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26 JULY 1993



EMBARGOED UNTIL TABLED IN THE NEGOTIATING COUNCIL

**SECOND SPECIAL REPORT ON CONFEDERALISM FROM THE
TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO
THE NEGOTIATION COUNCIL**

26 JULY 1993

1. Introduction

Since our (first) Special Report on Confederalism was tabled and debated in the Negotiation Council we have received a written response by the Conservative Party to that report, dated 23 June 1993. The Conservative Party's 'First Draft Constitution' for the proposed partitioned or seceded state (entitled 'KONSEPGRONDWET VIR DIE STAAT VAN AFRIKANERVOLK'), being a guideline presently under discussion by the Conservative Party, was also submitted to us.

1.1 It is not our function to get involved in a political argument with the Conservative Party. We reiterate our view, however, that the Conservative Party is entitled to express its political views and opinions. In this report we present a brief outline of the Conservative Party's constitutional approach and our response to the cardinal issues raised in it.

2. Outline of the Conservative Party's Approach

The basic elements of the Conservative Party's constitution for a "Volkstaat" can be summarised as follows:

- 2.1 The "Volkstaat", described as a Republic, is a sovereign independent and democratic 'regstaat', based on the separation of powers, representing the 'volk' through elected representatives.
- 2.2 The territory of the Republic is indivisible and the Republic may cooperate with the other states in Southern Africa on the basis of a voluntary confederation.
- 2.3 The Republic will have its own security forces of which a State President is the ex officio head.
- 2.4 Citizenship is granted to all Afrikaners residing in the Republic on the date of independence (see below) and citizens over the age of 18 will have the franchise, the right to be elected and to form political parties.
- 2.5 Part 2 of the draft constitution contains the fundamental rights regulating the state-individual relationship. Fundamental rights such as freedom of assembly, association, employment, and military service are limited to citizens.
- 2.6 The legislature consists of the State President and a Parliament having two houses: the members of the 'Volksraad' or lower house are elected on a constituency basis, whilst the members of the Senate are indirectly elected by the members of the 'Volksraad', in proportion to the strength of the relevant political parties.

- 2.7 The Executive consists of the State President and cabinet ministers appointed by the State President.
- 2.8 The State President is directly elected by universal franchise of citizens for a period of five years (re-electable only once) and he cannot serve in that capacity if he is over the age of 75 years.
- 2.9 Provision is made for a specially constituted Constitutional Court.
- 2.10 The Constitution is a rigid one providing for specified majorities for its amendment.

3. **Specific Issues**

3.1 General:

In paragraph 2.4 of our previous Special Report referred to above, we stated that a determination of the external features of the form of state does not involve a theoretical discussion of form of state, but rather a practical discussion of all those concrete elements which constitute statehood and determine the nature of the state. These concrete elements are:

- * the territory and boundaries of the state;
- * the creation and establishment of the state, whether through partition or secession;
- * the population of the state which implies a clear and legal definition of citizenship and the legal status of non-citizens; and
- * the governance and legal system of the state.

3.2 Territory and Boundaries

The determination of the territory and boundaries of the proposed Afrikaner state falls outside our mandate, and although we take cognisance of the fact that such proposals will be submitted to the Commission on the Demarcation/Delimitation of SPRs, we are of the view that no state can ever exist in vacuo. Unless the proposed features of the draft constitution obtain concrete and physical expression and manifestation in relation to a defined territory they are in our view constitutionally without any legal effect. The furnishing of the territorial features of the proposed state would have enabled constitutional lawyers to identify the nature of the state's population and the constitutional viability of an *agreed* partition or dismemberment of the present RSA.

3.3 The Creation and Establishment of the State

We do not contest the right of self-determination of a people like the Afrikaners: as an identifiable people or minority they could be protected in the political and legal sense in a composite South African state within the ambit of the constitutional principles adopted and in the process of being debated in the Negotiating Council. In so far as this collective right of self-determination implies the right of a people, however defined, to determine its political future, it may justify a secessionary action in respect of that territory in which they reside *only* if they are suppressed, or denied fundamental human rights, or if secession is voluntarily agreed upon with the government. The Conservative Party's submissions, in our view, do not contain any evidence that could form the basis for such a secession.

A voluntary partition is not foreseen as a viable constitutional alternative if the effect of such a proposed partition would be that a substantial part or the majority of the population of the partitioned state are disenfranchised in respect of the *territory* in which they live and in respect of the *government* that controls their lives in that territory. It can undoubtedly be expected that

in such an event the sanction of the international community for such a dispensation would be withheld. A confederal option with these unanswered lacunae can therefore not be recommended.

3.4 Citizenship and the Legal Status of Non-citizens

According to clause 6 of the Conservative Party's draft constitution, citizens of the proposed state would be Afrikaners residing in the territory as well as those persons born or resident elsewhere and who apply for citizenship. Citizenship may also be acquired by persons born in the territory of parents who are both citizens: this last-mentioned category applies only in respect of the acquisition of citizenship after independence. Although it is constitutionally permissible to define citizenship in terms of ius sanguinis (by descent), the initial cut-off point to ascertain who exactly would be the first Afrikaners in the proposed state, is still vague.

The second category of initial citizens comprises those born or resident outside the territory and who apply for citizenship. This means that all non-Afrikaners born in or residing in the state are not citizens of the proposed state, and indeed would be constitutionally disenfranchised in the state. To them it is no solatium or consolation to state that they will remain citizens of the 'New South Africa'. (See para 5.8 of the Conservative Party's said Response.) This indeed will amount to the formal denial of the very right of self-determination (on which the Conservative Party relies) to those others, be they a majority or a minority, who would be living in that state.

To merely treat them, as enunciated in clause 8 of the Conservative Party's draft constitution, as aliens, only emphasises the constitutional unacceptability of the proposed dispensation, rather than clarifying it.

4. **Conclusion**

Although the Conservative Party's submissions provide particulars on the governance and legal system of the proposed state, the question in regard to the other concrete elements referred to in paragraph 3.1 above which constitute statehood, have as yet not been resolved.

