(iii) where a Cabinet Minister is nominated as the plenipotentiary of the Executive Committee in treaties between States;

(iv) where the Minute of the Executive Committee authorizes the Minister of Foreign Affairs to take the necessary steps and he, in turn, appoints a Cabinet Minister to sign the treaty.

When bilateral treaties have been negotiated between the Republic and another State, signature will usually take place at a signing ceremony. There are no set formalities in connection with this ceremony; however, the goal is to arrange its smooth passage and to obviate any conflicts that might arise. The nature of the ceremony will depend on the importance of the treaty and the degree of publicity which both States wish to give to it.

Where the ceremony is to take place in South Africa, agreement must be reached with the foreign mission concerned over such issues as the time and place of signing, whether to allow photographs, who is to attend the ceremony, whether a speech will follow signature and whether there shall be a joint press release. Before the ceremony each State must ensure that the Full Powers of the other State are in order. The Department of Foreign Affairs is responsible for sending all versions and copies of the treaty to the headquarters of the foreign mission in South Africa for scrutiny. Once this is done the documents must be returned to the Department of Foreign Affairs.

It is preferable that each signer be helped by an assistant at the ceremony. In the case of South Africa, the assistant is usually an official from the Department of Foreign Affairs. If necessary, Full Powers will be officially exchanged. The date and place of signature must be filled in on the documents in all the languages used. Each signer then signs both original texts and initials all the copies.

The following documents must be sent to the archives:

(i) The original South African version of the treaty;

(ii) An initialled copy of the other State's version;

(iii) The original Full Powers (if any) issued to the foreign signer or a certified copy if the original was not handed over to the Republic;

(iv) A certified copy of the Full Powers issued to the South African signer or the original Full Powers if this was not handed over to the foreign power.

How the ceremony abroad is conducted will depend on the customs of the Foreign Ministry. However, certain precautionary measures will be taken to protect the interests of the Republic. The Department of Foreign Affairs will supply the South African agent with Full Powers authorizing him to sign and with the text of the treaty which has been approved by the Executive Committee. These documents enable him to prove to the foreign power that he is properly authorized to sign the treaty and to ensure that the documents which he ultimately signs concur with the text approved by the South African Government.

Before signature the South African agent must assure himself, by an inspection of the Full Powers, that the foreign country's agent is properly empowered to sign, and that the text which the foreign ministry sets up for signature concurs word for word with the text approved by the Executive Committee.

After the ceremony, the South African agent must send the following documents to the Department of Foreign Affairs:

(i) The original South African version of the treaty or, in the event of an exchange of notes, the original note received from the other State;

(ii) Initialled copy(ies) of the other State's version of the treaty or the initialled copy of the South African note;

(iii) The original or certified copy of the Full Powers issued to the agent of the other State;

(iv) As many copies of the South African version of the treaty as there are;

(v) In the case of a printed treaty which requires ratification, two copies of the printed text for use in the South African instrument of ratification.

The Department of Foreign Affairs will send the documents in (i), (ii) and (iii) above, together with a certified copy of the Full Powers issued to the South African agent, to the Archives for safekeeping, and one or more of the documents mentioned in (iv) above to the Department which will be responsible for administering the treaty, for its records. The document in (v) above is kept for use in the instrument of ratification.

The administering Department must be informed immediately signature takes place because the text of the treaty must sometimes be proclaimed or published in the Government Gazette within a certain time limit. If necessary the signer may be asked to telegraph ahead the date of signature.

If it had not been decided during negotiations exactly which State as to register the treaty with the United Nations Secretariat, this matter will be raised and resolved at the time of signature.

It sometimes happens that the signature is not affixed immediately after the closure of negotiations. In modern practice the plenipotentiaries will authenticate the text by initialling it <u>ne varietur</u>. Here they initial each page of the text and keep a copy of the initialled document. Initialling is optional and in no way binds the Government concerned. As Kaye Holloway observes:[65]

> '[Initialling] does not imply any element of consent on the part of their Governments, except if it is carried out by Heads of State or Governments or Foreign Ministers under certain circumstances, when the intention that it shall operate as signature is clearly indicated.'[66]

It does, however, serve to provide proof of exactly what has been agreed upon and makes the later conclusion of the treaty easier. This practice concurs with article 10 of the Vienna Convention on the Law of Treaties which states that the text of a treaty is established as authentic and definitive, <u>inter alia</u>, when representatives of those States participating in the drawing up of a treaty initial its text. Initialling, then, has two functions, the first being to identify the text. As to the second, Holloway explains:[67]

> '[W]hilst the authority to negotiate a treaty implied authority to initial the draft text, a separate authority was required to sign the treaty. Such authority was issued following approval of the draft text by the respective Governments at the end of negotiations.'

South African negotiators who sign multilateral treaties will be provided by the Department of Foreign Affairs with the necessary Full Powers, together with all important instructions. They must acquaint themselves with all the rules of procedure of the conference which have a bearing on signature. In the case of a treaty which is to be signed at the conference, these rules will appear in the procedural rules of the conference or may be ascertained from the Secretariat of the conference. Where the treaty is only to be signed at a later date, this information may be obtained from the Secretariat of the depositary authority. It is especially important to know when and where Full Powers must be deposited.

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65. Holloway op.cit. 35-6.

66. This view was shared by Sir Gerald Fitzmaurice, Special Rapporteur to the Vienna Convention on the Law of Treaties: First Report (1956) 2 <u>Yearbook of the International Law Commission</u> Articles 20 and 21. (Document A/CN. 4/101).

67. Holloway op.cit. 36.

According to his instructions, a South African plenipotentiary may simply sign the treaty or he may add a reservation or append the words 'ad referendum', or 'subject to ratification, acceptance or approval' to his signature.

Whenever the treaty allows no choice and the final resolutions of the treaty are not contrary to his instructions, the South African plenipotentiary will simply sign his name. If, for example, the treaty is, without choice, subject to ratification, he will sign only his name and not add the words 'subject to ratification'.

If the treaty allows for a choice, he must follow his instructions or the wording of the Full Powers. Where the instructions or Full Powers make no mention of ratification, acceptance or approval, he must simply sign his name.

If the South African plenipotentiary finds that his Full Powers or instructions clash with the treaty provisions, he must contact the Department of Foreign Affairs before he signs. If he does not sign on the opening day of signature, he must add the date of signing to his signature. In any event he must notify the Department of Foreign Affairs of the date of signature. The Department will send to the archives a certified copy of the Full Powers issued to the South African representative as well as the text of the treaty certified by the organisation or authority in charge.

The Vienna Convention[68] states that the consent of a State to be bound by a treaty is expressed by the signature of its representative when

(a) the treaty provides that signature shall have that effect;

(b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or

(c) the intention of the State to give that effect to the signature appears from the Full Powers of its representative or was expressed during the negotiation. These provisions also apply to South African treaties.

When the Republic is given a choice of simply signing or of signing subject to ratification, acceptance or approval, two factors must be taken into account in deciding what to do; first, the period when the Executive Committee had an opportunity to inspect the text will be

68. Article 12(1).

taken into account, and secondly, political or pragmatic issues will be assessed; for example, if the treaty is important or complex, time might be considered necessary to discuss the finer implications of the treaty. After a decision has been reached, the choice of action will be indicated in a Minute issued by the Executive Committee. This choice forms the basis for the wording of the Full Powers and/or instructions given to the plenipotentiaries.

It is not necessary for both States to sign a bilateral treaty on the same date. When they do sign on different dates the closing paragraph of the treaty indicates this:

> 'For the Republic of South Africa:
> Cape Town, this day the twenty-seventh
> day of January 1969.
> H. Muller
>
> For the Republic of Botswana:
> Gaberones, this day the fourth day of
> February 1969.
> N.P.K. Nwako.'

It is often agreed beforehand to write and exchange notes on the same day. This has the advantage that the treaty is concluded on that date. However, often notes with two different dates are exchanged.

It will generally be decided during negotiations to conclude a bilateral treaty where the treaty is to be signed. Often the venue chosen will be the place where the negotiations have been conducted. When a treaty is signed in the territory of one of the negotiating states and is made subject to ratification, provision will generally be made in the text of the treaty for the exchange of instruments of ratification to take place in the territory of the other State. So, the 1967 Convention between the Republic of South Africa and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income which was signed in South Africa provided[69] that

> 'This Convention will be ratified and the documents of ratification will be exchanged as soon as possible in Berne. Done in duplicate in Pretoria ....'

Usually, plenipotentiaries will congregate in one country to sign a treaty, but signature may take place in two different countries. Thus the extradition treaty between South Africa and Botswana, 1969,[70] was signed both in Cape Town and in Gaberones. Furthermore, the signing of

69. Republic of South Africa Treaty Series 5 of 1967.

70. Ibid., 2 of 1969.

a treaty need not take place in the territory of either of the negotiating States. The Agreement between the Government of the Union of South Africa and the Government of Ireland for the Avoidance of Double Taxation in Income Derived from the Business of Sea and Air Transport, 1958, was signed in London on 1 May 1958.[71]

71. Ibid., 13 of 1958.

4 RATIFICATION AND IMPLEMENTATION OF TREATIES

(a) Internal ratification

The term 'ratification' may be used in several different senses. First, there is ratification in the constitutional sense of the term, namely 'internal ratification', which is the act whereby the competent executive organ of the State solemnly confirms its willingness to be bound by a treaty which has previously been signed on its behalf by its agent.

Ratification was defined in 1950 by the International Law Commission as 'an act by which a State in a written instrument confirms a treaty as binding on that State'.[1] Sir Hersch Lauterpacht indicated that the normal rule was that ratification is the confirmation of the signature of a duly authorised representative.[2] Subsequent Special Rapporteurs Sir Gerald Fitzmaurice[3] and Sir Humphrey Waldock[4] both defined ratification as the confirmation of the consent given by signature. The Vienna Convention's definition of ratification is similar to that adopted by the Commission, viz.:

> 'the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty'.

Although this definition is loosely phrased - it could equally well apply to signature, for example - it seems established fact that the act of ratification consists in the confirmation of a previous signature. It is the accepted second part of the two-stage process of becoming a party to an international agreement.

Ratification is also the international procedure whereby a treaty is set in motion, that is, by the formal exchange or deposit of instruments

1. First Report : Revised articles of the draft convention on the law of treaties (1951) 2 Yearbook of the International Law Commission 72, article 5 (Document A/CN 4/43).

2. Second Report : Revised articles of the draft convention on the law of treaties (1954) 2 Yearbook of the International Law Commission 127, article 6(1) (Document A/CN 4/87).

3. Report on the law of treaties (1956) 2 Yearbook of the International Law Commission 113, article 31(1) (Document A/CN. 4/101).

4. Ibid., Article 10, commentary.

5. Article 2(1)(6).

of ratification. This may be deemed 'external ratification'. Whereas the object of signature is to authenticate a text and to identify the proposed parties to the treaty, the object of ratification is to indicate the final willingness of a State to be bound by the terms of the treaty. The deposit or exchange of instruments of ratification is an essential stage in the treaty-making process and is not merely evidentiary.

A popular but loose use of the term 'ratification' is in the sense of approval of a treaty by an arm of the State which is not competent itself to ratify the treaty but whose approval must be obtained for constitutional reasons. In the Republic, this body would be the legislature. Although the phrase 'parliamentary approval' is used in South Africa, this is misleading insofar as it is, in reality, the executive arm of Government which has the constitutional ability to ratify treaties, and not the legislative, albeit that Parliament's prior approval of a treaty is, on occasion, sought. So, for example, s.2(1) of the Treaties of Peace Act,[6] which governed the carrying into effect of peace treaties between the Union Government on the one hand and Bulgaria, Finland, Hungary, Italy and Roumania on the other, provided that whenever a treaty of peace was concluded between the Union Government and any power not mentioned above, between whom and the Union a state of war existed at the date of commencement of this Act or which had existed since the 6 September 1934, 'the Governor-General, after such treaty has been ratified with the prior concurrence of Parliament, may provide by proclamation that ... such treaty shall ... be deemed to be included in the [scope of the Act]'.

The Republic of South Africa Constitution Act contains no provision that treaties must, in certain circumstances, be ratified. Therefore, in general, except perhaps in the case of treaties of peace, the Republic is free to sign treaties at will, with or without reservation as to ratification.

As both the signing and ratification of a treaty in the name of the Republic of South Africa are acts of the executive arm of the State, ratification in effect amounts to a double approval by the same authority, and, because of this, the requirement of ratification is dispensed with in many bilateral treaties. Political or pragmatic reasons for ratification

6. Act 20 of 1948.

should exist; for example, the Republic may choose, for both these reasons, to sign a multilateral treaty without delay. It will, in that event, sign subject to ratification, to enable itself to examine the finer implications and innuendos of the treaty at its leisure.

The discretion to ratify will fall away when a multilateral treaty itself calls for ratification, or, in the event of a bilateral treaty, when the other State requires ratification as a result of its own constitutional requirements. Otherwise, it will normally be decided during the negotiations whether or not the treaty shall be subject to ratification. If so, it is best to include such a provision in the text of the treaty. If the negotiations are silent as to ratification, the Full Powers may provide that signature will be subject to ratification.

The question whether silence implies a necessity for ratification has been discussed by the South African Appellate Division in the case of S v. Eliasov,[7] where one of the objections raised against the validity of an extradition agreement concluded by an exchange of notes in 1963 between the Prime Minister of Rhodesia and the Acting Accredited Diplomatic Representative of the Government of South Africa was that it had not been ratified.

It was contended on behalf of the appellant that the 1963 exchange of notes brought into existence a new treaty with the same terms as the old, with the result that the requirement of ratification contained in the old treaty was part of the new agreement, despite the fact that the exchange of notes made no mention of ratification.

The Appellate Division rejected the argument that the exchange of notes in 1963 constituted a new agreement on exactly the same terms as the original 1962 treaty. It held that it was simply an agreement 'that the extradition agreement then already in full operation'[8] should continue to apply between the Republic and Southern Rhodesia as a constituent State of the Federation. Furthermore:

> '[t]here was no stipulation [in the 1963 exchange of notes] for the subsequent ratification of the concluded agreement and there could hardly have been having regard to the stipulation that the agreement should become operative with effect from an agreed date, namely, the dissolution of the Federation'.[9]

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7. 1967 (4) SA 583 (AD).
8. Ibid. at 593.
9. Ibid.

Thus, another factor which influenced the Court in deciding that ratification was not necessary was the stipulated date on which the parties agreed that the treaty should begin to operate - exactly one week after the exchange of notes. It is clear that the Court stressed the element of the intention of the parties where the treaty itself was silent on the issue of ratification. Professor C.J.R. Dugard[10] submits that the court's finding in this regard is fully in accordance with modern trends in international law:

> 'Where an agreement is silent on the question of the need for ratification - as in this case - the nature and form of the agreement must be examined to discover the intention of the parties on this subject.'[11]

The Appellate Division, in stressing the absence of a stipulation for ratification, impliedly supported the view that ratification is unnecessary unless expressly or impliedly required by the parties to a treaty. Legal opinion has long been divided on this issue. Fitzmaurice[12] writes that

> 'only those treaties need ratification which say so in terms, or as to which an inference of an intention that there should be ratification can be drawn, and that in regard to all other treaties it can be assumed that they are not intended to be ratified and, in the absence of indications to the contrary, are intended to come into force at the moment of signature'.

The opposite point of view is advocated by Lord McNair[13] thus:

> '[R]atification ... is an essential requirement of a treaty, unless (a) by its express terms the requirement of ratification is dispensed with or (b) it can be inferred from the nature or the form of the treaty or the circumstances in which it was negotiated that the parties intended to dispense with the requirement of ratification'.

McNair is supported in his view by many other international lawyers.[14]

The most authoritative modern statement on the law of treaties, the Vienna Convention, avoids the acceptance of any residuary rule for or against ratification and instead emphasizes the intention of the

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10. C.J.R. Dugard 'The Treaty-Making Process' (1968) 85 South African Law Journal 1 at 3.
11. Compare G.G. Fitzmaurice 'Do Treaties Need Ratification?' (1934) 15 British Yearbook of International Law 113 at 118 and 129, and H. Blix 'The Requirement of Ratification' (1953) 30 British Yearbook of International Law 352 at 380.
12. Fitzmaurice op.cit. 122. See further remarks by Fitzmaurice to the same effect at 129; compare Blix op.cit. 380.
13. McNair The Law of Treaties (1961) 134.
14. See authorities cited by Fitzmaurice op.cit. 122.

negotiating States with regard to ratification. It does, however, limit the requirement of ratification to cases in which it is expressly or impliedly required by providing[15] that

> 'The consent of a State to be bound by a treaty is expressed by ratification when :
> (a) the treaty provides for such consent to be expressed by means of ratification;
> (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
> (c) the representative of the State has signed the treaty subject to ratification; or
> (d) the intention of the State to sign the treaty subject to ratification appears from the Full Powers of its representatives or was expressed during the negotiations.'

