard to the completion of Part 1 of the document, it was agreed that the Technical Experts would finalise the list of submissions received, produce a summary of the public hearings and finalise the document with the addition of the outstanding information and would then submit it to the Theme Committee for final discussion on Wednesday 19 April.

Mr Husain added that some of the parties had not expressed themselves on some of the issues and requested whether the parties would either express themselves in broad principle or would record that these submissions would be made in other theme committees.

It was agreed that a procedure needed to be followed with regard to this matter and because parties had not expressed themselves this did not mean that they did not have an opinion on an issue but that the issue was considered by them in another Block or by another Theme Committee.

It was therefore agreed that a statement would be formulated by the Technical Experts and would be added as the first statement in Part 2 on Page 4 along to the following lines: "Because of the differing treatment between the parties of the issues, not all the parties have expressed themselves in this Block but that the reader is referred to other Blocks or forthcoming Blocks or other Theme Committees."



The FF raised its concern on the question of the flexibility of the Constitution. It was agreed that this matter would be covered under Block 3 which dealt with Supremacy of the Constitution.

All parties agreed to the amendments of the Draft Report and it was further agreed that discussion on items A, C, and D of Part One would take place once the Technical Advisors together with the Subcommittee had finalised these sections.

**5. REPORT FROM CORE GROUP**  
**6. DEADLINE FOR PARTY SUBMISSIONS FOR BLOCK 3**

It was agreed that these two items would be dealt with simultaneously.

The minutes of the Core Group meeting held on Wednesday 29 March 1995 contained in Document A19 were tabled.

The Chair reported on the two matters raised at the Core Group Meeting.

Firstly, with regard to the deadline for submissions on Block 3, it was reported that the Core Group had expressed the concern that the deadline should not be during the Easter Recess. However, the memorandum from the Administration of 31 March 1995 "Deadline for Block 3 and 4" was now tabled, requesting party submissions before or on 18th April.

It was agreed that the parties would endeavour to submit their submissions for Block 3 by the 18th April and that an orientation workshop would be held on Block 4 at the Theme Committee meeting on the 19th April so that the submissions for Block 4 could be submitted as soon as possible thereafter.

Secondly, with regard to meetings immediately after the Easter Recess, the Chairperson reported that the Core Group had agreed that due to problems of some members with travel arrangements, the Theme Committee would not meet on Tuesday 18th April but on Wednesday 19th April.

The memorandum of the Executive Director of 31 March 1995 regarding the "Schedule of CA activities for week 18-24 April 1995", was tabled. It was agreed that the Core Group would meet on Tuesday 18th April at 14h00 and that members who had travel difficulties would arrange for substitutes to attend.

**7. SETTING UP OF SUB-COMMITTEES**

It was agreed that the Administration should place advertisements calling for written public submissions on issues which are to be dealt



with through commissions or sub-committees as soon as possible.

**8. PUBLIC PARTICIPATION PROGRAMME**

A memorandum from the Executive Director entitled "Theme Committee consultation with the business sector" was tabled. It was agreed that the Administration should continue with its planning and keep the Theme Committee informed.

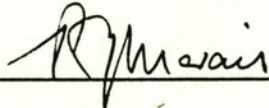
**9. GENERAL**

None

**10. CLOSURE**

The meeting rose at 10h30.

**CHAIRPERSON**



03.04.95

**MEMORANDUM**

**TO: CHAIRPERSON**

**FROM: LEOLA RAMMBLE  
MANAGING SECRETARY**

**DATE: 6 APRIL 1995**

**SUBJECT: AMENDMENT TO MINUTES DATED THE 27 MARCH 1995**

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The Theme Committee of 3 April 1995 requested that the input made by the Technical Advisors at the meeting of the 27 March 1995, be transcribed to deal with a correction to the minutes raised by Mr. Mtshali.

Please note that the transcriptions have been completed and we are still awaiting a response from the IFP, so that the minutes could be reformulated by the Technical Advisors and Secretariat.

**Action Required:**

This matter has to be dealt with in the Theme Committee meeting of the 19 April 1995.



