SOUTH AFRICA MULTI-PARTY NEGOTIATING PROCESS NEGOTIATING COUNCIL TECHNICAL COMMITTEE: CONSTITUTIONAL ISSUES SPECIAL REPORTS ON CONFEDERALISM 22 JUN - 26 JUL 1993

**EMBARGOED (PAGES 1-9)**
**UNTIL DELIVERY/TABLING IN THE**
**NEGOTIATING COUNCIL MEETING**

5

# SPECIAL REPORT ON CONFEDERALISM FROM THE TECHNICAL COMMITTEE ON CONSTITUTIONAL ISSUES TO THE NEGOTIATING COUNCIL 22 JUNE 1993

1. We have received submissions from the Conservative Party of South Africa and the Government of Bophuthatswana dealing with confederalism and related matters. We deal with these submissions in this special report.

## 2. SUBMISSION OF THE CONSERVATIVE PARTY OF SOUTH AFRICA

2.1 In a detailed written submission dated 7 June 1993 and entitled: THE CONSERVATIVE PARTY OF SOUTH AFRICA'S ANALYSIS OF THE PRESENT SOUTH AFRICAN SITUATION AND ITS PROPOSALS FOR A PEACEFUL RESOLUTION TO THIS QUESTION, (the Analysis), the Conservative Party sets out its views on the history of the Afrikaners, the course of democracies in Africa, political and constitutional realities in South Africa as well as their legal interpretation of concepts such as self-determination, confederation, etc. It is not for this Technical Committee to cross swords with the Conservative Party on its political views and opinions; in a very real sense they are the expressions of a political party's rights to which we alluded in our First Report (paragraph 3.4.2). Our role is to

analyse the legal opinions expressed in their submissions on a technical basis and to identify the issues that need to be addressed by the Negotiating Council.

2.2 In our Second Report we said:

> It would be helpful if participants in the Negotiating Council in favour of confederation as an option would provide us with more clarity on their proposals and in particular the territory and population of the envisaged separate state, and how it will meet the international law requirements of secession and self-determination.

In our view these are the crucial issues that need to be addressed in order to determine the feasibility of the Conservative Party's proposals and a South African confederation of states.

2.3 The argument of the Conservative Party in the Analysis is developed on the basis that the principle of self-determination is an internationally recognised right of peoples. We dealt with this issue in our First Report and pointed to the limitations on this right and to the fact that interntional law does not permit self-determination where it infringes upon the rights of others. It is clearly feasible to allow collective rights of self-determination to Afrikaners in a single South African state, protected in the manner explained in paragraph 3.5 of our First Report (inter alia by watchdog bodies, regional and local institutions, and specially accredited bodies of a representative nature and freely associated). What is problematic, however, is the feasibility of affording pre-established and exclusive constitutional and political rights to Afrikaners in a separate state, as contended for by the Conservative Party.

2.4 In paragraph 8.6.4 of the Analysis the Conservative Party says that it is fundamental that "the external features of the form of state must be determined first." In our view a determination of the external features of the

form of state does not involve a theoretical discussion of forms 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;
- the governance and legal system of the state.

2.5 The Conservative Party indicates that it intends to submit concrete proposals on the first element (ie the territory and boundaries of the proposed Afrikaner state) to the Commission on the Demarcation/Delimitation of Regions. There is, however, no information on this vital issue in the Analysis or any of its other submissions to us, nor has such information as yet been given during the debate on self-determination in the Negotiating Council.

2.6 In the Analysis the Conservative Party deals with the question of citizenship. It says that citizens in its contemplated state will be Afrikaners, whom it defines as "afstammelinge van die Afrikanervolk en daardie anderstalige patriotte wat met die Afrikanervolk lotsverbonde is op die basis van wedersydse aanvaarding en gemeenskaplike vryheidstrewe." In our view this definition lacks legal certainty. We will, however, use the word "Afrikaner" in this report as used by the Conservative Party. It seems clear, however, that it would not include, and is not intended to include, all South Africans living in the partitioned portion at the time of the partition.