The decision of the Court in S v. Eliasov that ratification is not essential where the agreement is silent and there are indications that the parties did not intend ratification is, therefore, clearly in line with modern thinking on this subject.[16]

As far as the Republic is concerned, the State President issues instruments of ratification only in regard to treaties between Heads of State. The Minister of Foreign Affairs is responsible for their issue in regard to all other types of treaties.

Although there is no provision in South African law which necessitates the tabling of all treaties to which the Republic becomes a party, successive South African Governments have been in the habit of tabling agreements and are usually willing to debate the political and other issues involved in the treaty. Tabling, however, may only take place once the treaty has become irrevocably binding on the Republic, and the Government has, on occasion, acted on the presumption that it was competent to commit the State by treaty without first submitting it to Parliament.[17]

Although, in theory, Parliament is asked to approve the actions of the executive, strict party discipline would seem to make it virtually impossible for Parliament to reject the ratification of a proposed treaty which has the approval of the Cabinet.

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15. Article 14(1).
16. Dugard op.cit. 4.
17. This was the position in regard to the ratification of the Charter of the United Nations by South Africa: House of Assembly Debates vol.55, cols. 1265-6 (7 February 1946). Smuts did, however, add that, although this practice was legal and in line with the Constitution, 'as a democratic country we have developed the practice of obtaining parliamentary approval before ratification'.

The basic objective of tabling (which takes place before both Houses of Parliament) is to inform Parliament and the South African public about all bilateral treaties entered into by the Republic. With that end in view, copies of treaties published in the South African Treaty Series are sent to the Documents Clerks of both Houses of Parliament. This enables members of Parliament to request information in Parliament about the treaties. The Minister of Foreign Affairs or any other minister may, at their discretion, and for special reasons, table treaties for the special information of both Houses.

Some treaties must, as a result of statute law, be tabled. This includes the Treaties of Peace Act which provides[18] that '[a]ny proclamation issued in terms of sub-section (1) shall be laid on the Table of both Houses of Parliament within fourteen days after publication if Parliament is then in ordinary session or if it is not then in ordinary session, within fourteen days after the commencement of its next ordinary session'. See, in addition, s.2(5) of the Post Office Act;[19] s.108(4) of the Income Tax Act;[20] s.26 of the Estate Duty Act;[21] s.356 bis of the Merchant Shipping Act,[22] and s.: of the Aviation Act.[23]

After approval to ratify a bilateral treaty has been obtained from the Executive Committee, the Department of Foreign Affairs must draw up an Instrument of Ratification. Where the treaty is one between Heads of State, the South African State President may personally sign the Instrument of Ratification, as in the following example :

'THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	DIE STAATSPRESIDENT VAN DIE REPUBLIEK VAN SUID-AFRIKA
To All and Singular to whom these Presents shall come, Greeting!	Aan Almal en Iedereen wat van hierdie Oorkonde kennis neem, Saluut!
WHEREAS a Treaty between the Republic of South Africa and the Republic of Botswana for the extradition of criminals has been signed, which Treaty is word for word as follows:	NADEMAAL a Verdrag tussen die Republiek van Suid-Afrika en die Republiek Botswana vir die uitlewering van oortreders onderteken is, welke Verdrag woord vir woord soos volg lui:

18. Section 2(3)(a).
19. Act 44 of 1958.
20. Act 58 of 1962.
21. Act 45 of 1955.
22. Act 57 of 1951.
23. Act 74 of 1962.

AND WHEREAS it is provided in Article 24 (1) of the said Treaty that it shall be ratified and that the instruments of ratification shall be exchanged;

EN NADEMAAL daar in artikel 24 (1) van genoemde Verdrag bepaal word dat die Verdrag bekragtig moet word en dat die bekragtigingsoorkondes uitgeruil word;

NOW, THEREFORE, I, JACOBUS JOHANNES FOUCHÉ, State President of the Republic of South Africa, having considered the Treaty aforesaid, do hereby confirm and ratify the same, and do engage and promise that all the stipulations therein contained will be faithfully performed and observed by the Republic of South Africa.

SO IS DIT DAT ek, JACOBUS JOHANNES FOUCHÉ, Staatspresident van die Republiek van Suid-Afrika, na oorweging van voormelde Verdrag, dit hierby bevestig en bekragtig. en onderneem en belowe dat al die bepalings daarin genoem getrou deur die Republiek van Suid-Afrika uitgevoer en nagekom sal word.

GIVEN under my Hand and the Seal of the Republic of South Africa at
on this
day of One Thousand Nine Hundred and Sixty-nine

GEGEE onder my Hand en die Seel van die Republiek van Suid-Afrika te
op hede die
dag van Eenduisend Negehonderd Nege-en-sestig.

STATE PRESIDENT.

STAATSPRESIDENT.

By order of the State President-in-Council.

Op las van die Staatspresident-in-Rade.'

All other Instruments of Ratification are signed by the Minister of Foreign Affairs :

BEKRAGTIGINGSOORKONDE

INSTRUMENT OF RATIFICATION.

NADEMAAL 'n Konvensie tussen die Republiek van Suid-Afrika en die Switserse Konfederasie ter vermyding van dubbele belasting met betrekking tot belasting op inkomste op die Derde dag van Julie. Eenduisend Negehonderd Sewe-en-sestig te Pretoria onderteken is, welke Konvensie woord vir woord soos volg lui:

WHEREAS there was signed at Pretoria on the Third day of July, one thousand nine hundred and sixty-seven, a Convention between the Republic of South Africa and the Swiss Confederation for the avoidance of double taxation with respect to taxes on income, the text of which Convention is word for word as follows:

EN NADEMAAL daar in artikel 27 (1) van genoemde Konvensie bepaal word dat die Konvensie aan bekragtiging deur die Kontrakterende State onderworpe is en dat Bekragtigingsoorkondes te Bern uitgeruil word;

AND WHEREAS it is provided in Article 27 (1) of the said Convention that it is subject to ratification by the Contracting States and that Instruments of Ratification be exchanged at Berne;

SO IS DIT DAT die Regering van die Republiek van Suid-Afrika, na oorweging van genoemde Konvensie, dit hierby bevestig en bekragtig en onderneem om die bepalings daarin genoem getrou na te kom en uit te voer.

NOW, THEREFORE, the Government of the Republic of South Africa, having considered the Convention aforesaid, hereby confirm and ratify the same and undertake faithfully to fulfil and carry out the stipulations therein contained.

TEN BEWYSE WAARVAN, ek, HILGARD MULLER, Minister van Buitelandse Sake van die Republiek van Suid-Afrika, hierdie oorkonde geteken en geseël het te ______________ op hede die ______________ dag van ______________ van die jaar Eenduisend Negehonderd Agt-en-sestig.

IN WITNESS WHEREOF, I, HILGARD MULLER, Minister of Foreign Affairs of the Republic of South Africa, have signed and sealed these presents at ______________ on this the ______________ day of ______________ in the year one thousand nine hundred and sixty-eight.

Instruments of Ratification in respect of bilateral treaties may be divided into the preamble, a quotation of the text of the treaty and the conclusion. They are typed or printed in both English and Afrikaans and signed and stamped in the same manner as the Full Powers.

Where a multilateral treaty has been signed on behalf of the Republic, the authority of the Executive Committee for ratification of the treaty must be obtained in the same manner as for bilateral treaties. Once the approval of the Executive Committee has been obtained, the Department of Foreign Affairs will generally be responsible for drawing up the Instrument of Ratification. The State President may issue such an Instrument, but this is only done where the treaty is between Heads of State. An example of a typical Instrument of Ratification for a multilateral treaty is the following:

INSTRUMENT OF RATIFICATION

WHEREAS a Wheat Trade Convention was opened for signature at Washington from the 15th October to the 30th November, 1967, the said Convention being one of two legal instruments constituting the International Grains Arrangement 1967;

AND WHEREAS the said Wheat Trade Convention was signed on behalf of the Republic of South Africa on the 28th November, 1967;

AND WHEREAS Article 37 of the said Wheat Trade Convention provides that the Convention shall be subject to ratification, acceptance or approval by each signatory in accordance with its respective constitutional or institutional procedures;

NOW, THEREFORE, the Government of the Republic of South Africa, having considered the said Wheat Trade Convention, hereby confirm and ratify the same and undertake faithfully to fulfil and carry out the stipulations therein contained.

IN WITNESS WHEREOF, I, HILGARD MULLER, Minister of Foreign Affairs of the Republic of South Africa, have signed and sealed these Presents at Cape Town on this the day of in the year of Our Lord One Thousand Nine Hundred and Sixty-eight.

Although it is important to describe the multilateral treaty meticulously in the Instrument of Ratification for the purpose of identification, the complete text of the treaty is not generally restated.

(b) External Ratification

After the treaty has been ratified by an appropriate constitutional organ of the Republic of South Africa, the Instruments of Ratification must be exchanged with the other Government concerned (in the case of bilateral treaties) or deposited with the depositary Government or organization (in the case of multilateral treaties) as the final stage in the treaty making process. This accords with the terms of the Vienna Convention which stipulates.[24]

> 'Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon :
> (a) their exchange between the contracting States;
> (b) their deposit with the depositary; or
> (c) their notification to the contracting States or to the depositary, if so agreed.'

Where a bilateral treaty has been negotiated, the exchange of the Instruments of Ratification usually takes place during a formal ceremony between the negotiators of each country. Both States agree beforehand who shall actually exchange the documents. Where the treaty is an important one, the Minister of Foreign Affairs himself may take part in the ceremony. Otherwise, the Secretary of Foreign Affairs or the head of the Foreign Mission concerned or, perhaps, lesser officials attached to the Department of Foreign Affairs or the Foreign Mission may exchange the Instruments.

24. Article 16.

The Instruments may be exchanged by post. If so, the date of the exchange will be agreed upon beforehand. Where telegrams are exchanged, the date of exchange may be regarded as the date upon which the later of the two Instruments has been received.

On the occasion of the exchange, a Protocol of Exchange is drawn up, the object of which is to place the negotiation on record. The Protocol of Exchange will be signed at the exchange ceremony by the two personalities who actually exchange the Instruments. If the exchange is to take place in South Africa, the Department of Foreign Affairs will be responsible for setting it up. The following is a typical example of a Protocol of Exchange :

PROTOCOL OF EXCHANGE

WHEREAS the undersigned Mr. B.G. FOURIE, Secretary for Foreign Affairs of the Republic of South Africa and Sir JOHN NICHOLLS, Ambassador Extraordinary and Plenipotentiary of the United Kingdom of Great Britain and Northern Ireland have met for the purpose of exchanging the Instruments of Ratification pertaining to the Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains which was signed at London on the Twenty-first day of November, 1968;

AND WHEREAS the aforesaid Instruments of Ratification have been examined and found to be in due and proper form.

THEREFORE the exchange of the Instruments of Ratification aforesaid took place this day.

IN WITNESS WHEREOF the abovementioned have signed this Protocol of Exchange in duplicate at Cape Town this .... day of .... One Thousand Nine Hundred and Sixty-nine.

For the Government of the Republic of South Africa :

For the Government of the United Kingdom of Great Britain and Northern Ireland :

A reservation made by the one State and accepted by the other may appear in the Protocol of Exchange. This happened, for example, in the exchange of Instruments of Ratification on 15 July 1952 in respect of an agreement between the Republic and the United States of America[25] for the avoidance of double taxation. This, however, is an unusual procedure and in such an event the approval of the Executive Committee should be obtained.

After the ceremony following the conclusion of a bilateral treaty, each State keeps the original Instrument of Exchange of the other State as well as that version of the Protocol of Exchange in which it is mentioned first, the principle of the alternat being employed with Protocols of Exchange. These documents must be sent to the Department of Foreign Affairs which, in turn, will forward them, together with a certified copy of the Sou African Instrument of Exchange, to the archives. The Departmen ll also notify the Department which will be involved in the adminis n of the treaty that ratification has taken place.

Instruments of R tification of multilateral treaties are filed with the Secretariat of the depositary organization or with the Foreign Ministry of the depositary Government. The depositary authority will issue a receipt in the form of a note to the South African mission. This will be forwarded to the Department of Foreign Affairs. The latter Department must send to the archives a certified copy of the South African Instrument of Exchange together with the original receipt received from the depositary authority.

It might be mentioned that the Republic has signed but has not to date ratified the Vienna Convention on the Law of Treaties. Despite this, the provisions contained in the Convention are treated as binding by the Department of Foreign Affairs.

(c) Effective Date of Treaties and Entry into Force

Article 24 of the Vienna Convention states :

"(1) A trea enters into force in such manner and upon such date as it may provide or as the negotiating States may agree;

(2) Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States;

25. Protocol of the Exchange of the Instruments of Ratification of the Convention between the Government of the Union of South Africa and the Government of the United States of America for the Avoidance of Double Taxation and for Establishing Rules of Reciprocal Administrative Assistance with Respect to Taxes on Income, signed at Pretoria on 13 December 1946 and the supplementary Protocol, signed at Pretoria on 14 July 1950. Not published.

(3) When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides;

(4) The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservation, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.'

This article, together with article 25 which deals with provisional entry into force, forms the basis of the law accepted by the Republic. Article 25 reads as follows:

'(1) A treaty or part of a treaty is applied provisionally pending its entry into force if :
(a) the treaty itself so provides; or
(b) the negotiating States have in some other manner so agreed.

(2) Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or part of a treaty with respect to a State shall be terminated if that State notifies the other States between whom the treaty is being applied provisionally of its intention not to become a party to that treaty.'

In the event of the date of entry into force of a multilateral treaty not being specifically stated in the treaty itself, but where it is, for example, quoted as the date upon which a certain number of States ratify, it is the responsibility of the depositary authority to establish what that date is and to notify the contracting States of the entry into force of the treaty. Any questions in this regard must thus be addressed to the depositary authority.

There are many different types of provisions relating to entry into force of multilateral treaties. One type of entry into force clause, which is relatively rare, deals with the entry into force of the convention solely in respect of each particular State which signs, ratifies or accedes to the convention.[26] So, for example, s.32 of the Convention on the Privileges and Immunities of the United Nations[27] provides that

> '[a]ccession shall be affected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.'

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26. Part II United Nations Handbook of Final Clauses UN Document ST/LEG/1 of 28 August 1951 p.46.

27. United Nations Treaty Series vol.1 p [illegible]; United Nations Handbook of Final Clauses op.cit. 48.

Another type of entry into force clause deals with the entry into force of the convention itself. The United Nations Handbook[28] on the subject specifies six categories in this regard. The first, which provides that the convention shall enter into force on a date specified therein, is usually to be found in technical conventions such as the Universal Postal Convention[29] which provides[30] that '[t]he present Convention shall come into force on 1 July 1948, and remain in operation for an indefinite period'.

The second category, which provides for the entry into force of the convention concerned on a date when specified States or a specified number of States have become parties thereto, is generally utilized by international organizations, since this type of clause meets their needs best. So, for example, the Constitution of the World Health Organization[31] provides[32] that 'this Constitution shall come into force when twenty-six Members of the United Nations have become parties to it in accordance with the provisions of Article 79'.

The third category, which is a variation of the preceding one, sets out clauses which additionally provide for the entry into force of the convention in respect of each State that subsequently becomes a party thereto, after the original date of entry into force. To this end the Constitution of the United Nations Educational, Scientific and Cultural Organization[33] provides:[34]

> 'This Constitution shall come into force when it has been accepted by twenty of its signatories. Subsequent acceptances shall take effect immediately'.

The fourth category is particularly important, according to the Handbook,[35] as these clauses are to be found in most of the conventions recently adopted by the General Assembly. They provide that the

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28. United Nations Handbook of Final Clauses ibid. 46.
29. League of Nations Treaty Series vol.202, p.159; United Nations Handbook of Final Clauses op.cit. 55.
30. Article 74.
31. United Nations Treaty Series vol.14, p.185; United Nations Handbook of Final Clauses op.cit. 57.
32. Article 80.
33. United Nations Treaty Series vol.4 p.275; United Nations Handbook of Final Clauses op.cit. 63.
34. Article 15(3).
35. United Nations Handbook of Final Clauses op.cit. 4[illegible].

convention shall enter into force after the expiration of a specified time, following the receipt by the depositary of a given number of ratifications or accessions etc. They provide, in addition, that the convention shall enter into force with respect to States which subsequently deposit their ratifications or accessions, upon a specified lapse of time after such deposit. This type of clause has been found to be very workable from the point of view of the functions of the depositary. A typical example is the Convention on International Civil Aviation[36] which provides:[37]

> 'As soon as this Convention has been ratified or adhered to by twenty-six States it shall come into force between them on the thirtieth day after deposit of the twenty-sixth instrument. It shall come into force for each State ratifying thereafter on the thirtieth day after the deposit of its instrument of ratification.'

