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DATE: Tues 8 June '93

SUBJECT: KwaZulu Govt -

Comment on the Third Report
of the Tech Com on
Constitutional Matters.

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MESSAGE:
(IF ANY)

KNAZULU GOVERNMENT

COMMENTS CONSTITUTIONAL PRINCIPLES TO THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL MATTERS

JUNE 8, 1993

1. In its third Report dated Friday May 27, 1993 the Technical Committee on Constitutional Affairs submitted to the Negotiating Council a set of constitutional principles for discussion and adoption. The Report of the Technical Committee states that these principles have been drawn from the CODESA documents, from the knowledge and experience of the members of the Committee and from the submission of the participants. The Report also clarifies that the Committee did not analyze the types of constitution which are contemplated by the various participants (see the Report @ 1.2).
2. The KwaZulu Government believes that the Technical Committee should also report to the Negotiating Council on the relation between the set of constitutional principles which it has tabled and the various types of constitution which are contemplated by the participants. This would not be an onerous task, due to the fact that the various constitutional submissions of the participants can be grouped in three or four broad types. The KwaZulu Government believes that this exercise would reveal that almost all the constitutional principles tabled by the Technical Committee have different meaning and technical values depending on the broader constitutional framework to which they belong, and that therefore the Negotiating Council can not undertake any intelligent debate on these principles unless the discussion is also accompanied by an awareness of the alternatives. These considerations are particularly true when related to the different types of form of state within which the principles relating to the form of government are to be accommodated.
3. The KwaZulu Government wishes to re-examine all constitutional principles once the Technical Committee has provided this additional information, and therefore the KwaZulu Government reserves judgement on the constitutional principles both as proposed by the Technical Committee and as partially adopted by the Negotiating Council on June 3, 1993.
4. The following exemplifications are to support the KwaZulu Government's request.
 - 4.1 At 2.1 the Report states that the "constitution of South Africa shall provide for the establishment of a single sovereign state". The KwaZulu Government fears that this statement may be contradicted by principles of federalism which postulate that a federation is founded on a system of

split sovereignty. According to such principles, the member states as well as the federal government share the attributes of sovereignty on the basis of a system of distributed (or allocated) original sovereignty. It seems that in many cases original sovereignty is recognized only to the member states and the *potestas* of the federal government is characterized as devolved sovereignty on the basis of an irretrievable transfer. Therefore, the Technical Committee should clarify how the principle which it proposes relates to various available options regarding the form of state and the overall constitutional framework. The Technical Committee should clarify whether the United States or the Federal Republic of Germany for instance are "single sovereign states".

- 4.2 At 2.2 the Report states that "the constitution [...] shall be binding on all organs of government". It seems that this principle could have a different meaning when referred to a federal system in which the federal constitution in its entirety may not be necessarily binding on state government and only portions of it may have such a prescriptive force. The Technical Committee should clarify whether it believes that in federations the federal constitution in its entirety binds all organs of government, including state governments, or if only portions of such federal constitution are binding. Reference to established federal systems would be appreciated, with possible explanation of the function of the 14th Amendment of the U.S. Constitution.
5. Similarly, the Technical Committee should clarify whether the proposed requirements for the judiciary set forth @ 2.3 of the Report would differ in a system with as many judiciaries as the member states plus one for the federal government.
6. Clarification should also be provided on the relation between the principles of representation set forth @ 2.5 of the Report and the principle of "equal suffrage" on which important federal models seem to be based.
7. The Technical Committee should also clarify whether it believes that the requirements set forth @ 2.7 of the Report that the South African constitution should contain legislative procedures which "shall be adhered to be all legislative organs at all levels of government" is compatible with the recognised prerogatives of member states of a federation to regulate this matter.
8. The Technical Committee should clarify whether in its opinion the recognition of a role for traditional leaders called for @ 2.12 of the Report would vary in a federal system in which the identification, recognition and protection of traditional leaders would be primarily a matter of state law, so as to accommodate local differences and needs.

