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' @ KWASULU GOVERNMENT

COMMRNTR CONSTITUTIONAL, PRINCIPLES TO THE TECHNICAL, COMMITTEE  
ON CONSTITUTIONAL, MATTERS

JUNE 8, 1993

o 988 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 @

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 partially adopted by the Negotiating Council on June 3,

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

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eighty. According to such principles, the  
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attributes of sovereignty on the basis of a system of  
distributed (or allocated) griginal sovereignty. It uoxim  
that in many cases original sovereignzty is recognized on {  
to the member states and thae potestas of the fodoxra  
government is characterized as davolved 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

he Federal Republic of Germany for instance are  
"single sovereign states", .

At 2,2 the Report states that "the constitution [...] shall  
be binding on all organs of govexrnment". It seems that  
this principle could have a different meaning when referred  
to a federal system in which the federal co

its entirety may not be ne

government and onl

prescriptive force.

whether it believes that

constitution in its ! organs of  
government, including state governments, or {f only  
portions of such federa) 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,

Similarly, the Technical Committee should clarify whether  
the proposed rÃ@quirements for the Judiciary set forth 8 2.3  
of the Report would differ in â\200\230a 8system with as many

Judiciaries as the member states Plus one for the fedexal  
government .,

Clarification should also be pProvided on the relation

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@ Report an @ principle of ve al suffrage"

important federal moâ\200\231;!als speem to boqâ\200\230imnd. IS i lah

N Reeraant t.tt-ï-\201t:. hould ofthe  
N constitution shoy  
legislative procedures which "ghal) be adhered go cg: t:ï-\2021

legislative oxgans at all levels of government"

compatible with the recognised prerdgat  
States of a federation to regulatapkhxug;a:t::. f member

The Technical Committee should clarif  
whether i  
opinion the racognition of a role for tgad.ltiona1 lonadi::  
called for @ 2 of the Report would' vary in a federal  
ldentlfication, Tecognition angd

al leaders would rimarily a  
80 as to accommodate local %ifforen1zo-

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ect. ik would also bs useful to ascertain  
 = i:at?;j;-s tf\;g;' ,l'anhcnica]. Committee beljoves that the m;j::  
 aspects of incidence of \*indigenous\* law are relate ho  
 matters which in a federation would be left to 21.  
 legislative authority of the members states, such as faT {  
 law, property, inheritance, et cetera. The re?#qicgf  
 Committee could clarify whether it is suggesting tha  
 this principle were to be applied wi fin a federal system,  
 the federal constitution would/should be prescriptive of  
 what state constitutions should contain in this respect,

. e Technical Committee should clarify whethex if the  
 S ginci le set forth in 2.13 of the Report were to be  
 applieg 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 minoritied which is dealt alibi

in the Repeort,

11. The Report @ 3.4 through 3.8 deals with the powers of the  
 so-called SPR. The Technical Committee should Âclarify  
 whether the language and the reference concepts employed in  
 the formulation of these principles are compatible and  
 logically consistent with the notion of a fedexation 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 claxify to

adoption would exclude the KwaZulu Government'â\200\231's proposed  
 notion of "residualityâ\200\235, 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.3. aftor wWwrr,

12, fThe XwazZulu Government also saeks ' clarity from the  
 Technical Committee on the Principle set fort{ â\202¬ 3.9.1.1.  
 OÂ@f the Report which feems to embrace the notion of  
 subsidiarity and Seems to support the allocation of powers  
 on the basis of efficiency only. The: Kwazuly Govexrnment  
 has contended that this specific notion of aubaidiarity  
 would lead to the allocation to the 8PR of only those  
 Powers of local interest and to the exclusion of matters  
 8uch as the regulation of Commerce or the adoption of  
 criminal codes, oy family, lnharltancÂ and labour laws,  
 The Technical Committee â\200\234shoulq clarigy' whether in its

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u Government also seeks clarity on the principle

il 52: !g;::?}lxl 1303.9.1.3. which calls for the resolution of

legislative conflicts between the national level and the

SPR governments by giving 200\234precedence 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 200\230"precedence" 200\235 to the national government. The

' 200\230technical 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 200\230"200\234provincial"  
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 200\230"200\234conflict 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 Powers 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

regionalism, leaving space for provincialism 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 200\234"guarantee minimum standards across  
the nation", ties to the allocation of powers to the  
central level, We would like to know whether in

significantly, without the recognition of accompanying

governmental functions over the subject matter will be; xir\202?g



either to be uniformed or standardised., In this regard we  
would like to know how, for instance' in the U.8., the

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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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