The fifth category deals with the provisions for the entry into force not only of the convention, but also of any annex attached to it. Such clauses have been used in protocols which amend existing agreements, by setting out the amendments in the annex, which itself then enters into force, in respect of each of the amended agreements, when a stipulated number of parties thereto have become parties to the protocol. So, for example, the Protocol Amending the Agreement for the Suppression of the Circulation of Obscene Publications,[38] signed at Paris on 4 May 1910 provides:[39]

> 'The present Protocol shall come into force on the date on which two or more States shall have become Parties thereto.
>
> The amendments set forth in the annex to the present Protocol shall come into force in respect of the Agreement of 4 May 1910 for the Suppression of Obscene Publications when thirteen Parties thereto shall have become parties to the present Protocol, and consequently, any State becoming a Party to the Agreement after the amendments thereto have come into force shall become a Party to the Agreement as so amended.'[40]

Rulings on entry into force of bilateral treaties to which the Republic is a party are usually included in the text of the treaty itself. Provision is often made for entry into force on the date of signature or in a particular period of time thereafter; on the date of

36. United Nations Treaty Series vol.15 p.295; United Nations Handbook of Final Clauses op.cit. 68.
37. Article 91(b).
38. United Nations Treaty Series vol.30 p.3; United Nations Handbook of Final Clauses op.cit. 73.
39. Article 5.
40. The sixth category provides for miscellaneous clauses of entry into force.

ratification or in a particular period of time thereafter; or on the date on which the two Governments notify each other in writing that there has been compliance with all prescribed constitutional requirements in their respective States or on a particular date after this notification.

If no provision has been made regarding entry into force of the bilateral treaty, a convention exists to the effect that it will enter into force on the date of signature, provided, of course, that the treaty is not subject to ratification. If it is, it will enter into force on the date of ratification of both parties. An exchange of notes which contains no provisions in respect of its entry into force will enter into force on the date of the delivery of the replying note unless provision is made for ratification, in which case it will enter into force upon ratification.

In the event of a treaty being signed and awaiting ratification before it enters into force, the signature pending the completion of ratification is not devoid of all effect. There is a tendency on the part of States which have signed a treaty requiring ratification to place certain limitations upon their freedom of action during the period which precedes its entry into force. Gunther Doeker[41] states that

> '[t]his principle would eliminate most of the questions and doubts which are caused by the acceptance of the doctrine of retroactivity of ratification, since all the acts performed during the period of vacatio leges of the treaty would be subject to its provisions from the time of signature'.

According to D.P. O'Connell,[42] signature of a treaty is an act of good faith and not an empty gesture. It does not follow that an unratified treaty is devoid of legal significance as such a treaty has equitable implications that the law cannot ignore. If a contractor, in reliance upon good faith, commits itself to a course of action and suffers harm from the failure of its co-contractor to ratify, it may have a claim founded in abuse of right.

The Permanent Court of International Justice in the Jurisdiction of the Oder[43] case, in which it was contended that Poland had incurred obligations under the Barcelona Convention of 1921 which it had signed but not ratified, held that among 'the ordinary rules of international law ... is the rule that conventions, save in certain exceptional cases, are binding only by virtue of their ratification'. This implies, at

41. Gunther Doeker The Treaty-making Process in the Commonwealth of Australia (1966) 144.
42. D.P. O'Connell International Law 2 ed. (1970) I 222-3.
43. 1929 PCIJ, Series A, No.23 at 20.

least, that 'in certain exceptional cases' a signature results in a legal commitment.

In the Mavrommatis Concessions[44] case, the status of the unratified Treaty of Sèvres and Protocol XII was in issue, but the Permanent Court unfortunately failed to pronounce on this matter.

In the Certain German Interests in Polish Upper Silesia[45] case, Poland challenged the right of Germany to alienate certain property in the interval between the date of signature of the Treaty of Versailles and its coming into force. However, the Court found it impossible to regard Germany's action as a breach of good faith.

Today the matter is governed by the Vienna Convention on the Law of Treaties which goes further than customary international law appears to have gone. Article 18 provides:

> 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when :
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
> (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.'

This Article resulted from recognition by the International Law Commission at its eleventh session that signature, in addition to authenticating the text, also operates as a provisional consent to be bound by the instrument as an 'international agreement and not a mere text'.[46]

The final form of Article 18 differs from the earlier proposal of Special Rapporteur Sir Hersch Lauterpacht, who contended that signature subject to subsequent confirmation implies the obligation, to be fulfilled in good faith, 'to refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed'.[47] The use of the word 'intended' would have introduced a subjective element into the appreciation of the prohibited act which would have weakened, at least in practice, the force of the prohibition,

44. 1925 PCIJ, Series A, No.5 at [illegible].
45. 1926 PCIJ, Series A, No.7 at 39.
46. Report of the I.L.C. covering the work of its eleventh session UN Doc. (A/4169) Suppl. No.9.
47. First Report, (A/CN. 4/63) in (1953) 2 Yearbook of the International Law Commission, article 5( )(b).

by providing the party in default with a convenient escape clause.[48]

According to Kaye Holloway:[49]

> 'The doctrine of good faith, which recognised the obligation to base refusal to ratify on sufficiently sound grounds and the fact that in all cases refusal injured the right of other signatories, seems to have been adhered to even by the most fervent supporters of the discretionary nature of ratification.'

The date of entry into force of a bilateral treaty may be made public through a press release or an announcement or proclamation in the Government Gazette. In any event, this date will appear on the title page of its publication in the South African Treaty Series. As publication takes place after the treaty has entered into force, publication in the Treaty Series cannot be a condition precedent to its entry into force. This accords with Australian practice.[50]

(d) Registration and publication

(i) Registration

Under customary international law, if a treaty has been validly made between two subjects of international law it is operative between them and fully effective in accordance with its terms. However, when the League of Nations was established, Article 18 of the Covenant of the League stipulated that 'every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered'. The purpose of this Article was to prevent States entering into secret agreements without the knowledge of their nationals, and without the knowledge of other States, whose interests might be effected by such agreements. While the effect of this Article would seem to be that unregistered treaties would simply be invalid, in practice the matter was not at all clear[51] and many treaties were regarded as effective despite the lack of registration.[52]

48. Holloway op.cit. 57.

49. Ibid. 47.

50. Gunther Doeker op.cit. 14 .

51. This problem has been discussed more fully at pp. 58-60 above.

52. In 1962 South Africa had attempted to argue that as the Mandate for South-West Africa had not been registered with the Secretariat of the League of Nations, it was not binding in international law. The International Court of Justice rejected this argument, stating inter alia that as the main purpose of Article 18 was to ensure that all international agreements obtained wide publicity which had in this instance been obtained by other means, the mandate was a binding agreement: 1962 I. .J. Reports 319 at 332.

When the League of Nations was superseded by the United Nations, those responsible for drafting the Charter sought to clarify the matter, with the result that Article 102(1) of the Charter requires 'every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force [to be] as soon as possible ... registered with the Secretariat and published by it'. If States fail to register a treaty, as sometimes happens, the Charter makes it clear[53] that the treaty will not be void for all purposes, but that it may not be invoked 'before any organ of the United Nations'. This would of course include the International Court of Justice. An unregistered treaty would, therefore, be valid but unenforceable, as the absence of registration will act as a bar to the setting up of the treaty in dispute before the International Court of Justice as much as to matters debated by the political organs of the United Nations.

Registration of international agreements is, nevertheless, regarded as a highly desirable practice as it has done much to eliminate 'secret' treaties, and Article 80(1) of the Vienna Convention on the Law of Treaties seeks to reinforce this aspect of the treaty-making process by providing that

> '[t]reaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication'.

This Article must be read together with Article 102 of the Charter of the United Nations; and the effect today of an unregistered treaty remains that it is valid but simply unenforceable before any organ of the United Nations.

On 14 December, 1946, the General Assembly of the United Nations adopted certain Regulations[54] in this regard which describe in detail the procedure to be followed when registering a treaty with that body and these have now become standard practice. As a result of these Regulations, if the Republic of South Africa or any other State registers a treaty with the United Nations, it must certify that the text is a true and complete copy thereof and that it includes all reservations made by the parties thereto.[55]

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53. Article 102(2).
54. Resolution 97(1) as modified by resolutions 364(iv) and 482(v), adopted by the General Assembly on 1 December 1949, and 12 December, 1950, respectively: Registration and Publication of Treaties and International Agreements, Regulations to give effect to Article 102 of the Charter of the United Nations, hereinafter cited as <u>Regulations</u>.
55. <u>Regulations</u> op.cit. Article 5(1).

Any subsequent action which effects a change in the parties or the scope and application of the terms of a registered treaty must also be registered by means of a certified statement to this effect.[56] This implies that any denunciation of a registered treaty must also be registered with the Secretariat. Modifications of treaties entered into before 1945 and, therefore, not registered with the United Nations will not usually be registered. Thus modifications to the Trade Agreement between the South African and Canadian Governments signed at Ottawa in August 1932 were not registered.[57] Registration will, however, not take place until the treaty has come into force.[58] If the Republic is responsible for registration, it must ensure that the certified copy which is being registered reproduces the text of the treaty in all the languages in which the treaty was concluded. This certified copy must be accompanied by two additional copies and by a statement detailing, in respect of each party, the date on which the treaty has come into force and the method whereby it has come into force.[59]

Civil aviation agreements deserve a special mention. The 1947 Convention on Civil Aviation, held in Chicago on 4 April, states[60]:

> 'Subject to the provisions of the preceding Article, any contracting State may make arrangements not inconsistent with the provisions of this Convention. Any such arrangement shall be forthwith registered with the Council, which shall make it public as soon as possible.'

Detailed rules regarding registration with ICAO of aeronautical agreements and arrangements were adopted by the International Civil Aviation Council on 1 April 1949. These have subsequently been followed by the Republic of South Africa. Article 9 of these rules stipulates the procedure to be followed when registering such an agreement with ICAO. A duly certified true copy of the agreement must be submitted to the Secretary General ICAO which must reproduce the original text in all the languages in which the agreement was concluded. A special procedure must be followed if the original text is not in one of the three official working languages of ICAO. The registering party must, at the same time or as soon as possible thereafter, notify the Secretary General of the date and manner of the coming into force of the agreement if this is not evident from its terms.

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56. Regulations op.cit. Article 2(1).
57. Union Government Treaty Series 1[illegible] of 19[illegible].
58. Regulations op.cit.
59. Regulations op.cit. Article 5(2).
60. Article 8[illegible].

Registration with ICAO has the effect of relieving the parties from the duty of registering the agreement with the United Nations Secretariat.[61]

While bilateral agreements must also be registered with the United Nations, the Regulations adopted by the General Assembly pursuant to Article 102 of the Charter fail to stipulate which party is to register the agreement. This must, therefore, be decided between the contracting States themselves and a clause to this effect is sometimes inserted into the body of the treaty. When the duty to register falls on the Republic this will be the responsibility of the Department of Foreign Affairs which must set about this task 'as soon as possible'.[62] Before any steps can be taken, the treaty must be in force and consent for registration must be obtained personally from the Secretary of Foreign Affairs. The Department must submit a certified copy of the treaty which reproduces the text in all the languages in which the treaty was concluded, and this must be accompanied by a statement setting forth the date on which the treaty came into force and the method whereby it has come into force; for example, by signature, by ratification, by accession.[63] The South African Department of Foreign Affairs, as a rule, includes in this statement a brief description of the treaty, its date and place of signature and enumerates the languages in which the treaty was concluded. This declaration is thereafter signed by a senior official of the Department of Foreign Affairs and stamped with the departmental stamp. The date and place of this signature and the capacity of the signer (who usually signs on behalf of the Secretary for Foreign Affairs) is indicated on the certificate. A typical example of this declaration is as follows:

CERTIFICATE

EXCHANGE OF NOTES CONSTITUTING AN AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND THE GOVERNMENT OF THE FRENCH REPUBLIC RELATING TO THE RECIPROCAL RECOGNITION OF AIRWORTHINESS CERTIFICATES

Place and Date of Signature	:	Cape Town, 20th May, 1968
Method of Entry into Force	:	Exchange of Notes
Date of Entry into Force	:	20th May, 1968
L[illegible] was concluded in	:	Afrikaans, English and French

Pretoria
September, 1968

Secretary for Foreign Affairs of the Republic of South Africa

61. Ibid. Article 8.
62. Regulations op.cit. Article 1.
63. Regulations op.cit. Article 5(2).

Three[64] certified copies of the treaty in all the languages used are sent, together with the declaration, in triplicate, to the Permanent Representative of the Republic of South Africa at the United Nations with the request that he register the treaty in accordance with Article 102 of the Charter and that he forward the certificate of registration issued by the Secretariat of the United Nations to the Department of Foreign Affairs in Pretoria.

The procedure in regard to the registration of aeronautical agreements is somewhat different. The procedure as regulated by Article 9 of the Rules (as described above) must be followed. If the treaty is not in one of the three official working languages of ICAO (English, French or Spanish), the Department of Foreign Affairs must translate the treaty (in duplicate) into one of these languages. These documents will be sent to the South African Ambassador in Ottawa for forwarding to the Secretary-General of ICAO. The Secretary-General will, in turn, issue a certificate of registration to the South African ambassador. This will ultimately be filed in the archives at Pretoria.

(ii) Publication

Whereas registration of a treaty ensures that it will come to the attention of member States of the United Nations, this process does nothing to ensure that citizens of the country concluding the treaty become acquainted with its contents. As a result, a variety of methods may be employed by a State to publicise within its borders the contents of any given treaty.

The issue of press releases in regard to treaty negotiations of the Republic is not essential but may prove useful as a means of informing the South African public about important new treaties. It also serves to clarify the date of entry into force of a treaty.

The form of a press release differs according to circumstances. As far as bilateral treaties are concerned, the press release usually describes the parties to the treaty, the capacity of the representatives who signed the treaty, the date(s) and place(s) of signature and/or ratification and the manner and date of entry into force.

Where multilateral treaties are in issue, the press release will contain the full title of the treaty and the date and place of signing.

64. Ibid.

Mention may also be made of the date and manner by which the Republic became a party as well as the date of entry into force as regards the Republic.

Press r... es are issued in both official languages by the Department of Info... ion. The following is a typical example of a press release vis-à-vis a bilateral treaty which has been signed but which is still to be ratified :

PRESS RELEASE

Immediate Release

The Department of Foreign Affairs announces the signing of an Extradition Treaty between the Republic of South Africa and the Republic of Botswana.

The treaty was signed by Dr. the Honourable H. Muller, Minister of Foreign Affairs, at Cape Town on the 27th February, 1969, and by the Honourable M.P.K. Nwako, Minister of State of Botswana, at Gaberones on the 4th March, 1969.

The Treaty is subject to ratification and will enter into force thirty days after the date of the exchange of the instruments of ratification.

PERSVERKLARING

Onmiddellike Vrylating

Die Departement van Buitelandse Sake kondig aan die ondertekening van n Uitleweringsverdrag tu... en die Republiek van Suid-Afrika en die Republiek Botswana.

Die verdrag is op 27 Februarie 1969 deur Sy Edele dr. H. Muller, Minister van Buitelandse Sake, te Kaapstad, en op 4 Maart 1969 deur sy Edele M.P.K. Nwako, Minister van Staat van Botswana, te Gaberones, onderteken.

Die Verdrag is onderhewig aan bekragtiging en tree in werking dertig dae na die datum waarop die bekragtigingsoorkondes uitgeruil is.

Since 1932, the Department of Foreign Affairs has published a treaty series which lists all bilateral treaties as well as several multilateral treaties to which South Africa is a party. While it is usual to publish all bilateral treaties, multilateral treaties will only be published in special circumstances. For example, the Geneva Convention Relating to the Treatment of Prisoners of War of 12 August, 1949,[65] was published in

65. Union Government Treaty Series 1? of 1952; United Nations Treaty Series vol.75 p.135.

the series because of a provision in the Convention that the parties should give it wide publicity. In addition, multilateral treaties of regional importance to a small number of States will often be published in this series, as was the Customs Union Agreement between the Governments of the Republics of South Africa, Botswana, Lesotho and Swaziland of 1969.[66] Every treaty published in the series is registered in the Treaty Series Register, kept by the administrative branch of the Department of Foreign Affairs. Copies of this series are forwarded to all South African missions abroad.

In addition to the South African treaty series there is a South African treaty index kept by the administrative branch of the Department of Foreign Affairs. This is a card index system consisting of all treaties binding on the Republic. It comprises a chronological and alphabetical list of subjects and, in respect of bilateral treaties, countries. The chronological index contains full information; while the alphabetical index simply cross-refers to the chronological index. The information catalogued includes the full title of the treaty, the date and place of signature, the manner in which the Republic became a party, the date and place of ratification or accession, the date of entry into force as regards the Republic, when the treaty may end, whether it is binding on South-West Africa, whether it must be tabled, the date and number of registration with the United Nations, whether it has been published in the <u>Government Gazette</u>, the number it is listed under in the South African treaty series, the number it is stored under in the archives, where the text is obtainable and any further pertinent remarks.