**TRANSCRIPTION FROM TAPE OF THE THEME COMMITTEE 1 - MEETING OF 27 MARCH 1995**

**HEUNIS:** Thank you for the occasion and I trust that this will be seen as a bona fide attempt to assist and facilitate your discussion now and in future. You will recall that since the inception of your discussion some parties would regard their reference to one sovereign state as precluding the notion of federalism whereas arguably other parties would regard the absence thereof as precluding the notion of a unitary state.

The contribution that I would like to make presupposes a bit of knowledge of the different branches of the law and what a subject of the law generally is for our purposes. I would like to refer you for instance to private law. In every country you have a system of private law which regulates the legal relationships between subjects of the law. Chair, you and I and other honourable members who are here are all subjects of the law. The law governs the legal relationships between us. If we were to conclude a contract the law says what we need do in that contract. That is governed by private law. Companies are also subject of private law. Even the state may be the subject of private law, for instances, if the state enters into a contract with an individual or a company it becomes then, even if it is sovereign or even if it has lots of authority generally speaking in other branches of the law, it becomes your equal as a subject of private law. There are also other systems or branches of the law such as administrative law which presupposes an unequal relationship between subjects being people and the state.

Then you have a system of law, constitutional law, which defines organs of state and it establishes the interrelationship between organs of state, it governs the way in which the state has to be run and the way in which its executive and legislative organs function and it governs the relationship between those organs.

But then there is another system of law, public international law. The primary subjects of public international law are states. There are also other subjects such as international organisations but for purposes of what I would like to convey to you I would like to focus on the fact that states are the subjects of international law, in other words, it is international law that sanctions, for instance, international agreements between states. In order to qualify as a subject of international law i.e. to be a state, a state must have in terms of what is known as a declaratory theory of recognition, it must have a territory, it must have a people and a government which exercises effective control in respect of the territory and of the people. If you have that you have a state.

For purposes of international law states are referred to as sovereign by reason of the fact that they are on an equal footing with all other states. It means that states are independent and that is what Prof Corder and I think is intended when Principle I of the Constitutional Principles refers to the state being a sovereign state. It means to our thinking no more and no less than that this state of the Republic of South Africa and the future Republic of South Africa as defined in the new Constitution would be on a par with other states in terms of international law. It would be an equal subject along with all other states that form the international



community by reason of the fact that it is a sovereign state for purposes of international law i.e. it is an independent state, it is not subject to the authority of any other state and it is not subject to the authority of any other subject of international law such as international organisations. It is not a colony, it is an independent sovereign state i.e. a subject of international law.

Having said that I would clearly not want what I have said to inhibit the discussion as far as the parties various positions are concerned on this subject matter.  
Thank you, Chairperson.

**Mokaba:** If Constitutional Principle 1 confines the question of sovereignty to international public law, then it is a simple declaration that it is equal in international terms with other states. Does it then mean that a part of what is understood as South Africa, for example, a province can be regarded as equal, can have that type of relationship with other states including the state within which it is recognised as a province?

**Heunis:** Chairperson, yes I think that what the notion of sovereignty in the context of international law denotes, that it precludes not federation but confederation. Because confederation pre-supposes the existence of a number of sovereign states. In other words it goes beyond federalism, but if one were to take examples - there are many federations in the world but there is not one federation of which the component states or provinces of whatever one wants to call them can lay claim to being a sovereign state having the status of a subject of international law. So the answer to the question is really that the constituent parts of a sovereign state for purposes of international law cannot themselves qualify as being subjects of international law without attaining a full measure of sovereignty for purposes of international law i.e. without becoming a fully independent state for purposes of international law.

**Zondi:** Mr Chairman, its just a comment to say that quite clearly what Dr Heunis is saying is the IFP is in total agreement with. That is the understanding of our position and would like to refer especially our colleagues of the ANC to Page 4 paragraph 4 of our submission - that first sentence has got a small 1 and a footnote at the bottom where we clearly state our position.

**Chair:** Any further clarification on what Dr Heunis has said.

**Mulder:** I agree with what I heard. Just to turn it around if I may - if I am correct, in Belgium - the other way around the Government as such, the Belgium Government can have some agreement - that is the moment, the situation there, for example, that agreements that the sovereign country of Belgium may make with other countries can only be done after consultation with the other different ones and even that they must agree that they have a veto but that's international veto for example, Belgium going into some educational treaties with the rest of Europe, I know that the German speaking part do have certain veto rights but that's an internal argument from that point of view that that's possible from the other way around.