2.7 It seems to have been accepted during the debate in the Negotiating Council that the present population of the state contemplated by the Conservative Party would not contain a majority of Afrikaners. If this is so, an implication of the Conservative Party's proposal is that the state contemplated by them will either be based on minority rule, or will call for large scale population removals or shifts in order to establish an Afrikaner majority within its boundaries. It will also involve the denial of citizenship to the majority of the people within the state at the time of its establishment, and the conferring on them of citizenship in a state in which they do not live and may not have any direct interest. On this basis, political self-determination for Afrikaners in their own independent sovereign state according to the proposals of the Conservative Party, would involve a denial of self-determination to the majority of people who would be living in that state when it is established. These implications, which are not sanctioned by international law on which the Conservative Party relies, have not been addressed by it.

2.8 The Conservative Party indicated in the debate in the Negotiating Council that its preference would be for voluntary partition rather than unilateral secession. The examples of partition and secession that it gives in the Analysis, and which it mentioned during the debate are, with the exception of Yugoslavia, all examples of states in which the people seeking political self-determination constituted a clear majority in the partitioned segment. As far as we are aware no example can be cited of a successful voluntary partition, or of a unilateral secession recognised by international law, in which the territory of a nation state has been partitioned on the basis that a minority within one of the portions, has been given exclusive political rights in such portion. The implications of such a partition are pointed out in paragraph 2.7 hereof. They are in conflict with international law and it is for this reason that we expressed the view in our First Report that an Afrikaner state established on such a basis, and against the will of the majority of the people living in such a state, would be unlikely to secure international recognition.

2.9 The Conservative Party has provided no details of the governance and legal system of the state that it contemplates. During an earlier debate in the Negotiating Council on the general constitutional principles a spokesperson for the Conservative Pary indicated that his Party had no objection to these principles as such: its objection was to the principle of a single state which is contrary to the Conservative Party's vision of two or more states of which one will be an Afrikaner state. The framework for the governance and legal system of the contemplated Afrikaner state will be identified if the Conservative Party addresses the issues raised in this report and also indicates:

2.9.1 which of the general constitutional principles set out in paragraph 2 of our Third Report it accepts for the Afrikaner state;

2.9.2 which of the principles dealing with the allocation of powers to different levels of government set out in paragraph 3 of our Third Report it accepts for the Afrikaner state;

2.9.3 the structures of government that are contemplated for the Afrikaner state, including the powers and functions of the Head of State, how the Head of State will be appointed, how the legislature will be constituted, what electoral system will be adopted, who will be entitled to vote, how the legislature will take its decisions, how the executive will be constituted and take its decisions, and how the judiciary will be appointed and function.

If this information is provided by the Conservative Party to the Negotiating Council it will enable the Council to determine the external features of the form of state advocated by the Conservative Party.

## 3. SUBMISSION OF THE GOVERNMENT OF BOPHUTHATSWANA

3.1 In a submission dated 31 May 1993, the Government of Bophuthatswana, while not contesting our broad exposition on confederations, states:

> The classic definitions and examples of confederations are well known and do not call for further elaboration. It may even be better to disregard all of it for the time being, in order to approach this whole matter with an open mind in designing a constitutional model *sui generis* perhaps even including new terminology to describe it.

As "relevant and applicable aspects of such a model", the examples of Berlin until German unification, the Commonwealth of Puerto Rico and the former French Community are briefly alluded to. In conclusion it is said: "These are some examples of a 'non-classical'approach to this issue (ie confederalism),which indicates a need, in certain exceptional cases, for an original, innovative and flexible approach".