Other forms of publication include tabling as well as proclamation and publication in the <u>Government Gazette</u>. Tabling has already been discussed above.[67] There is no general statutory or constitutional rule which requires proclamation and publication of new treaties and agreements in the <u>Government Gazette</u>. However, certain individual statutes require this procedure to be followed, including s.48 of the Customs and Excise Act;[68] s.2(3) of the Extradition Act;[69] s.53(b) of the Children's Act;[70] s.30(2) of the Prisons Act;[71] s.35(1)(b) of the Retreats and Rehabilitation Centres Act;[72] s.85 of the Public Health Act;[73] s.108(3) of the

66. Republic of South Africa Treaty Series 8 of 1969.
67. See p. 151 above.
68. Act 91 of 1964.
69. Act 67 of 1962.
70. Act 33 of 1960.
71. Act 8 of 1959.
72. Act 86 of 1963.
73. Act 36 of 1919.

Income Tax Act;[74] s.2(4) of the Post Office Act,[75] s.26(2) of the Estate Duty Act;[76] s.356 bis (1)(b) of the Merchant Shipping Act,[77] and s.31(b) of the Aviation Act.[78] In the vast majority of these Acts publication is simply intended to bring the treaty or agreement in question to the attention of the South African public. If publication was to be overlooked in any particular instance, the treaty or agreement would, nevertheless, retain its validity. The position as regards the Extradition Act[79] is decidedly different as the Act expressly provides[80] that no extradition agreement shall be of any force or effect 'until it has been published by the State President by Proclamation in the Gazette'.

The effect of this provision has been duly considered by both the Transvaal Provincial Provision[81] and the Appellate Division[82] in the Eliasov cases. When the matter came before the trial court, it was common cause that the extradition agreement reached by the exchange of notes between the South African and Southern Rhodesian accredited representatives had never been published by the State President in the Gazette, so the court[83] held that 'it follows therefore that it is of no force and effect within the Republic'. Similarly, the Appellate Division reached the conclusion[84] that, although the extradition agreement between the Republic of South Africa and Southern Rhodesia 'constituted a valid international agreement with effect from [31 December 1963 according to the terms of the agreement itself, it] only became of force and effect within the Republic as part of its municipal law with effect from the 25 June 1965' (that is, the date of publication in the Gazette).[85]

74. Act 58 of 1962.
75. Act 44 of 1958.
76. Act 45 of 1955.
77. Act 57 of 1951.
78. Act 74 of 1962.
79. Act 67 of 1962.
80. Ibid., section 2(3).
81. S v. Eliasov 1965 (2) S.A. 770(T).
82. S v. Eliasov 1967 (4) S.A. 583 (AD)
83. S v. Eliasov 1965 (2) S.A. 770(T) at 772.
84. S v. Eliasov 1967 (4) S.A. 583 (AD) at 591.
85. By the time the matter reached the Appellate Division the Agreement had been duly published in the Government Gazette.

Finally, it may be mentioned that the United Nations publishes a monthly list of all negotiations which took place in that month in connection with the registration of treaties with the United Nations. This list is entitled 'Statement of Treaties and International Agreements registered or filed and recorded with the Secretariat'. The information contained therein is comparable to the information supplied by the South African treaty index.

([illegible]) Accession

Accession may be defined as the formal entrance of a third State into an existing treaty, so that it becomes a party to the treaty, with all rights and duties arising therefrom.[86] Customary international law states that accession can only take place with the consent of all the contracting parties. This rule is now embodied in the Vienna Convention on the Law of Treaties which provides:[87]

> 'The consent of a State to be bound by a treaty is expressed by accession when :
> (a) the treaty provides that such consent may be expressed by that State by means of accession;
> (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
> (c) all the parties have subsequently agreed that such consent be expressed by that State by means of accession.'

Lord McNair[88] points out that, normally and historically, accession is a secondary process. It is basically the act whereby a third State accepts the offer of becoming a party to a treaty already signed by other States (although not necessarily yet in force).

The International Law Commission's first formulation of accession stipulates that, unless the treaty provided otherwise, a State might accede only after the treaty had come into force.[89] Subsequently Sir Hersch Lauterpacht formulated the rule that, unless the treaty otherwise provided, 'accession may be effected any time after the establishment of the text'.[90] Sir Gerald Fitzmaurice, while confirming the view of

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86. L. Oppenheim International Law - a Treatise 8 ed. (1955) I Peace [illegible].
87. Article 15.
88. McNair op. cit. 149.
89. Holloway op.cit. 88.
90. Draft Articles on the Law of Treaties, First Report, Article 7(3). Document A/CN.4/63 in(1953) Yearbook of the International Law Commission.

the Commission, added that, exceptionally, accession might take place prior to the entry into force of the treaty.[91]

Kaye Holloway[92] comments:

> 'While the traditional concept of accession, which implies the acceptance of an existing instrument by those alien to its framing and negotiation, justified the principle of allowing accession only after entry into force of a treaty ... practice would seem to indicate a trend in the opposite direction more in keeping with the new treaty-making procedures .... Accession clauses are liberally interpreted insofar as the date of deposit of accession instruments is concerned.'

Of late, McNair adds, accession has also become a primary process, being the act whereby a State becomes a party to an instrument intended to become a treaty, the text of which has been drafted under the auspices of an international organization, and which has been thrown open for accession.

South Africa has become a party to most multilateral treaties by way of accession. In those cases the Republic was not signatory to the treaty for one reason or another, however the treaty itself provided that States in such a position could become parties upon depositing an instrument of accession. Some treaties provide that they shall be open for signature for a certain period, but that after the expiry of that period they shall become open for accession; others provide that accession may take place after the treaty has entered into force.[93] In any event, the acceding State may only become a party to the treaty after expiry of the stipulated period or happening of the stipulated event.

When the Republic becomes a party by accession, it may, in certain circumstances, make a reservation at the time of acceding. This reservation will normally be included in the instrument of accession.

As usual, authority from the Executive Committee must be obtained before the Government may accede to a treaty. Once this has taken place, the Department of Foreign Affairs will draw up an instrument of accession. A specimen of an instrument of accession as normally employed by the Republic reads as follows:

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91. Ibid., Article 34(6).

92. Holloway op.cit. 88.

93. McNair op.cit. 150.

94. See Reservations to the Convention on Genocide case 1951 I.C.J. Reports 15; also Articles 19-21 Vienna Convention on the Law of Treaties.

INSTRUMENT OF ACCESSION

WHEREAS the International Conference for the Adoption of a Convention for the Suppression of Counterfeiting Currency held at Geneva, on the 20th April, 1929, adopted an International Convention for the Suppression of Counterfeiting Currency, and Protocol;

AND WHEREAS an invitation to accede to the Convention by depositing an instrument of accession with the Secretary-General of the United Nations, was extended to the Government of the Republic of South Africa by the Secretariat of the United Nations on the 12th December, 1962;

AND WHEREAS the Government of the Republic of South Africa have duly considered the said Convention and Protocol, and have promulgated legislation in compliance with Article 23 of the Convention;

NOW THEREFORE, the Government of the Republic of South Africa hereby accede to the International Convention for the Suppression of Counterfeiting Currency, and Protocol, done at Geneva on the twentieth day of April, 1929, and undertake faithfully to fulfil and carry out the stipulations therein contained;

IN WITNESS WHEREOF, I, HILGARD MULLER, Minister of Foreign Affairs of the Republic of South Africa, have signed and sealed these presents at Pretoria on this the day of in the year of Our Lord One thousand Nine hundred and Sixty-seven.

Where the Republic acceded to a generally known international treaty, the full text of the treaty will not normally be repeated in the instrument of accession. However, it is of the utmost importance that the treaty be identified in the instrument of accession to avoid disputes arising at a later stage over the wording of a treaty. As a result, where a multilateral treaty is applicable between a limited number of States only, the full text of the treaty will often be included in the instrument of accession.

All that is required to effect accession is the act of lodging the instrument of accession with the Secretariat of the depositary authority. International practice dictates that accession is not usually followed by ratification, and in South Africa, too, accession will not necessitate ratification. In fact, the practice in regard to accession is similar in many respects to that of ratification, and instruments of accession, like those of ratification, are signed by the Minister of Foreign Affairs.

A certified copy of the South African instrument of accession, together with the original receipt received from the Secretariat of the depositary authority, must be sent by the Department of Foreign Affairs to the archives for safekeeping.

(f) The Extension of South African Treaties to the Territories of South West Africa and the Prince Edward Islands

Introduction

The Republic of South Africa has control over two territories which do not form normal parts of South Africa, viz., South West Africa and the Prince Edward Islands. Very little attention has been paid by writers as to how South Africa goes about extending treaties to these territories in view of the general rule of international law that a State has authority to negotiate treaties on behalf of its territory alone.[95]

Any solution to this problem, more particularly in regard to South West Africa, has become increasingly remote in the light of current international attitudes towards any South African presence in the area. Both the General Assembly[96] and the Security Council[97] have passed a number of resolutions condemning South Africa's continued occupation of South West Africa (Namibia) and have urged member States of the United Nations to refrain from entering into any treaty relations with the South African Government which might have the effect of recognising the latter's authority to negotiate on an international level on behalf of or concerning the territory. Member States have, in addition, been requested to review existing treaties with South Africa in so far as they extend to South West Africa.[98]

In 1971, the International Court of Justice gave an Advisory Opinion[99] which upheld the validity of the actions taken by the two United Nations organs, thus ensuring that the continued authority of the South African Government with regard to South West Africa has been condemned not only politically but judicially as well.

It is the purpose of this study to examine in some detail the validity of the application by the South African Government in the past of treaties to the territories of South West Africa and the Prince Edward Islands, and to decide in the light of current international attitudes whether the continued extension of treaties to these territories remains valid today.

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95. Article twenty-nine of the 1969 Vienna Convention on the Law of Treaties.
96. General Assembly Resolution 2145 (xxi) of 27 October 1966; 3295 (xxix) of 13 December 1974; 3399 (xxx) of 26 November 1975.
97. Security Council Resolutions 245 (1968); 246 (1968); 264 (1969); 269 (1969); 276 (1970) and 283 (1970).
98. Security Council Resolution 283 (1970).
99. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) 1971 I.C.J. Reports 16.

(i) South West Africa (Namibia)

In the wake of the First World War the signing of the Treaty of Versailles[1] was seen to herald a new era of peace whose administration was placed in the hands of the League of Nations. The Covenant of the League made provision,[2] inter alia, for the future fate of

> 'those colonies and territories, which, as a consequence of the late war, have ceased to be under the sovereignty of the States which formerly governed them, and which are inhabited by people not yet able to stand by themselves under the strenuous conditions of the modern world'.

As a result of this universal sentiment, the 'mandates system' was created which specifically entrusted 'the tutelage of such peoples... to advanced nations' and which stipulated that this tutelage should be 'exercised by them as Mandatories on behalf of the League'.[3]

The Mandate in respect of South-West Africa was confirmed in Geneva on 17 December 1920 by the Council of the League of Nations. It was formally conferred on His Brittanic Majesty for and on behalf of the Union of South Africa, and gave the Mandatory 'full power of administration and legislation over the territory subject to the Mandate'. South Africa could, henceforth, administer the territory 'as an integral portion of the Union' and could 'apply the laws of the Union to the territory subject to such local modifications as circumstances may require.'[4] The Union's powers in regard to the territory were subsequently confirmed by the Treaty of Peace and South West Africa Mandate Act,[5] the Treaties of Peace Act,[6] and the South West Africa Constitution Act.[7] It has been suggested[8] that the Mandate itself, read with the above Acts and the South Africa Act of 1909 (which established the necessary machinery for government in South-West Africa as well as in South Africa) constitute a composite grundnorm for South West Africa.

(ii) The Prince Edward Islands

These islands were first discovered in 1772 by a French navigator, Marion du Fresne, who, however, did not purport to claim them on behalf

1. The Union of South Africa was a signatory to this treaty.
2. Article twenty-two.
3. Ibid.
4. Article two of the Mandate for South West Africa; John Dugard The South West Africa/Namibia Dispute (1973) 72.
5. Act 49 of 1919.
6. Act 32 of 1921.
7. Act 42 of 1925.
8. C.J.R. Dugard 'South-West Africa and the Supremacy of the South African Parliament' (1969) 86 South African Law Journal 194 at 199-200.

of France. Four years later a British mariner, Captain Cook, sailed between the islands but did not weigh anchor.[9] From that time on the islands were thought to have belonged, at least nominally, to Great Britain. However, apart from granting guano and fishing rights in respect of the islands to two different companies (which rights were never exercised), the British Government took no further steps to establish any effective control over the islands, with the result that the islands were, in all likelihood, completely abandoned.

In any event, when the South African Government moved to annex these islands in 1947 and 1948, they first consulted the British Government, ex abundanti cautela, who gave an assurance that they laid no claim to the territory, and, on the contrary, that they would be pleased to see South Africa, as the nearest country, establish jurisdiction over the islands.[10]

In February 1949, notes were exchanged[11] between the two Governments whereby His Majesty's Government in the United Kingdom transferred to His Majesty's Government in the Union of South Africa all right, title and interest which they formerly possessed in the two islands.

The preamble to the Prince Edward Island Act[12] provides as follows:

> 'Whereas effective occupation and administration of Marion Island and Prince Edward Island were established on the twenty-ninth day of December 1947, and the fourth day of January 1948, respectively, and such occupation and administration will continue permanently.
>
> And whereas by proclamation issued by His Excellency the Governor-General, dated the twelfth day of January, 1948, it was declared that His Majesty's sovereignty over the said islands is henceforth to be exercised by His Majesty's Government in the Union of South Africa ....'

Section (1) goes on to provide further:

> 'The territory known as the Prince Edward Islands, consisting of Marion Island ... and Prince Edward Island ... is hereby declared to have been annexed to and to form part of the Union of South Africa.'

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9. House of Assembly Debates vol.65 cols. 3041-3 (22 September 1948).
10. House of Assembly Debates vol.65 cols. 3043-4 ([illegible] September 1948).
11. Union Government Treaty Series No.11 of 1950: Exchange of Notes between the Government of the Union of South Africa and the Government of the United Kingdom with regard to the Transfer of the Right, Title and Interest in Marion Island and Prince Edward Island.
12. Act 43 of 1948.

(iii) Treaty Extension - Methods Employed

It is clear that, in view of the above, the South African Government holds itself responsible for the administration both of South West Africa and of the Prince Edward Islands. The question then arises whether a treaty entered into by the South African Government would automatically extend to these territories.

According to Article 29 of the Vienna Convention on the Law of Treaties, '(u)nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.'[13] Can South-West Africa and the Prince Edward Islands be considered part of the 'entire territory' of the Republic for the purposes of Article 29? An examination of the Republic of South African Constitution Act[14] confirms that this question must be answered in the negative. The Act defines the Republic as consisting of the provinces of the Cape of Good Hope, Natal, Transvaal and the Orange Free State. No mention is made either of South West Africa or of the Prince Edward Islands. Furthermore, the nature of the mandates system is such that, although the Republic is responsible for the foreign relations of South-West Africa,[15] most international lawyers contend that external sovereignty over the mandated territory does not vest in South Africa as the Mandatory.[16] In addition, although the Prince Edward Islands Act provides that the Islands are 'annexed to' and 'form part of' the Union, it does not provide that they comprise one of the four provinces. Apart from this omission, s.4 of the Prince Edward Islands Act states quite clearly that :

> 'No Act of the Union Parliament passed after the date of commencement of this Act shall apply to the Territory, unless by such Act it is specifically expressed so to apply or unless it is declared to apply by proclamation of the Governor-General'.

It would, therefore, appear that treaties concluded by the South African Government do not automatically extend to the territories of South-West Africa and the Prince Edward Islands. To overcome this obstacle, bilateral treaties have, in the past, been made applicable

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13. Although South Africa has not yet ratified this Convention, it does regard it as an authoritative statement on the Law of Treaties and, in practice, follows its terms.
14. Act 32 of 1961, article one.
15. John Dugard The South West Africa/Namibia Dispute (1973) 77.
16. The South African Appellate Division has, however, held that sovereignty over South West Africa does vest in South Africa: R v. Christian 1924 A.D. 101.

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to either or both of these territories by utilising the following methods.

First, the territory over which the treaty was to operate had been defined by mentioning specific areas by name. For example, the preamble to the Most-Favoured Nations Trade Agreement between the Government of the Republic of South Africa and the Spanish Government of 1963[17] provided[18] that

> '(i)n this Agreement ... "Spain" means the Spanish Territory of the Iberian Peninsula; the Balearic and Canary Islands; Ceuta and Melilla; the Spanish Provinces of Sahara, Ifni, Fernando Poo and Rio Muni. "South Africa" means the Republic of South Africa and the territory of South-West Africa.'

Secondly, it was possible to include the territories of South-West Africa and the Prince Edward Islands in the ambit of the treaty even without mentioning these areas by name. So, for example, the preamble to the Agreement between the South African Government and the Government of the Kingdom of the Netherlands regarding the establishment and registration of dentists[19] specified:[20]

> '"(T)he Kingdom of the Netherlands" shall be understood to refer to the Kingdom of the Netherlands in Europe, but "the Republic of South Africa" to refer to the Republic of South Africa or any other territory falling under the jurisdiction of the Republic of South Africa at the date of signature of this Agreement.'