**Heunis:** That would be governed by constitutional law. In other words, what Dr Mulder is doing is referring to an example where it is inherent or part of the autonomy of a province in a federation or a constituent element of a federation that for certain purposes it must be consulted. For instances, if the state were to conclude an international agreement which would have implications for that particular province the state needs to in terms of constitutional not international law consult with the province. If I may draw an analogy. For instance, in terms of various federal constitutions such as that of Switzerland, such as that of the United States, the constituent states need to be consulted before, for instances the constitution can be amended. There are even federations where the constituent element states are empowered to enter into legal relationships with other states properly so called, in other words, other or states which are fully independent states.

**Chair:** Any other questions?

**Nzimande:** Chairperson, some difficulties are created now, because as much as we have said that we have closed this but this definition re-opened this again. Because, it's a pity I don't think we should be in the habit of asking our Technical Advisers to judge various parties' contributions but if I hear the definition of sovereignty as Prof Heunis is defining it, its in complete opposition to what paragraph 2 to what the IFP submission is saying, and I am saying that because it is the state, that sovereign state which carries those attributes of sovereignty but here that is being denied. Now I am rather uncomfortable when my colleague, Mr Zondi, says he is in perfect agreement with the definition yet point 2 as far as I read it is in complete opposition to that definition because it is a denance of the sovereignty of that state and I don't think that we can pass on this matter without getting this clarity, without by any means, Mr Marais, wanting to re-open the discussion on the IFP submission as such.

**Chair:** It is proper to get some clarity and I can't see it to be out of order.

**Corder:** Perhaps I could help the way that we would read it, Dr Nzimande, is that what the IFP is talking about in Paragraph 2, and I think that we are trying to be very careful not to seem that we are judging any party submission, that is why we kept quiet for 2 hours this morning when we could have said this right at the beginning, but it seems to me, and I hope that I am reading this correctly, that the IFP in Paragraph 2 is approaching it, you'll see the word "modern constitutionalism" in line 3, that is from the internal point of view. What Dr Mulder has been referring to, what we've been trying to stress, what Dr Heunis has been trying to stress on our behalf is that our reading of Constitutional Principle 1 concentrates on the international law perspective whereas the IFP submission is chiefly focused on the internal constitutional law perspective. Indeed just on a very quick perusal on the other parties submissions as well, most of the other parties also concentrated on internal arrangements as well. Now we've had lots of discussion in this Theme Committee about overlap with other committees and it may assist to remember that Theme Committee 2 entire focus bar Block 10 which deals with constitutional amendments, Theme Committee 2's entire focus is on the vertical separation of powers. In other words, from the internal point of view division of powers and



internal constitutional arrangements. I don't know if that helps at all but in other words what I am suggesting is that it is possible for the IFP to say that they are in agreement with what Dr Heunis had said as seen from the international law perspective.

**Nzimande:** Follow up - that what one will have to look into , without extending the debate. My uneasiness is to what extent is this particular projection of the internal meaning of sovereignty even the potential of subverting the international dimension at the end of it all? The point I made very early that it looks like we are talking about, which is a contradiction in a sense, a state without sovereignty because of the kind of imperatives that are driving the internal definition of sovereignty, that is my uneasiness. A matter perhaps that we will need to look into.

**Chair:** Anyone to attempt an explanation on that.

**Heunis:** Chairperson, if I may just refer with respect to the definition of a state in international law. For the purposes of international law a state needs to have a territory and a state needs to have a population and it has to have a government which exercises effective control in respect of the territory and the population. If those requirements are not met then it isn't a state for purposes of international law.

**Ripinga:** I wanted to align myself with Comrade Blade, on the modern constitutionalism approach to defining the state. I think I also have a problem with that. I fully align myself with what Dr Heunis has said because that is what I've said at the beginning when defining the state, but to try and have another hidden type of definition or approach like is given to us by Prof Corder is going to confuse everything, which allows in fact in the end the violation of all Constitutional Principles because another hidden approach is being used. So I wouldn't go with that approach of modern constitutionalism. In fact, I have a problem with modern constitutionalism because I don't see it in the library and I don't know where it comes from.

**Zondi:** Just also again to state for the record that we are in total agreement with the understanding that was projected by Prof Corder. Thank you.