3.2 In response to this submission of the Government of Bophuthatswana, it must be pointed out immediately that confederations, being a voluntary association of separate, independent states, do differ according to the manner in which they come about, their histories and their respective confederal pacts. The classic example of a confederation in the form of the German Bund (1815-1866) differs in many respects from modern confederations such as the (former British) Commonwealth and the European Community. At least two examples cited in the submission, ie those of Berlin and Puerto Rico, do not constitute confederations in any real sense of the word. They are what is sometimes called hegemonic state systems which are often transient in nature, are the result of a particular course of history and are characterised by the fact that the particular state or geographical entities possess a certain kind of

autonomy *vis-à-vis* the dominant or mother-state which is less than that enjoyed by an independent state. Examples of such hegemonic state systems abound and mostly exist under the following circumstances:

3.2.1 Very often *islands,* entirely detached from the mainland of the dominant mother-state are drawn into such a system by way of international accord, constitutional arrangement or a combination of the two (eg, the Aaland Islands, Puerto Rico, the New Hebrides, the Canton and Enderbury Islands, as well as the Channel Islands and the Isle of Man); in some instances, these islands acquire the status of protectorates or semi-protectorates for some time before they become fully independent; in other cases they are incorporated into the constitutional body of the mother-state (eg Réunion).

3.2.2 Sometimes an enclave or city is given a particular status as a result of an international and internal (national) arrangement which usually follows a period of colonisation, war or conflict, eg the free city of Danzig, Hong Kong, Berlin and Trieste (in the case of Trieste the arrangement was, however, not implemented). As a rule these enclaves and cities lose their special status after the expiry of a certain time or the occurrence of certain events.

3.2.3 In some cases, territories have, via an international agreement, been given *sui generis* status which is neither that of a component state in a federation nor that of an independent state in a confederation. The well known example which is close to our experience, is the status of the erstwhile mandated territory of South West Africa.

3.3 All the above examples of so-called hegemonic state systems point to the fact, which is argued in the submission of the Government of Bophuthatswana, that the constitutional relations between states and other territories need not and simply cannot be explained in simple confederal terms. However, what is of overall importance, is that all the abovementioned state relations are the direct products of given historical and other realities. Similarly, in considering the

position of Bophuthatswana the following objective factors, which are relevant to it and the other TBVC states, must not be lost sight of:

3.3.1 There is no element of statehood in the TBVC states' existence which is presently supported, underwritten, sanctioned or recognised by the international community or international organisations and which could form the basis for the particular sui generis status advocated by the Government of Bophuthatswana.

3.3.2 The demographics, economic systems, financial viability and politics of the TBVC states are intrinsically linked to those of the RSA. Transport (two of the states are landlocked and the other two possess no harbours), infra-structures, etc are almost totally dependent on systems and networks of the RSA. Objectively and without any intention to denigrate them, the extent of vassalage of the TBVC states to the RSA cannot be denied.

3.3.3 None of the TBVC states is in the nature of islands detached from the territory of the RSA. The territories of these states are interspersed between the existing regions and provinces of the RSA and they are inexorably a part of the South African geography and its accompanying geo-politics. According to international law the TBVC states are treated as being part of South Africa.

3.3.4 The majority of the inhabitants and citizens of the TBVC states were South Africans by birth before these states became independent and there are strong indications that they and their descendants may wish to regain this status.

3.4 If we are to consider semi-confederal or hegemonic state systems for the RSA and the TBVC we would require instructions from the Negotiating Council to do so, and more detailed proposals than are contained in the submissions to us from the Bophuthatswana government. It would appear from the aforegoing, however, that the possibility that Bophuthatswana or any other of the TBVC states will continue in a semi-confederal relationship or hegemonic

state system with the RSA is rather slight. Furthermore, such a relationship or system cannot be brought about unilaterally and it has very little chance of being successful if not supported by the international community.

## 4. CONCLUSION

We cannot take the issue of confederation further without instructions from the Negotiating Council. The issues raised by the Conservative Party and the Government of Bophuthatswana raise crisply the question whether partition, secession or the continued independence of any of the TBVC States is an acceptable option. We require instructions on these matters.

**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.