In similar vein, Article 1(c) of the Air Transport Agreement of 1969 between the South African Government and the Austrian Federal Government[21] provided that

> '"Territory" in relation to a Party means the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, administration or trusteeship of that party.'

Thirdly, reference, in the past, has been made in the treaty to a definition of 'territory' which appears in another treaty. A Trade Agreement entered into between the Governments of the Republic of South Africa and Malawi in 1967[22] reads:[23]

> 'In this Agreement ... "Malawi" means the area in respect of which the Government of the Republic of Malawi is a contracting party to the General Agreement on Tariffs and Trade; "South Africa" means the area in respect of which the Government of the Republic of South Africa is a contracting party to the General Agreement on Tariffs and Trade'.

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17. Republic of South Africa Treaty Series No.1 of 1963.
18. Article XI.
19. Republic of South Africa Treaty Series No.5 of 1965.
20. Article one.
21. Republic of South Africa Treaty Series No.3 of 1969.
22. Republic of South Africa Treaty Series No.1 of 1967.
23. Article one.

Fourthly, bilateral treaties have on occasion defined 'territory' by including specific, named areas (in this case, South-West Africa) not in the definition section, but in the actual provisions of the treaty itself. For example, an exchange of notes constituting a visa Agreement between the Governments of South Africa and Belgium in 1962[24] provided:[25]

> 'The Government of the Republic of South Africa will authorize its competent diplomatic and consular agents to issue Belgian citizens with business and tourist visas valid for a period of one year and several visits to the Republic of South Africa and South-West Africa.'

Fifthly, the territories of South-West Africa and the Prince Edward Islands have been included by implication. In 1969 an extradition treaty was concluded between the South African Government and the Government of Botswana,[26] which provided:[27]

> 'Extradition shall be granted in respect of offences which are in terms of the laws of the requesting Party subject to the jurisdiction of that Party's highest court of appeal in criminal matters.'[28]

It is probable that this devious approach was resorted to in order to avoid a direct mention of South-West Africa, in view of General Assembly Resolution 2145 (xxi) of 27 October, 1966 which declared that South Africa's Mandate over the territory was 'terminated' and that 'South Africa has no right to administer the Territory'. Such a conclusion finds support in the events surrounding the extradition agreement concluded in 1968 between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland.[29] Article 1 of this treaty obliged both parties to extradite persons wanted in respect of offences 'committed within the territory of the requesting party'. As a consequence of General Assembly Resolution 2145 (xxi), it appeared doubtful whether South-West Africa could rightfully be described as falling 'within the territory' of South Africa, and, therefore, whether Swaziland would have been obliged to extradite persons alleged to have committed offences in South-West Africa.[30] In any event, this defect was

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24. Republic of South Africa Treaty Series No. 8 of 1962.
25. Section two.
26. Republic of South Africa Treaty Series No. 2 of 1969.
27. Article two.
28. Crimes committed in South West Africa are, presently, subject to the jurisdiction of the South African Appellate Division.
29. Republic of South Africa Treaty Series No. 4 of 1968.
30. C.J.R. Dugard 'The Extradition Agreement between South Africa and Swaziland' (1959) 86 South African Law Journal, 88 at 92.

cured by a separate treaty negotiation in 1969, when an exchange of notes[31] took place which specifically extended to South-West Africa the original extradition agreement with Swaziland. This extension of the terms of an existing bilateral treaty to encompass South-West Africa by means of a separate treaty negotiation may be regarded as yet another method of including the territories of South-West Africa or the Prince Edward Islands in the terms of a treaty.

On occasion provision has been made in the body of the original treaty for such future extension. Examine, for example, the Double Taxation Convention of 1967 between the Governments of South Africa and Switzerland, which[32] stated:[33]

> 'This Convention may be extended either in entirety or with modification, by agreement between the contracting States, to all or any of the territories for whose international relations South Africa is responsible....'

Before any steps are taken to extend a bilateral treaty to South-West Africa, the Department which will be responsible for administering the treaty must be consulted, in conjunction with the Department of the Prime Minister, the Administration of South-West Africa and the South-West African branch of the Department of Foreign Affairs. Once a decision on the South African side has been reached over the desirability of applying a particular treaty to South-West Africa or the Prince Edward Islands, one of the formulae mentioned above must be negotiated with the other contracting State.

Most multilateral treaties, as a matter of course, have special clauses allowing for the extension of the treaty in question to territory. These clauses are formulated in several ways. Often there is a formula which provides for the optional application of the treaty to areas the foreign relations of which the contracting parties are responsible. So, for example, the Convention on Road Traffic of 1968 provides:

> 'Any State may, at the time of signing or ratifying this Convention or of acceding thereto, or at any time thereafter, declare by notification addressed to the Secretary General[34] that the Convention shall become applicable to all or any of the territories for the international relations of which it is responsible. The Convention shall become applicable to the territory or territories named in the notification thirty days after the receipt of the notification by the Secretary-General or on the date of entry into force of the Convention for the State making the notification, whichever is the later.'

31. Republic of South Africa Treaty Series No. 6 of 1969.
32. Ibid. No. 5 of 1967.
33. Article twenty-six.
34. The Secretary-General of the United Nations.

Alternatively, there is a formula which makes provision for the optional exclusion of territories the foreign relations of which contracting States are responsible. An example of such an exclusionary clause is contained in the International Sanitary Convention for Aerial Navigation of 1944 which states:

> 'Any contracting Party may on signature or accession declare that the present Convention does not apply to all or any of its colonies, overseas territories, territories under its protection, suzerainty or authority, or territories in respect of which it exercises a Mandate. The present Convention may at any time thereafter be applied to any such territory by notification in writing to the Government of the United States of America, and the Convention shall apply to the territory concerned from the date of the receipt of the notification by the Government of the United States of America'.

In addition to the above, an even simpler formula may be used which provides for the automatic application of the treaty to territories the foreign relations of which the contracting State is responsible. This was the case in the Articles of Agreement of the International Monetary Fund of 1945 which provided:

> 'By their signature of this Agreement, all Governments accept it both on their own behalf and in respect of all their colonies, overseas territories, all territories under protection, suzerainty or authority and all territories in respect of which they exercise a Mandate'.

Depending on the provisions of the multilateral treaty in question, territorial extension can occur either at the time of signing, ratifying or acceding to the treaty, alternatively during separate negotiations at a later date. Whenever the Government wishes to extend the terms of a multilateral treaty to South West Africa or the Prince Edward Islands, it should do so by way of a written communication (signed by the Minister of Foreign Affairs or by a plenipotentiary authorised to apply for such extension in his Full Powers) to the depositary authority or organisation under whose auspices the treaty was negotiated. It is then the duty of the depositary authority or organisation to inform the other contracting States of the application.

(iv) South-West Africa (Namibia) and the United Nations

Whilst the formulae enumerated above accurately describe the attitude of the Department of Foreign Affairs as regards treaties it may wish to extend to the territories of South-West Africa and the Prince Edward Islands, it is questionable, especially in view of the 1971 Advisory Opinion of the International Court of Justice and the numerous United

Nations resolutions describing South Africa's continued presence in the territory of South-West Africa as illegal, whether the Republic will, in the future, be able to make a particular treaty applicable to South-West Africa simply by utilising one of the above formulae.

In 1966 the General Assembly passed a resolution[35] whereby it terminated the Mandate over South West Africa.

Lacking, however, the necessary powers to ensure the withdrawal of South Africa from the territory, the General Assembly enlisted the co-operation of the Security Council by calling the latter's attention to the resolution.[36]

The Security Council responded to this appeal, inter alia, by passing resolution 283 (1970) wherein it requested all States to refrain from any relations - diplomatic, consular or otherwise - with the Republic which might imply recognition of the authority of the South African Government over the territory of Namibia. All States maintaining diplomatic or consular relations with South Africa were called upon to issue a formal declaration to the South African Government to the effect that they no longer recognized any authority of South Africa with regard to Namibia. They were requested further to terminate existing diplomatic and consular representation extending to Namibia and to withdraw any diplomatic or consular mission or representation residing there. Furthermore, States were requested to review all bilateral treaties between themselves and the Republic in so far as they contained provisions by which they applied to Namibia. The Secretary-General of the United Nations was asked to review all multilateral treaties to which South Africa was a party and which, either by direct reference or on the basis of relevant provisions of international law, might be considered to apply to the territory of Namibia.[37]

In 1971, in response to a request by the Security Council, the International Court of Justice gave an Advisory Opinion wherein it concluded[38] that South Africa was under a legal obligation to withdraw its administration from South-West Africa. Member States of the United Nations were legally obliged to recognise the illegality of the South African presence in South-West Africa and to refrain from acts which might imply recognition

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35. General Assembly Resolution 2145 (xxi) of 27 October 1966.
36. Thus acting in accordance with Article 11(2) of the Charter of the United Nations.
37. The International Court of Justice has never been called upon to advise on the legal effects of resolution 283 (1970), per John Dugard The South West Africa/Namibia Dispute (1973) 478.
38. 1971 I.C.J. Reports 16 at 12[illegible].

of the Republic's illegal presence there. Member States were further exhorted to refrain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purported to act on behalf of or concerning South-West Africa and from applying existing bilateral treaties concluded by South Africa on behalf of South-West Africa which involve active intergovernmental co-operation. An exception was made in respect of certain multilateral conventions such as those of a humanitarian character, the non-performance of which might adversely affect the inhabitants of South-West Africa. The Court left it to the competent international organs to take specific measures in this respect.

It may be noted that Advisory Opinions of the International Court of Justice are, strictly speaking, not binding.[39] However, they do carry political weight and have been complied with in most cases.[40]

The Security Council, on the other hand, has power to take binding decisions which member States are under a legal obligation to obey.[41] This is specifically provided for in the Charter of the United Nations[42] which states that '(t)he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

Both the Security Council and the General Assembly accepted the 1971 Advisory Opinion of the Court in a number of resolutions passed by each body subsequent to the decision. General Assembly resolution 3295 (xxix)[43] called on States not yet complying with the Court's decision 'to discontinue all direct or indirect relations with South Africa when it purports to act on behalf of or concerning Namibia'. General Assembly resolution 3399 (xxx)[44] reaffirmed this.[45]

The Security Council, too, passed several resolutions which indicated its complete approval of the 1971 Advisory Opinion.[46] Resolution 366 (1974) demanded that South Africa make a 'solemn declaration' that it would comply with resolution and decisions of the United Nations and

39. Michael Akehurst <u>A Modern Introduction to International Law</u> 2 ed (1970) 302.
40. Ibid.
41. Akehurst op.cit. 252.
42. Article twenty five.
43. General Assembly Resolution 3295 (xxix) of 13 December 1974.
44. General Assembly Resolution 3399 (xxx) of 26 November 1975.
45. See, too, General Assembly Resolutions 3111 (xxviii) of 12 December 1973 and 3324 E (xxix) of 16 December 1974.
46. See, for example, Security Council Resolutions 300 (1971); 301 (1971) and 310 (1972).

the 1971 Advisory Opinion of the Court in regard to South West Africa, and that South Africa take the necessary steps to effect the withdrawal of its illegal administration of Namibia.

The Government of the Republic of South Africa responded to the Court's Advisory Opinion by rejecting it on the basis that it would 'not stand up to the test of juridical analysis and that too familar double standards [were] evident in the latest opinion'.[47] Mr. Vorster affirmed that the South African Government would therefore 'proceed with our task [of administering the territory] and [would] not neglect our responsibility towards South West Africa and its peoples'.[48]

Mr. Vorster issued another statement in Windhoek on 10 May, 1975, which was reflected in a communication by the South African Government to the Secretary-General of the United Nations on 27 May.[49] The Government stated therein that it would remain in and continue to administer South-West Africa only as long as the inhabitants so wished and that it did not claim one inch of the territory for itself. However, it was unable to accept United Nations supervision over the territory although it was prepared to negotiate with a personal representative of the Secretary-General.[50]

It would appear from the above that the South African Government's attitude in respect of treaties which may be applied to the territory of South West Africa has remained unaffected by the 1971 Advisory Opinion of the International Court of Justice and by the numerous Security Council and General Assembly resolutions calling on States not to conclude treaties with South Africa which apply to South-West Africa.

Indeed, not all member States of the United Nations have adhered to these requests by the international judicial and political bodies. Early in 1972, a new extradition treaty[51] was entered into between the Governments of South Africa and Malawi to replace the 1962 extradition agreement between the Republic and the Federation of Rhodesia and Nyasaland to which Malawi was held to have succeeded in S. v. Bull[52] and S. v. Devoy.[53]

Article one of the new agreement makes the treaty applicable to South West Africa by conferring jurisdiction to South Africa over all persons

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47. Per the Prime Minister B.J. Vorster in a statement to the Rand Daily Mail 22 June 1971.
48. Ibid.
49. S/11701.
50. U.N. Chronicle June 1975 vol. 12 number 6 p.13.
51. Republic of South Africa Treaty Series 1 of 1972.
52. 1967 (2) SA 636 (T).
53. 1971 (3) SA 899 (AD).

found within, and all acts committed within, the jurisdiction of the Supreme Court of South Africa. This, of course, includes the territory of South-West Africa.

Despite such examples of obvious flaunting by some States of the Court's Advisory Opinion and the United Nations resolutions, South Africa will not find it easy to negotiate many future treaties with application to South-West Africa. The United Kingdom, for one, has publicly stated that 'the Mandate can no longer be regarded as being in force and that South Africa's occupation of Namibia is unlawful and that it should withdraw'.[54] In view of the increasing hostility of the world towards the continued South African occupation of South-West Africa, the South African Government might well find that very few States would be willing to enter into treaty negotiations unless South-West Africa is expressly excluded from its ambit.

In conclusion it must be noted that the position of South-West Africa at the present time (1978) is highly unsettled. However, it seems fairly certain that independence is soon to be granted to the territory. When this happens the question of extension of new treaties to South-West Africa will no longer be relevant. Nevertheless, it might still be necessary to determine whether a particular treaty had been applied to the territory before it became independent. In such an event, the methods of extension of treaties described in the preceding pages will hopefully be of some assistance.

54. Per Mr. James Callaghan, British Foreign Secretary on 4 December, 1974, as quoted by John Dugard 'Foreign Affairs and Public International Law' (1974) Annual Survey of South African Law 52 at 54.

5. TREATY IMPLEMENTATION AND CONSTITUTIONAL LIMITATIONS

(a) Theories regarding the Inter-relationship of Customary International Law and Municipal Law

Introduction

An examination of the relationship between international law and municipal law raises two important issues regarding the nature and operation of international law. The first is the question whether rules of international law can become *per se* part of municipal law: that is, whether its rules have a direct legal effect on individual citizens and courts within the State without any necessity of transforming them into municipal law by some legislative process. The second question is whether, even assuming that such direct operation is possible, rules of international law automatically override conflicting rules of municipal law. These two issues are connected with the wider juridical debate on the relative merits of the monistic and dualistic theories of the inter-relationship between public international law and municipal law.

(i) Origins of the Theories

According to one writer[1] the origins of the relationship of municipal law to another normative order such as international law are closely linked to the development of the doctrine of sovereignty. He contends[2] that the early Catholic academics were among the first to adopt a concept of State sovereignty which they were careful to reconcile with a monistic construction of law in general. To them, sovereignty was a delegation from a superior legal order, 'a competence rather than an omnipotence'.[3] It was in this vein that Suarez wrote:

> 'in universo humano genere potuerunt iura gentium moribus introduci'

In later years jurists of the 'natural law' school further developed the idea that sovereignty represented no more than a competence given by international law. International law, in turn, was identified as part of the wider concept of 'ius naturae'.

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1. J.G. Starke 'Monism and Dualism in the Theory of International Law' (1936) 17 British Yearbook of International Law 66 at 67.
2. Ibid.
3. Ibid. 68.

During the mid-eighteenth century the doctrine of sovereignty was profoundly influenced by the ideas of Vattel and Hegel. The former theorized that every sovereign State was free to determine for itself the nature and extent of the obligations imposed on it. The latter carried the position even further by defining the State as a metaphysical reality with value and significance of its own, and by endowing it with the ability to choose whether or not it should respect the law. In this way the modern theory of dualism was born.

The doctrine of State sovereignty reached its apex in the nineteenth century under the influence of the 'positivist' school of jurisprudence. As Lauterpacht[4] noted:

> '(I)t is not a mere coincidence that positivist writers are, as a rule, dualists, and vice versa. This applies in particular to the principal protagonists of the dualist doctrine, namely, Triepel, Strupp, Anzilotti and Cavaglieri.'

Perceived in this light, the dualist view is merely a manifestation of the traditional positivist attitude.

The monist theory experienced a revival in the twentieth century and was especially influenced by the writings of Kelsen. The Austrian school of jurisprudence was the first to adopt monism as its creed, and its thesis was taken up by many modern scholars of international law.

The position today is that monism appears to have obtained the widest theoretical acceptance, although there are divergent views on the nature of monism itself.