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9. In this respect it would also be useful to ascertain whether the Technical Committee believes that the major aspects of incidence of "indigenous" law are related to matters which in a federation would be left to the legislative authority of the members states, such as family law, property, inheritance, et cetera. The Technical Committee could clarify whether it is suggesting that if this principle were to be applied within a federal system, the federal constitution would/should be prescriptive of what state constitutions should contain in this respect.
10. The Technical Committee should clarify whether if the principle set forth in 2.13 of the Report were to be applied within a federal system the federal constitution would be prescriptive of what state constitutions should contain in this respect. This section seems to call for political protection of political minorities over and above human rights protection for minorities which is dealt *alibi* in the Report.
11. The Report @ 3.4 through 3.8 deals with the powers of the so-called SPR. The Technical Committee should clarify whether the language and the reference concepts employed in the formulation of these principles are compatible and logically consistent with the notion of a federation where residual powers are left to the members states and only listed powers are devolved upwards to the central government. The Technical Committee should also clarify to the Negotiating Council whether, as a technical matter, the formulation of the principles which it is proposing for adoption would exclude the KwaZulu Government's proposed notion of "residuality", as well as the establishment of a federal system on the basis of the notion of split sovereignty and autonomous and entrenched jurisdictions. In this regard the Technical Committee could provide us with information about the notion of delegation and co-operative federalism developed in the U.S. after WWII.
12. The KwaZulu Government also seeks clarity from the Technical Committee on the principle set forth @ 3.9.1.1. of the Report which seems to embrace the notion of subsidiarity and seems to support the allocation of powers on the basis of efficiency only. The KwaZulu Government has contended that this specific notion of subsidiarity would lead to the allocation to the SPR of only those powers of local interest and to the exclusion of matters such as the regulation of commerce or the adoption of criminal codes, or family, inheritance and labour laws. The Technical Committee should clarify whether in its technical opinion this principle is compatible with the concept of residuality advocated by the KwaZulu Government.

13. The KwaZulu Government also seeks clarity on the principle set forth in 3.9.1.3. which calls for the resolution of legislative conflicts between the national level and the SPR governments by giving "precedence to [...] the national government". The KwaZulu Government would like to know whether the Technical Committee is of the opinion that this type of arrangement is compatible with both a regional and a federal state. In this regard the Technical Committee is kindly requested to look at regional states such as Italy and Spain where this conflict seems to be resolved without giving "precedence" to the national government. The Technical Committee should also indicate to the Negotiating Council whether this type of arrangement would be compatible with a regional or a federal form of government as they are known around the world, or if by itself and/or in conjunction with the notions employed in the Report, this principle promotes the creation of a "provincial" state.
14. The foregoing technical clarifications are also requested with reference to 3.9.1.4 of the Report which puts on the same level the notions of "conflict with national interests" along with the notion of conflict between regions or between states and regions. We would like to know whether in established models of regional states only the former conflict is resolved through the potestas of the central government, while the latter type of conflict is resolved through procedures of independent constitutional adjudication. We would also like to know how the same conflicts are resolved in established federal systems. The Report suggests that both types of conflict are to be resolved through the discretionary and overriding action of the central government. The Committee should clarify whether this recommendation precludes true federalism and regionalism, leaving space for provincialism only, or whether this technique is used in established federal and regional models.
15. With reference to 3.9.2.2. and 3.9.2.3. the Technical Committee should clarify how the need to "ensure uniformity across the nation" and "guarantee minimum standards across the nation", ties to the allocation of powers to the central level. We would like to know whether in established federal systems this result is achieved with or without the intervention of government, and, more significantly, without the recognition of accompanying governmental functions over the subject matter which is either to be uniformed or standardised. In this regard we would like to know how, for instance in the U.S., the E.P.A. with little or no environmental functions provides for most of the environmental standards, and how in the same country the uniformation of important matters such as commercial laws seems to be performed by the private A.B.A. without government's intervention.

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16. The KwaZulu Government wishes to take this opportunity to thank all the members of the Committee on Constitutional Affairs for the excellent contribution they are providing to the negotiation process, and hopes that the clarifications provided by the Technical Committee in response to this request will assist the negotiations in reaching further clarity and progress.

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