

2/4/19/3

CONSTITUTIONAL ASSEMBLY

**THEME COMMITTEE ONE
CHARACTER OF
DEMOCRATIC STATE**

**DRAFT REPORT
BLOCK 8**

**FOREIGN RELATIONS &
INTERNATIONAL LAW**

REPORT FROM THEME COMMITTEE ONE

BLOCK 8: FOREIGN RELATIONS AND INTERNATIONAL LAW

31 JULY 1995

PART ONE

- A) Summary Overview of submissions received and processed by Theme Committee One from sources outside the Constitutional Assembly (Vol 23 and 25) - see attachment.
- B) The Technical Committee conducted an Orientation Workshop on 29 May 1995 - before parties made their submissions on the subject matter of this Block - for which purpose the attached Briefing Document was compiled.
- C) Public Participation Programme:
- None of the submissions received from the public during the CPMs was relevant to the agenda item being dealt with by the Theme Committee in Block 8.
- D) No public hearings were held on this agenda item.
- E) The following Constitutional Principles refer:

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.

XXI(3)

Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

PART TWO

AGENDA ITEM 11: FOREIGN RELATIONS AND INTERNATIONAL LAW

A. GENERAL DISCUSSION OF THE MATERIAL

There appears to be widespread support for the notion that South Africa must take its rightful place in the international community and become a party to international human rights conventions. Parties generally emphasise the importance of adherence to public international law in all spheres of state activity and the need for Parliamentary involvement in respect of approval for and incorporation into national law of international treaties to which the Republic may become a party.

Again some parties emphasised certain issues which were not referred to by others and a number made no or few specific proposals regarding the current and suggested future constitutional provisions canvassed in the Briefing Document and the contribution by Professor D J Devine. The division into "non-contentious" and "contentious" issues is thus complicated. However, since the Briefing Document deals extensively with all pertinent issues and had been at the disposal of the various parties, it can be assumed that matters raised therein with which issue has not been taken by any party can safely be regarded

as "non-contentious".

B. NON-CONTENTIOUS ISSUES

I) Although the way in which the President will in future be required to exercise his powers may vary, he should in principle retain the powers currently provided for in section 82(1)(f) and (i) namely -

- (a) to appoint, accredit, receive and recognise ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers; and
- (b) to sign (not negotiate) international agreements.

II) The President should remain the Commander-in-Chief of the National Defence Force as currently provided for in section 82(4)(a) of the Constitution.

III) The President should continue to have authority as currently provided for in section 82(4)(b) of the Constitution -

- (a) with the approval of Parliament, to declare a state of national defence;
- (b) to employ the National Defence Force in accordance with

and subject to provisions similar to those provided for in sections 227 and 228 of the Constitution; and

(c) to confer upon members of the National Defence Force permanent commissions and cancel such commissions.

IV) As currently provided for in sections 227(1)(a) and (b), (2)(a)(i), (ii) and (iii), (d) and (e) the National Defence Force -

(1) may, subject to the Constitution, be employed -

(a) for service in the defence of the Republic, for the protection of its sovereignty and territorial integrity;

(b) for service in compliance with the international obligations of the Republic with regard to international bodies and other states,

(2) shall -

(a) exercise its powers and perform its functions solely in the national interest by -

(i) upholding the Constitution;

(ii) providing for the defence of the Republic;
and

(iii) ensuring the protection of the inhabitants of
the Republic,

in accordance with the Constitution and any law,

(3) not breach international customary law binding on the
Republic relating to aggression; and

(4) in armed conflict comply with its obligations under
international customary law and treaties binding on the
Republic.

V) The checks and balances currently provided for in section 228(4) and
(5) are regarded as acceptable.

(1) Subsection (4) provides that -

(a) the President must, when the National Defence
Force is employed for service, inform Parliament of
the reason for such employment; and

(b) in the case of employment referred to in section 227(1)(a) or (b) and if Parliament is not sitting, the President must summon the appropriate joint standing committee of Parliament to meet expeditiously, but not later than 14 days after the commencement of such employment, and must inform the committee of the reasons for such employment.

(2) Subsection (5) provides that Parliament may by resolution terminate any employment referred to in section 227(1)(a), (b) or (e), without such termination effecting the validity of anything done in terms of such employment to the date of such termination, or any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such employment.

VI) Subject to the proviso that in subsection (1) the reference to the current Constitution should become a reference to the final Constitution and that more appropriate and practical provision should be made for Parliamentary approval for and incorporation into national law of international treaties in accordance with the remarks contained in the Briefing Document as well as those contained in Professor Devine's contribution, a section similar to the current section

231 which deals with the status of international law and the conclusion and incorporation of international treaties, should be retained.

VII) If possible all other relevant sections should be approved upon from a drafting point of view.

C. **CONTENTIOUS ISSUES**

There are no contentious issues.

D. **ADDITIONAL ASPECTS**

The following additional aspects were raised by the parties concerned:

ACDP: Proposes that the new Constitution, in line with the right of access to information, should require of the national government to also include citizens in its decision-making regarding the conclusion of international agreements since they could have a direct or indirect influence on individuals in the country. Openness in international dealings is also called for.

ANC: Advocates that South Africa must lead the way in the international promotion of human rights and where possible seek to achieve the peaceful resolution of conflicts. Important decisions need to be taken by the President in consultation with the Cabinet and his functions and powers should be determined by the Constitution or Parliamentary legislation. The President

should have power over and have ultimate responsibility in respect of the intelligence services and be accountable to Parliament in respect of all matters concerning such services.

DP: Raises the question as to the desirability or otherwise of the inclusion of a section in the Constitution dealing with international law but makes it clear that it is not opposed to such inclusion.

NP: Makes the point that the royal prerogatives previously contained in the South African Constitutions have been replaced by the provisions of section 82. There is consequently no need to retain these prerogatives. Stresses that the South African National Defence Force should not breach binding international customary law relating to aggression and that it should in armed conflict comply with binding international customary law and treaties. The retention of a section similar to section 231 is regarded as of vital importance. Raises as ancillary matters the desirability of the retention of section 218(1)(e) of the Constitution which provides that the National Commissioner of the SAPS shall be responsible for international police liaison and section 116(2) which provides that the Human Rights Commission must report to a relevant legislature any legislation which may be contrary to the relevant norms of international human rights law.

PAC: Emphasises the judicial sanctity of *jus cogens* (the highest principles of law recognised by civilised nations) and the importance of adherence to public international law generally.

**Analytical Survey of Report by Theme Committee One on Block 8 -
Foreign Relations and International Law**

Constitutional Principles	Contentious Aspects	Non-contentious Aspects	Remarks
I, XXI(3)	None	<ol style="list-style-type: none">1) Powers of the President regarding South African representatives abroad and foreign representatives in South Africa and in respect of international agreements -----2) President to be Commander-in-Chief of National Defence Force -----3) President's authority in respect of the deployment of the National Defence Force -----4) Purposes for which the National Defence Force may be employed -----5) Checks and balances in respect of the employment of the National Defence Force -----6) The status of international law, the conclusion of treaties and the incorporation of the terms thereof -----7) If possible, relevant sections should be improved from a drafting point of view	Drafting of a new section is required