(ii) <u>The Dualist Conception of the Relationship between International Law and Municipal Law</u>

Exponents of the dualist school[5] contend that international law and municipal law are two completely different legal orders. The dualist begins with the proposition that law is an act of sovereign will. Municipal law can be differentiated from international law in that it is a manifestation of this will internally directed, as distinct from participation in a collective act of will by which the sovereign powers undertake obligations with respect to other sovereign powers.[6] This

4. Hersch Lauterpacht International Law : Collected Papers (edited by E. Lauterpacht (1970) I General Works ...
5. Among these appear Triepel, Anzilotti, Strupp, Cavaglieri, Schwarzenburger and Waltz.
6 D.P. O'Connell International Law 2 ed. (1970) I ...

results in a dualism of legal sources, subjects and substance.

The two legal orders differ, first, as to their sources of law. Municipal law stems from the will of the State itself. This will is exercised through legislative and judicial organs, or manifests itself as customary law. International law, on the other hand, finds its source in the common will of States. This will expresses itself through custom or treaty.

The second point of difference between the two legal orders relates to subjects of the law. Municipal law deals with municipal organs, juristic and natural personae. It regulates the relationship between the State and the individual as well as between individuals within the State itself. International law governs the relationship between equal members of the international community; that is, between States inter se or between States and other international organs and organizations which share a common status as true subjects of international law.

The legal orders differ, thirdly, in their substance or subject-matter. Municipal law concerns itself with matters affecting the relationship between individuals, or between individuals and State organs. International law confines itself to regulating matters of particular interest to States and other international bodies. It does not concern itself with the well-being of those governed by municipal law.

(iii) The Monist Conception of the Relationship between International Law and Municipal Law

The monist theory[7] denies the validity of all the premises on which the dualist doctrine is built. The essence of the monist view is that all rules of law ultimately regulate the conduct of the individual, the only difference being that, in the international sphere, the consequences of such conduct are attributed to the State. A classic example of this is the Nuremberg trials where the individual was held to be directly responsible in terms of international law. The tribunal held that the individual was bound to apply norms of international law, even though in so doing he would be violating municipal law.

The monist theory maintains that, in both spheres, law is essentially a command binding on the subjects of the law independently of their will.

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7. Amongst whose exponents are Kant, Kelsen, Verdross, Kunz, Guggenheim, Constantopoulos and Sauer.

It asserts that municipal law and international law, far from being essentially different, form one unified normative order, in terms of which the former derives its binding force by way of delegation from the latter. In this way both legal orders share the same sources and subjects.

(b) Practical Importance of these Theories

Introduction

In order to evaluate the theoretical discussion of the inter-relationship between international law and municipal law, it is necessary to investigate fully its practical and factual importance and to see whether the theoretical discussion throws light on the actual practice of States as regards international law. Two questions fall to be considered here; first, what is necessary for the applicability of these doctrines in a municipal legal system; and secondly, which legal order takes priority in the event of a clash between the two.

(i) The Transformation and Adoption Theories

As already stated, dualists subscribe to the view that international law and municipal law are separate legal orders stemming from different sources and regulating diverse subjects and subject-matter. One consequence of this disparity is that rules of international law cannot operate directly in the municipal sphere. As a result, each individual rule of international law must be 'transformed' or incorporated into municipal law before it can affect individual rights. This 'transformation' is achieved by way of an authoritative legal act, either statute or custom. In other words, a source of municipal law must transform an international legal norm into municipal law in order to become internally applicable. In the words of Felice Morgenstern:[8]

> '(T)he true meaning of the doctrine of transformation is that each rule of international law must be individually incorporated in municipal law, as international law itself is by its nature, inapplicable in the municipal sphere.'

The monist school does not face the problem of transformation since it maintains that both international and municipal norms belong to the

8. Felice Morgenstern 'Judicial Practice and the Supremacy of International Law' (1950) 27 British Yearbook of International Law 42 at 50.

same legal order. An act of transformation by municipal organs would be illogical since such a use of municipal law would only amount to a technical device for the internal enforcement of international law. International law, as a world constitution, determines all subordinate legal norms and in this way affects individuals directly.

Some monists adhere to a theory of adoption or incorporation, explained by Morgenstern[9] in the following terms:

> '(A)s international law is thus not by its nature applicable to individuals, it can be "adopted", as such, into the national law of individual States. This means that a specific act of "transformation" of each individual rule of international law is not required before international law can be applied to legal relations within the State. "Adoption" does not mean that international law is operative in the municipal sphere by virtue of a rule of international law superior to and independent of the will of the State. The enforcement of international law within the State under the doctrine of adoption is dependent on the will of the State concerned .... (T)he doctrine of "adoption" differs from the doctrine of "transformation" in that it makes possible the automatic operation of international law in the municipal sphere, with a consequent enhancement of its authority.'

(ii) The Question of Primacy and the Solution of Conflicts between International Law and Municipal Law

Despite the assertion by the Dualists that international law and municipal law derive from different sources and affect distinct subjects, they nevertheless maintain that a relationship between the two legal orders is not only desirable, but indispensable. They contend further that a conflict situation between the two orders cannot arise and that it is, therefore, unnecessary to decide which system shall take priority. Potential conflict is avoided through the process of the 'transformation' theory. In terms of this theory, the reception by municipal law of international law operates the so-called 'transformation' of international norms. These norms change in character and are incorporated into the legal order by which they are accepted. In this way individual rules of international law are transformed into municipal laws. Only norms that can be adapted to the type of situation governed by the municipal legal order can be transformed. Hence a conflict can never arise.[10]

9. Morgenstern op.cit. 59-60.
10. Doeker op.cit. 165-6.

Exponents of the monist theory of the inter-relationship of international law and municipal law are divided in their approach regarding the primacy of one system over the other and the possible solutions to conflicts. The 'extreme monists' argue that all municipal law which is contrary to international law is automatically void. This is so because municipal law derives its authority by way of delegation from international law. The latter system determines the territorial and personal sphere of validity of national systems of law and makes their co-existence legally comprehensible.[11] In the words of Starke:[12]

> '(T)he generally accepted principles seem to be these. International law binds new States without their consent, and if consent is expressed, it is only declaratory of a juridical situation already in existence. Once the new State steps into the international community it becomes subject to the norms which bind other members of that society and accepts obligations as well as the benefits of international organization.' [13]

Certain monists who may be termed 'moderate' assert that municipal law which is contrary to international law is not automatically void; it is binding internally. Despite this, they maintain that international law ultimately supersedes contradictory principles of municipal law as the offended State can, in the long run, demand the non-applicability of municipal law contrary to international law. In matters of State responsibility international tribunals will decline to regard the absence of adequate provisions of municipal law as a good defence.[14]

Finally, some proponents of monism[15] despite maintaining that international law and municipal law form part of the same legal order, assume that municipal law is superior to international law. This theory has been called 'inverted monism'[16] or 'monism in reverse'. Its main

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11. Lauterpacht op.cit. 152.
12. Starke op.cit. 77.
13. Lauterpacht op.cit. 222 adds that such recognition is given in pursuance of inescapable political necessity and legal duty. Kaye Holloway op.cit. 241 comments that the effect of withdrawing this recognition would be to place the State outside the pale of the international community, a situation hardly conceivable.
14. Ibid.
15. Among these are to be found Bergbohm, Phillip Zorn, Albert Zorn, Wentzel.
16. O'Connell op.cit. 42.

proponent, [illegible], grossly exaggerated Hegel's theory of State-will. This led him to propose that international law is only that part of municipal law which regulates the legal relations of one State with foreign States. In terms of his theory of 'auto-limitation' of the sovereign will, the State is superior and antecedent to the international community and remains the only law-making authority.[17] International law is thus a deviation from municipal law and remains binding only as long as the State agrees to be bound by it.[18] This theory has never found favour in international tribunals.

(c) The Harmonisation Theory

Because of certain patent deficiencies in both the dualist and the monist doctrines, a third theory regarding the inter-relationship of international law and municipal law has been developed. According to O'Connell:[19]

> 'A monistic solution to the problem of the relationship of international law and municipal law fails because it would treat one system as a derivation of the other, ignoring the physical, metaphysical and social realities which in fact detach them ....
> But a dualist solution is equally deficient because it ignores the all-prevailing reality of the universum of human experience .... The correct position is that international law and municipal law are concordant bodies of doctrine, each autonomous in the sense that it is directed to a specific, and, to some extent, an exclusive area of human conduct, but harmonious in that in their totality the several rules aim at a basic human good.'

He develops his argument further:[20]

> '(L)aw, being a rule for the solution of human conflicts ... should be harmonious and should not allow for contradictory rules of behaviour. If contradictory rules in fact exist it does not follow that one of them must be void; but neither does it follow that the systems which gave rise to them are mutually incompatible. It is one of the principal functions of juristic reasoning to eliminate contradiction by harmonising the points of collision, not by pretending they do not exist, nor by crushing the one with the other .... The theory of harmonisation assumes that international law ... forms part of municipal law ... but in the rare instance of conflict between the two systems this theory acknowledges that [the municipal judge] is [bound] by his jurisdictional rules .... The judge, when faced with a conflict

17. Ibid. 43.
18. Doeker op.cit. 164.
19. O'Connell op.cit. 43.
20. Ibid. 44-5.

> between international law and municipal law, is in the presence of two texts of distinct formal origin, but claiming the same juridical substratum for their legal value. The substratum is not destroyed by virtue of the formal delimitation of domains of application. The judge is bound by the demarcation of these domains, but he must not assume that there is any inherent incompatibility between them. Rather, he must give effect to both, within the limits of the competence conferred on him, presuming that when he applies international law he encounters no obstacle from municipal law and vice versa.'

Other international lawyers have pursued a similar line of thought. Sir Gerald Fitzmaurice[21] analyses the monist-dualist controversy from an apparently neutral standpoint, but does advocate certain elements of the harmonisation theory. He draws attention to the 'artificial and unreal' nature of 'the postulate that international law is the superior order, namely national law in all the different States is adapted and applied by a process of delegation from international law'. National law existed prior to international law. He also rejects the opposite postulate that 'international law exists as an extension of the national legal order', a view which is 'artificial and leads to absurdities'. To Fitzmaurice the vital issue is not the formal distinction between the two orders, but the question to what extent international law obliges States, however indirectly, to adapt their domestic laws to rules of international law in so far as these have repercussions in the international sphere.

Holloway comments[22] that where Fitzmaurice admits the possibility of a conflict of obligations when the State is unable to conform to the requirements of international law, and then proceeds to show that the State in such cases commits a breach of its international obligations and will be held internationally responsible:

> 'it would seem that he is in fact supporting the idea of a certain independence between the two orders, each supreme in its own field, but with international law exercising indirectly or implicitly a measure of co-ordination and harmonisation.'

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21. Sir Gerald Fitzmaurice 'The General Principles of International Law, Considered from the Standpoint of the Rule of Law'. (1957) 2 Recueil 1 at 7.

22. Holloway op.cit. 246-7.

(d) South African Practice in respect of such Theories

(i) The Reception of the British Doctrine that 'International Law is a part of the Common law'

The relationship between South African municipal law and public international law at the present time is largely determined by common-law rules inherited from the United Kingdom, since there are no constitutional provisions or general legislation dealing with this question. It is, therefore, necessary to enquire into the legal position of the inter-relationship between international law and municipal law as illustrated by United Kingdom practice.

The concept that international law forms part of the common-law was first enunciated by Blackstone in his Commentaries on the Laws of England[23] in a passage which merits quotation :

> 'The Law of Nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted to its full extent by the common law, and is held to be part of the law of the land. And those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered to be introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the Kingdom, without which it must cease to be part of the civilized world.'

This doctrine was affirmed by British courts as early as 1737 when Lord Mansfield in Barbuit's case[24] attributed the statement to Lord Talbot that 'the law of nations, in its fullest extent, was part of the law of England'. Lord Mansfield subsequently adopted a similar approach in Triquet v. Bath[25] and in Heathfield v. Chilton.[26] In the latter case he said: '(t)he privileges of public ministers and their retinue depend upon the law of nations which is part of the common law of England'. The Blackstone doctrine has been consistently acted upon by British courts ever since and has been applied in a large number of cases in various situations with regard to which the ordinary law of the land was silent.

The rule that principles of international law were to be applied directly by British courts despite the absence of express legislation to

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23. Blackstone Commentaries on the Laws of England 15 ed. (1809) Book IV, ch.5, p.67.
24. (1737) Cas. t. Talb. 281, 25 E.R. 777.
25. (1764) 3 Burr. 1478.
26. (1767) 4 Burr. 2016.

this effect appeared to suffer a temporary setback in the case of 'The Franconia'.[27] However, this case was only an apparent exception.[28] As Lauterpacht[29] points out, the insistence of some of the judges in this case on the necessity for an Act of Parliament was due not to the desire to challenge the established doctrine, but to the uncertainty of international law on the subject in dispute.

In any event, the case of West Rand Central Goldmining Co. v. R.[30] clearly re-established the Blackstone rule. The court held:[31]

> 'It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.'[32]

In 1916 the Appeal Court in the case of The Zamora[33] ruled that the principles of international law relating to angary constituted part of the common law.[34] Lord Parker stated[35] that

> '(i)t would be anomolous if the international law by which all nations are bound could only be ascertained by an enquiry into the municipal law which prevails in each ... The authorities point to the conclusion that international usage has in this respect developed a law of its own, and has not recognized the right of each nation to apply its own municipal law.'

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27. R v. Keyn (The Franconia) (1876) 2 Ex.D. 63.
28. Morgenstern op.cit. 52.
29. Lauterpacht op.cit. 219.
30. [1905] 2 K.B. 391.
31. At 406-7.
32. O'Connell op.cit. 51 comments that the above statement by Lord Alverstone supports the harmonisation theory rather than the monist doctrine, in that it seems to indicate that international law is channelled with municipal law in order to guide the judicial process. Whenever appropriate, the norms of international law will govern the decision; but if inappropriate they will not.
33. The Zamora [1916] 2 A.C. 77.
34. The right of angary is the right of a belligerent sovereign to take possession of the property of neutrals (for the purposes of public welfare) so found within his territory or within territory occupied by his forces; per Lord Atkin L.J. in Commercial and Estates Company of Egypt v. The Board of Trade [1925] 1 K.B. 271 at 293.
35. At 100.

In 1924 Bankes L.J. in Commercial and Estates Company of Egypt v. Board of Trade[36] quoted with approval the dictum of Lord Parker[37] and expressly followed the decision of the West Rand Central Goldmining Co. case.

Despite the above authority, there have been dicta which may indicate that the Blackstone doctrine is held in doubt by certain English judges.[38] Lauterpacht regards these as isolated dicta which have not diminished the authority of Blackstone's rule. O'Connell, on the other hand,[40] provides a different interpretation to Lord Atkin's statement[41] that 'so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law ...' and to Lord Wright's similar statement in The Christina[42] that a rule of international law 'is binding on the municipal courts of this country in the sense and to the extent that it has been received and enforced by these courts'. O'Connell believes that Lord Atkin and Lord Wright probably meant that an English court is bound by its own rules of stare decisis when applying international law, so that it may not resort to novel and altered law when it has its own precedents to govern its decisions. He adds:[43]

> '(S)uch a position is consistent with the theory that international law and municipal law form one body of doctrine, and that potential conflicts between their respective rules must be minimised by a process of judicial harmonisation'.

In any event, the rule established by modern British judicial practice indicates that customary rules of international law are, by and large, deemed to be part of British common law.

While this may be the general rule, there remain several exceptions. It is widely accepted that rules of customary international law will not be applied in cases where they are inconsistent with British statutes, whether the statutes be earlier or later in time than the particular rule of international law concerned.[44] At first glance this would appear to be

36. [1925] 1 K.B. 271.
37. At 282.
38. See Mortensen v. Peters [1906] 8 F. (Ct. of Sess.) 93; Commercial and Estates Co. of Egypt v. Board of Trade [1925] 1 K.B. 271 at 293 (per Atkin L.J.); Chung Chi Cheung v. The King [1939] A.C. 160 at 167 (per Atkin L.J.); Compania Naviera Vascongada v. Steamship Christina [1938] A.C. 485 at 497 (per Lord Macmillan).
39. Lauterpacht op.cit. 220.
40. O'Connell op.cit. 50.
41. In Chung Chi Cheung v. The King [1939] A.C.160 at 167.
42. [1938] A.C. 485 at 502.
43. O'Connell loc.cit.
44. Mortensen v. Peters supra.

a significant exception to the monist doctrine, but a closer examination of the situation does not yield the same impression. For a start, it is tempered by the rule of construction that the legislature did not intend to derogate from international law. Whenever possible, Acts of Parliament must be interpreted to avoid conflict with international law.[45] Lord Porter, in the most recent case on the matter in Theophile v. Solicitor-General,[46] held:

> 'There is a presumption that Parliament does not assent or assume jurisdiction which goes beyond the limits established by the common consent of nations .... Statutes are to be interpreted, provided that their language admits, so as not to be inconsistent with the comity of nations.'

There is no doubt that where the intention of the legislature to derogate from customary international law is clearly to be ascertained from the language of the Act itself, a municipal court will be bound to give effect to the overriding supremacy of the legislative will. However, there has to date been only one decision in the British Commonwealth where this intention was found to be clear.[47] This was the Australian case of Polites v. Commonwealth[48] where the court held that the Commonwealth Parliament was competent to provide by regulations under the National Security Act for the compulsory conscription of aliens in the Australian defence forces, despite the existing rule of customary international law that aliens could not be compelled to serve in the military forces of a foreign State. Latham C.J. held[49] that despite the rule that statutes should be interpreted consistently with the law of nations, domestic courts were bound by conflicting municipal legislation.

This decision was clearly correct, because as Lord Porter said in Theophile's case:[50]

> '(T)his presumption [that Parliament does not intend to legislate contrary to international law] must give way before an intention clearly expressed .... If, therefore,

45. Mortensen v. Peters (1906) 14 S.L.T. 227 at 232; [1906] 8F (Ct. of Sess.) 93 at 103; R. v. Keyn (1876) 2 Ex.D. 63 at 85; R. v. Dudley (1884) 14 Q.B.D. 273 at 284; Le Louis (1917) 2 Dods. 210 at 254.

46. [1950] A.C. 186 at 195-6 (P.C.)

47. D.P. O'Connell op.cit. 52.

48. (1945) 70 C.L.R. 60.

49. At 69.

50. Theophile v. Solicitor-General [1950] A.C. 186 at 195-6.

statutory enactments are clearly inconsistent with international law, they must be so construed, whatever the effect upon the rights of aliens not within the jurisdiction may be.'

Lauterpacht[51] asserts that this exception bears no relation whatever to the question of the direct operation of international law in the sphere of municipal law:

> 'It merely means that there are limits to the direct operation of international law ... that municipal law can, within the State ... assert its overriding force and command judges to act as organs of the State and not as organs of international law ... that within the State the primacy of international law is subject to overriding State legislation. But, in so far as municipal law does not actively and unequivocally interfere, the direct operation of international law is a fact'.

In addition to this rule of construction, there is also the rule of evidence that international law, unlike foreign law, need not be proved as a fact by expert evidence or otherwise. The courts will take judicial notice of its rules and may of their own volition refer to text-books and other sources for evidence thereof.[52]

The rule that 'international law is part of the law of the land' in any event really means that international law should be regarded as part of the common law of England. If the doctrine is seen in this light, the rule that English legislation overrides conflicting principles of international law is only an apparent exception. English statute law will always take priority over any other source of law, including common law, because of the doctrine that Parliament is supreme.[53] Therefore, Acts of Parliament will naturally and automatically take precedence over any rules of international law, which, after all, form part of the common law. It would be nonsense to argue that English common law is foreign law simply because Acts of Parliament take priority. Surely it follows that international law should not be regarded as an alien system of law merely because another type of English law, viz., statute law, will prevail in the event of a clash between the two.

A second apparent exception to the rule that 'international law forms part of municipal law' has come about due to the application by English courts of the doctrine stare decisis. In terms of this doctrine, where customary rules have been determined by British courts of final authority, later British courts are bound by that determination even though a

51. Lauterpacht op.cit. 221.
52. Re Piracy Jure Gentium [1934] A.C. 586.
53. Quaere: European community law.

divergent customary rule of international law may thereafter develop.[54] In many instances it is not the principle of binding judicial precedent which is responsible for the inadequate application of international law in municipal courts, for these courts have found no difficulty, when applying municipal law, in limiting existing principles by stressing novel features in cases apparently within the scope of an old established rule. Lauterpacht points out[55] that in the decision of Bank of Ethiopia v. National Bank of Egypt and Liguori[56] the court, instead of simply relying on previous decisions laying down the principle of the validity of the internal acts of a Government recognized de facto, might have considered the relevance of the fact that the occupation of Abyssinia was effected in violation of the covenant of the League of Nations. The real difficulty remains that municipal courts are not always sufficiently acquainted with the subtleties of international law to circumvent the strict application of the stare decisis rule.

Application of this doctrine of precedent has led certain writers to assert that 'English courts [are] no longer applying developing principles of international law but what might be termed an "anglicised" version of those principles'.[57] This statement is only partly true. English courts are limited in their power to neglect precedent and apply new or modified international law. Occasionally, English law and international law have taken divergent paths, the most notable example of this, until very recently, has been the law of sovereign immunity. Early English decisions adopting the absolute view on sovereign immunity, which is now regarded as outmoded by the international community, continued to bind English courts year after year because of the strict application of the doctrine of precedent. Recently, however, there have been a number of important cases relating to the question of sovereign immunity which indicate that English courts have begun to reassess their approach to this subject and are taking steps to bring English law into line with that of the rest of the world. In the case of Thai Europe Tapioca

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54. Chung Chi Cheung v. R. [1939] A.C. 160 (P.C.) at 168, per Lord Atkin who held that '(t)he courts ... will treat [international law] as incorporated into the domestic law so far as it is not inconsistent with rules enacted by Statutes or finally declared by their tribunals'.
55. H. Lauterpacht 'Is International Law a part of the Law of England?' (1939) 25 Transactions of the Grotius Society 51 at 87 note m.
56. [1937] Ch. 513.
57. D.W. Greig International Law (1970) 50.

Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies, Imports and Shipping Wing,[58] the court was asked to grant sovereign immunity in respect of an action in personam, where the cause of action arose out of a transaction of commerce. As none of the incidents of this took place within the jurisdiction of the English court, all three judges had no hesitation in upholding the plea of sovereign immunity. Lord Denning M.R. did, however, make the obiter statement[59] that a foreign sovereign would not be granted immunity when he enters into a commercial transaction with a trader in England and a dispute were to arise which is properly within the territorial jurisdiction of the English courts. Neither Lord Lawton nor Lord Scarman L.JJ. were prepared to accept this obiter statement of Lord Denning on the ground that the doctrine of stare decisis applied to a rule of international law and the rule of absolute immunity had been incorporated into English municipal law by decisions binding on the court. They clearly decided that it was not open to them to accept the rule of restrictive immunity and that the court was bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or the legislature declares that it is no longer so.[60]

Shortly after this judgement, the Judicial Committee of the Privy Council in Owners of the Ship Philippine Admiral v. Wallem Shipping (Hong Kong) Ltd. and Others[61] did in one respect abandon the absolute theory of sovereign immunity and accepted the restrictive theory. This was as regards actions in rem. They held:

> 'The trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions .... their Lordships themselves think that it is wrong that it should be so applied .... Thinking as they do that the restrictive theory is more consonant with justice they do not think that they should be deterred from applying it'.

Unfortunately, the Privy Council discouraged any advance towards restricting the immunity for actions in personam, leaving this alternative open for the House of Lords to follow should it so wish.

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58. [1975] 3 All E.R. 961 (C.A.)
59. At 966.
60. See especially the statements of Lawton L.J. at 968 and those of Scarman L.J. at 969-70.
61. [1976] 1 All E.R. 78 (P.C.)
62. At 232-3.

In a surprising move, without waiting for the House of Lords or the legislature to declare that the rule of restrictive immunity is now part of English municipal law, the majority of the Court of Appeal in Trendex Trading Corporation v. Central Bank of Nigeria[63] has itself done so. Disregarding Stephenson L.J.'s declaration to stand 'loyally albeit reluctantly on the old doctrine and the old decisions',[64] Lord Denning M.R. held[65] that the reasoning of the Privy Council in The Philippine Admiral[66] was of general application and covers actions in personam as in those actions, too, the restrictive theory is more consonant with justice. He took the view that there was no reason to wait for the House of Lords to make the change. The Court of Appeal could and should state its views as to the rules of international law and apply them as it thought best, leaving it to the House of Lords to reverse its decision if necessary. He stated:[67]

> 'Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of the court as to what was the ruling of international law fifty or sixty years ago is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was fifty or sixty years ago, it can give effect to that change - and apply the change in our English law - without waiting for the House of Lords to do it'.

Lord Shaw L.J. agreed with Denning that English courts were free to apply the current concept of qualified immunity. He placed priority on the rule that international law is part of the law of the land and stated that this rule could hardly be followed if English courts were forced to apply as part of English law what had once been the law of nations but what had since ceased to be.[68] He did not go as far as Lord Denning in saying that international law knows no rule of stare decisis, but held instead that while the rule of stare decisis operates 'to preclude a court from overriding a decision which binds it in regard to a particular rule of international law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect of extinguishing the old rule'.[69]

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63. (1977) 2 W.L.R. 356 (C.A.)
64. At 381.
65. At 367-8.
66. Supra.
67. At 365-6.
68. At 3[illegible].
69. Ibid. It should be noted that in January, 1978, the State Immunities Bill was tabled in the British Parliament. This Bill aims to introduce the doctrine of qualified immunity into the British legal system.

This is not the first occasion on which the doctrine of precedent has been qualified in relation to its application by municipal courts of principles of international law. Sir Samuel Evans in The Odessa[70] cautioned that '(p)recedents handed down from earlier days should be treated as guides to lead and not as shackles to bind. But the guides must not be lightly deserted'. Until the Trendex case, judges had taken more to heart the second part of Sir Samuel's advice and had not lightly deserted their guides. This gave rise to the real danger that municipal courts would get out of touch with international law as practised at the actual time.[71] In view of this it is timeous for the Court of Appeal to re-examine and to air, as it has so ably done, the problems surrounding the application of the traditional doctrine of precedent by municipal courts in relation to the norms of international law. The possibility, however, remains of a future court holding that the statements of Denning M.R. and Shaw L.J. were only obiter, in view of the fact that the Court of Appeal unanimously held that the bank was not entitled to immunity as it was not an emanation, arm, alter ego or department of the State of Nigeria. Nevertheless, Brierly's statements[72] that 'international law is not a part, but is one of the sources of English law' and that 'even some of the principles which have been most firmly established as law for English courts represent no more than the national view of what international law is or ought to be',[73] are not entirely accurate and cannot be accepted without qualification. No doubt some rules of international law may be regarded as a source of English law but as the judgement in Trendex demonstrates, English courts are prepared to apply, even in the face of contrary decisions, new principles of international law. International law, like legislation, precedent and common law, should be regarded not only as a source of municipal law, but also as a vital and developing part of the law.

The doctrine of stare decisis should simply be regarded as a rule of interpretation of law. Just as the rule that legislation takes priority over a rule of common law does not negate the rule of common law (and along with it international law) being part of the law of England, so

70. . B.& C.P.C. at 174.
71. See Morgenstern op.cit. 82.
72. J.L. Brierly 'International Law in England' (1935) 51 Law Quarterly Review 24 at 31.
73. Ibid. 25.

the rule that the lower courts must follow decisions of higher courts cannot imply that international law is not part of the law of the land. The doctrine of precedent merely establishes a hierarchy of legal norms. It does not disqualify a rule from being regarded as a rule of law. It can result not only in a new rule of international law not being applied immediately by English courts, but also in the application of an outmoded interpretation of an Act of Parliament or any rule of common law.

There exist under British practice two further exceptions to the automatic applicability of customary international law by municipal courts. These may be deemed exceptions proper.

First, the 'acts of State' doctrine may prevent an English court from applying a rule of customary international law. An 'act of State' has been defined as 'an act of the executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are within the allegiance of the Crown'.[74] Municipal courts will accept such acts of State, for example, a declaration of war, an annexation of territory or an act of reprisal, and will not declare them to be invalid despite the fact that a breach of international law may have been involved.

The act of State doctrine has often been invoked by a public servant as a defence to a tortious act committed by him in the course of his duties. In English law the plea of act of State is a sufficient defence to an action against an official in respect of an act committed by him against an alien resident abroad. The court in Buron v. Denman[75] held that in such a case the Crown alone is responsible for the act and, owing to the special position of the Crown, the wrong ceases to be actionable. A British court is powerless to give redress to that alien, whose only remedy is to enlist the support of his own Government to make diplomatic representations on his behalf.

This statement of the law has become the accepted judicial practice. In 1921, Viscount Finlay in Johnstone v. Pedlar[76] stated:

> 'If an action be brought in the British courts ... it is open to the defendant to plead that the act was done by order of the British Government, or that after it had been committed it

74. [illegible] Wade and G. Phillips Constitutional Law 8 ed. (1946) [illegible]

75. (1[illegible]) 154 All E.R. 450.

76. [1921] A.C. [illegible] at 271.

> was adopted by the British Government. In any such case the act is regarded as an act of State of which a municipal court cannot take cognizance. The foreigner who has sustained injury must seek redress against the British Government through his own Government by diplomatic or other means'.[77]

In Cook v. Sprigg,[78] a case on appeal from a decision of the Cape Supreme Court, the court held that annexation was an act of State and that any obligations assumed under a treaty to that effect, either to the ceding sovereign or to individuals, were not obligations which municipal courts were authorized to enforce.

British courts have also limited their own powers of jurisdiction in respect of declarations of war and peace. In R. v. Bottrill, Ex Parte Kuechenmeister[79] it was held that a certificate of His Majesty's Secretary of State for Foreign Affairs, to the effect that His Majesty was still at war with a foreign State, was conclusive evidence that the state of war was not at an end, even though the certificate recited facts such as the unconditional surrender of the enemy State, the displacement of its central Government and the assumption of supreme authority with respect to that State by the Governments of His Majesty and his Allies - which might in international law be regarded as putting an end to the state of war. Scott L.J. held:[80]

> 'When the King makes peace with an enemy State, that war comes to an end, but it does not come to an end before that peace is made. Whether international law has a different rule is irrelevant; for international law is only binding on our courts in so far as it has been adopted and made part of our municipal law'.

It is clear that in regard to acts of State, British courts have abdicated all jurisdiction,[81] preferring the Sovereign to reach decisions in this sphere and wishing to present a united front to the world. The court's objective is not to empower the executive to violate international law, although that may be the result in individual cases, but to leave appreciation of the factors involved to the organ of State most qualified to do so.[82]

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77. See, too, the judgement of Lord Sumner at 290 in which he states that '(w)hat the Crown does to foreigners by its agents without the realm is State action also and is beyond the scope of domestic jurisdiction'; see, as well, Commercial and Estates Company of Egypt v. The Board of Trade [1925] 1 K.B. 271 and Attorney-General v. Nissan [1969] 1 All E.R. 629 (H.L.)
78. [1899] A.C. 572 at 578.
79. [1947] K.B. 41.
80. At [illegible].
81. See Netz v. Ede [1946] 1 All E.R. 628 at 632.
82. Morgenstern op.cit. [illegible].

As Lord [illegible] said in Secretary of State in Council of India v. Kamachee Boye Sahaba:[83]

> 'The transactions of independent States between each other are governed by other laws than those which municipal courts administer and such courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make'.

This does not mean that municipal courts take no cognisance of acts of State. Fletcher Moulton L.J. in Salaman v. Secretary of State for India,[84] while upholding the act of State doctrine, added:

> '(I)t may, and often must, be part of [the] duty [of municipal courts] to take cognisance of it. For instance, if an act is relied on as being an act of State, and thus affording an answer to claims made by a subject, the courts must decide whether it was in truth an act of State and what was its nature and extent'.

Closely related to the category of acts of State are cases in which the Courts accept as binding the view of the executive as to the existence of certain legal situations in the international sphere, irrespective of whether or not the certified executive position is in agreement with the international law position. These cases relate to matters which fall within the domain of the executive - viz., the conduct of foreign relations, and include the following questions:[85]

(1) Whether a foreign State or Government has been recognized by the United Kingdom either de facto or de jure;

(2) Whether recognition has been granted with regard to conquest by another State or other changes of territorial title;

(3) Whether certain territory is under the sovereignty of one foreign State or another;

(4) The sovereign status of a foreign State or its monarch;

(5) The commencement and termination of a state of war against another country;[90]

(6) Whether a state of war exists with a foreign country,[91] or between two foreign countries;

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83. (1859) 7 Moo.Ind.App. 476 at 5[illegible] (P.C.)
84. [1906] 1 K.B. 613 at 639.
85. See [illegible] Oppenheim International Law - A Treatise [illegible] ed. [illegible] [illegible]
86. [illegible]
87. [illegible]
88. [illegible]
89. [illegible]
90. [illegible]
91. [illegible]
92. [illegible] 2 K.B. 79[illegible].

(7) Whether there is a case for reprisal in maritime war;[93]

(8) Whether a person is entitled to diplomatic status;[94]

(9) The existence or extent of British jurisdiction in a foreign country.[95]

These statements of the executive are usually contained in an 'executive certificate' and often emanate from the Foreign Office. It is known as a Foreign Office certificate. Common law links the issue of such a certificate by the executive to the executive's functions in the realm of foreign affairs. Its effect is to substitute the Crown's view of the matter for an independent judicial investigation into the factual situation.[96] It evidences the strong desire of the courts to co-ordinate their decisions with executive policy.[97] The practice is an eminently reasonable one, since the executive is charged with the conduct of foreign affairs and is in the best position to supply authoritative information as to facts of which the courts, in consequence, take judicial notice.[98] As Lord Atkin stated in the Arantzazu Mendi:[99]

> 'One State cannot speak with two voices on such a matter,[1] the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognize as a fellow sovereign in the family of States, and the relations of the foreign State with ours in the matter of State immunity must flow from that decision alone'.

The Courts recognise that the existence of these facts results in important political consequences as far as the foreign policy of the State is concerned and, as a result 'sound policy requires that the courts of the King shall act in unison with the Government of the King.'[2] Despite this, the courts will only take judicial notice of the executive certificate if its terms are definitive and unambiguous.[3] If it lacks

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93. The Zamora [1916] 2 A.C. 77 at 98.
94. Engelke v. Musmann [1928] A.C. 433 (H.L.).
95. North Charterland Exploration Company (1910) Ltd. v. The King [1931] 1 Ch. 169.
96. A.J.G.M. Sanders 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413 at 414.
97. J.L. Brierly 'International Law in England' (1935) 51 Law Quarterly Review 24 at 32.
98. Oppenheim op.cit. 767.
99. Government of the Republic of Spain v. S.S. Arantzazu Mendi [1939] A.C. 256 at 264.
1. In this case the matter was whether to recognize a foreign Government.
2. Taylor v. Barclay (1828) 2 Sim. [illegible] at 221; 57 English Reports 769 at [illegible].
3. J.G. Starke An Introduction to International Law 7 ed. (1972) 88 and authorities cited therein.

clarity on account of the novelty of the situation or its complexity, the court has the duty to interpret the certificate in accordance with the relevant principles of international law.[4]

The courts do not regard these executive certificates in the nature of evidence because they do not express the opinion of the official who wrote them but are categorical statements on behalf of the Government. Lord Phillimore in Engelke v. Musmann[5] stated:

> '(T)he certificate of the Foreign Office ... delivered by the Attorney-General ... was not ... a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the Secretary of State on behalf of Her Majesty had done, not what he was doing ad hoc, or what he was believing or repeating, but what the Foreign Office had done'.[6]

While the courts regard themselves as bound by these Foreign Office certificates and regard them as 'statement(s) ... of fact, the content of which are not open to be discussed by the court(s) on grounds of law',[7] they do not see the executive as usurping in any way the functions of the judiciary. As Lord Phillimore put it:[8]

> 'The certificate is no attempt on the part of the executive to interfere with the judiciary of the country. The status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law'.

Foreign Office certificates undoubtedly qualify the automatic applicability of customary international law, but there is hardly a question of a serious encroachment upon the functions of the judiciary, and this practice should not be regarded as proof that international law is not part of the common law of the land.

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4. Oppenheim op.cit. 767 n.2.
5. [1928] A.C. 433 at 451.
6. See, too, the statement of Viscount Finlay in Duff Development Corporation Ltd. v. Kelantan Government [1924] A.C. 797 at 813 to the effect that '(s)uch information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his ministers upon a matter which is peculiarly within his cognisance'. This statement was cited with approval by Lord Reid in Carl Zeiss Stiftung v. Rayner and Keeler [1967] 1 A.C. 853 at 901.
7. Per Lord Wright in the Arantzazu Mendi [1939] A.C. 256 at 267.
8. Engelke v. Musmann [1928] A.C. 433 at 451.

(ii) South African Judicial Practice

(A) Application of the Doctrine that 'International Law forms part of South African Law'.

In South Africa prior to 1970, there was no positive judicial statement on the relationship between international law and municipal law. Although South African courts have in the past followed the British lead by taking judicial notice of customary international law. Such a practice must have been based on the assumption that international law was part of the municipal law.[9]

One of the earliest South African decisions in which principles of international law were applied was the case of Ncumata v. Matwa[10] in which it was held that the property of a subject in rebellion taken during hostilities vests on capture in the Crown, in the same manner as would property captured in war from an enemy. The plaintiff in this case relied chiefly on certain provisions of a Placaat of 22 April 1799. The court held[11] that the Placaat was 'beside the issue' because '[i]nternational law which allows a Government to deprive a rebel or an enemy of his property during hostilities has not been touched on by that Placaat'. Furthermore, Act 16 of 1880, on which the plaintiff further relied 'does not ... touch on the principles of international law upon which the defendants base their case. That defence is a sound one, and both facts and law favouring the defendants, they must have judgement with costs'.

The Anglo-Boer war gave rise to several instances which entailed judicial discussion of various principles of international law. In a trilogy of cases the South African courts held that the Boer forces had belligerent rights over the territory under their control. In Lemkuhl v. Kock[12] the court decided[13] that

> '[The Boer's] warfare was not illegal and they enjoyed belligerent rights .... (T)hey could seize and retain, in the course of their operations, animals and other property of such subjects which they required for warlike purposes'.

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9. J.W. Bridge 'The Relationship between International Law and the Law of South Africa' (1971) 20 International and Comparative Law Quarterly 746 at 747.
10. (1881-2) 2 E.D.C. 272.
11. At 279.
12. 1903 T.S. 450.
13. At 454.

In Van Deventer v. Hancke and Mossop,[14] Mason J. reached a similar decision. He noted[15] that this particular dispute was 'not a dispute between British subjects and an alien enemy to which the ordinary rules of international law might possibly apply ....', implying by this statement that the court was well aware of the rules of international law, and that, had it been such a dispute, the court would have applied those rules.

The following year, Innes C.J. in Olivier v. Wessels[17] confirmed that

> 'the Boer forces were entitled to belligerent rights; they were persons striving for a common cause, and although their country had been annexed, they had a perfect right to capture what they wanted for war purposes from the enemy'.

The whole concept of belligerent rights is essentially an international law concept and it can be seen that South African courts had no hesitation in applying it as it would a rule of municipal law.

Three privately-owned donkeys which strayed into the enemy's lines during the siege of Mafeking in the Anglo-Boer War were the cause of the law-suit in Mshwakezele v. Guduza.[18] Sixteen months after the siege the appellant (M) recovered possession of them upon their being sent out to graze by G, who had purchased all three, two at a public auction of a deceased person's estate, and the third from a man who, under military orders, had himself recaptured the animal from a man fighting on the side of the enemy. No evidence was led as to how the two donkeys came into the deceased estate. Buchanan A.C.J.[19] held that

> '(t)his appeal has raised an interesting question of international law .... The Statement in section 359 of Wheaton's International Law seems to me correctly to lay down the law.... Upon capture, the original owner was divested of his property when the enemy had acquired firm possession of the goods, or ... after the booty had been carried into a place of safety infra praesidio of the captor'.

There was nothing to prove that the two donkeys purchased from the deceased estate had been taken possession of by the enemy so the appellant retained his ownership in these. However, the court held that he had lost ownership of the third donkey which had been captured

14. 1903 T.S. 401.
15. At 419.
16. Ibid.
17. 1904 T.S. 235 at 241.
18. (1901) 18 S.C. 167.
19. At 170.

by the enemy and taken to a safe place. International law was automatically applied by the court in reaching its decision and was clearly accepted as part and parcel of South African municipal law.

A number of other cases in which principles of international law were simply accepted and applied without comment by South African courts dealt with the legality of confiscation by the State of private property during times of war. Innes C.J. in Alexander v. Pfau[20] took it upon himself to decide 'in what respects the common usage of nations has exempted resident aliens from the burden of contributing to the military necessities of the country in which they live'.[21] At the same time he discussed the Roman-Dutch authorities and found them not to conflict with international law.[22] In similar vein Wessels J. held[23] that :

> 'I can find no authority in international law for the proposition that the goods of neutrals or belligerents are exempt from seizure for war purposes'.[24]

The third judge in the case, Smith J. quoted extensively from the writings of international law jurists.[25] The actions of all three judges prove that they regarded at least those rules of customary international law as part of the South African common law.

In Achterberg v. Glinister[26] it was held that the action in question did not amount to commandeering for military purposes nor to booty taken during hostile operations. As a consequence, the court held that it could not apply 'the general rule of modern international law ... that private property of belligerents on land is ... respected by the other belligerent'.[27]

The case of Du Toit v. Kruger[28] also dealt with the seizure of enemy property during times of war. De Villiers C.J.[29] held that as

> '(t)he modern authorities ... do not afford much assistance for the decision ... the court has to fall back on rules laid down by the ancient jurists of Rome, perpetuated in the

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20. 1902 T.S. 155.
21. At 160.
22. Ibid.
23. At 16[illegible]
24. See, too, further statements of Wessels J. at 164.
25. At 166-7.
26. 1903 T.S. 326.
27. Per Innes C.J. at 330; this dictum was cited with approval by Maasdorp C.J. in Smit v. Bester [illegible] O.R.C. 30 at 33.
28. (1905) 22 S.C. 234.
29. At 238-9.

> Jurisprudence of the Netherlands, and accepted in times past as holding good in international law'.

The tone of this statement implies that the court regarded international law as forming an integral part of the South African common law.[30]

The case of Ex Parte Belli[31] concerned an urgent application for an interdict prohibiting the Union Government from confining an alien enemy as a prisoner of war during World War One. Maasdorp J.P. stated:[32]

> 'I think the matter may be narrowed down largely to merely considering now what the position of the petitioner is in this particular case, and I cannot do better ... than to refer to the positive law of the country and to international law'.

The judge thereupon consulted international law text-books and came to the conclusion[33] that 'the law of nations [which] we are now asked to enforce ... leaves the whole matter in the discretion of the Government'. The application was, therefore, refused.[34]

A Transvaal court in Ex Parte Lowen[35] was asked to consider whether a person could be stateless. Schreiner J. replied to this question in the affirmative:[36]

> 'The Condition of statelessness is generally recognized by writers on international law and indeed it is difficult to deny that persons may be stateless'.

He proceeded to investigate sources of international law on this point, together with legislation, Roman-Dutch law, British law and precedent. This practice clearly indicates that South African courts turn naturally to principles of international law in appropriate circumstances.

The applicant in Mahomed and Minor Son v. Immigrants Appeal Board,[37] who claimed to be domiciled in Natal, returned from a visit to India, bringing with him his minor son. They were refused admission as prohibited immigrants within the meaning of section 4(1)(a) and (b) of the Immigrants Regulation Act.[38] The court refused him leave to appeal

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30. See, too, Maree v. Conradie 190[illegible] C.[illegible]C. [illegible] at 25-6, where Maasdorp C.J. refers to principles of international law to solve the question of the legality of confiscation of property of subjects who were trading with the enemy.
31. 1914 C.P.D. 742.
32. At 745.
33. At 746.
34. Searle J.'s statement at 746 also manifests an unquestioned acceptance of international law.
35. 1938 T.P.D. 504.
36. At 506.
37. (1918) 39 N.L.R. 7.
38. Act 22 of 1913.

on the grounds that he was an alien. In arriving at this decision they examined and applied principles of English law and international law as a matter of course.

The question before the court in Marburger v. The Minister of Finance[39] was whether a foreigner resident in a conquered State at the time of conquest becomes a subject of the conquering State merely by the fact of conquest. Juta J.P.[40] decided to ascertain 'from these authorities on international law[41] clearly what the international law is'. He added[42] that as

> '(n)o provision was made in [the Treaty of Vereeniging between the British Government and the Transvaal forces] for foreigners ..., it may be contended that their position has to be dealt with in accordance with the ordinary rules of international law'.

In R. v. Holm, R. v. Pienaar[43] the two accused, both South African nationals, had, during the Second World War, broadcast from Germany propaganda material which was heard in the Union. The Appellate Division referred extensively to various principles of international law[44] and held[45] that 'there is no international custom or rule of law which prevents the Union of South Africa from punishing one of its nationals for the crime of high treason committed outside the Union'. The Appellate Division unfortunately did not comment on the relationship of international law to South African municipal law but simply utilized international law in arriving at a decision.

Murray J. in R. v. Newmann[46] stated even more succinctly :

> 'it is ... proper in ascertaining the extent of our own common-law conception of high treason to have some regard to the principles of the law of nations'.

This statement indicates that international law plays, whenever relevant, an important role in the formulation of South African common law.

Government Notice III of 22 January 1943 prohibited any person 'from carrying on any business transaction' with any person or firm

39. 1918 C.P.D. 183.
40. At 189.
41. Cited by counsel on both sides.
42. At 189.
43. 1948 (1) S.A. 925 (AD).
44. At 929 ff.
45. At 931.
46. 1949 (3) S.A. 1238 (T) at 1248.

named in the Notice. The accused in R. v. Lionda[47] had been convicted of an attempt to contravene the Notice by posting a letter to a firm named in the Notice, offering to export manganese and requesting particulars as to the firm's requirements so as to enable a purchase price to be quoted. On appeal it was contended for the appellant that the Government Notice did not cover the entering into a business transaction, but only the carrying on of the transaction once it had been entered into. Dismissing this appeal, Davis A.J.A. held:[48]

> 'In my opinion, reading the words "carrying on any business transaction" only in the light of their dictionary definition and the context, and without the background of international law ... amounts to a limited meaning [which] is not their correct one .... The regulation must not be read alone, it must be read against the background of international law, more especially that law as expounded by Roman-Dutch writers'.[49]

South African tribunals have, on occasion, sat as Colonial Courts of Admiralty. Here, admittedly, their situation was somewhat unique as they were obliged to apply English Admiralty law in place of Roman Dutch law. This meant, in effect, applying principles of international law because as Juta J.A. said in Crooks and Company v. Agricultural Co-operative Union Ltd:[50]

> '(T)he Colonial Court of Admiralty must be guided by the same regard to international law and the comity of nations, which especially in regard to maritime and prize law was one of the great features of admiralty law' [51]

The above cases have dealt mainly with questions arising out of the conduct of war, an area in which one could expect principles of international law to be relevant. South African courts have applied international law as part of South African law in a number of other situations as well.

In S. v. Devoy[52] the Natal Provincial Division, acting on the basis that international law forms part of South African municipal law,

47. 1944 A.D. 348.
48. At 352.
49. Davis A.J.A. went on to examine, inter alia, Grotius De Jure Belli ac Pacis III, XVII, 3(1).
50. 1922 A.D. 423.
51. See, too, the dictum of Buchan J. in In re 'Mashona' (1900) 17 S.C. 135 at 144 where a South African municipal court sat as a prize court.
52. 1971 (1) S.A. 359 (N).

applied international law to solve the question whether an extradition agreement entered into between South Africa and the Federation of Rhodesia and Nyasaland could have survived the dissolution of the Federation so as to continue in force between South Africa and Nyasaland.[53]

The Appellate Division, like the court a quo, arrived at a positive conclusion, considering en route the rules of customary international law in respect of State succession and mutual consent.[54]

The Court in S. v. Penrose[55] had to decide whether the term 'diplomatic agent' contained in section 2 of the Diplomatic Privileges Act[56] included an honorary consul. The court held that it did not, relying in the course of its judgement largely on the fact that at international law a consul is not a diplomatic representative.

A number of South African judgements have been concerned with the problem of sovereign immunity. Our courts, following the English lead, have consistently applied principles of international law, albeit somewhat outdated international law. The earliest of these cases was De H arth v. The S.S. India[57] where Gardiner J., in deciding whether the ship 'SS India', which belonged to the Portuguese Government, was immune from an attachment order of the South African Supreme Court, held[58] that '(i)nternational law and the comity of nations must ... govern [the] application'. To ascertain exactly what international law was on this point he examined Roman-Dutch authorities, other writers on international law as well as English, American and Continental decisions.[59] This decision was confirmed and approved in Ex Parte Sulman.[60]

53. Nyasaland had, meanwhile, become the State of Malawi on 6 July 1964.

54. S. v. Devoy 1971 (3) S.A. 899 A.D. at 908.

55. 1966 (1) S.A. 5(N).

56. Act 71 of 1951.

57. 1921 C.P.D. 451.

58. At 456.

59. At 458.

60. 1942 C.P.D. 407. Once again the Cape Provincial Division took judicial notice of the principles of international law relating to the immunity of public ships of foreign countries.

In 1975, the Cape court, once again confronted with the question of sovereign immunity, was asked to consider whether international law relating to sovereign immunity had not changed over the past fifty years and, if so, the court was asked to apply the so-called 'qualified' view of sovereign immunity.[61] The court declined to decide the issue, preferring to apply the traditional view of public international law, viz., 'of granting immunity in respect of property which belongs to a sovereign foreign State or of which it is in possession or control'.[62]

The above brief survey of South African precedent indicates that South African courts have frequently acted on the assumption that international law is part of the common law of South Africa by taking judicial notice of it. But until very recently there had been only one express judicial statement on the relationship between international law and South African common law. This occurred in Ex Parte Schumann[63] where the Natal court held[64] that it was 'a well settled principle of international law' that no subject or citizen of a belligerent State could legally transfer his allegiance to an enemy State while the hostilities continued. Selke J. added:

> 'these principles of international law are ... principles of general application throughout the civilized world ... and in my opinion they are principles which are recognized by the law of this country'.[65]

This acknowledgement that international law was indeed part of South African law extended only to the particular rule of international law

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61. Lendalease Finance Co.(Pty.) Ltd. v. Corporacion de Mercadeo Agricola 1975 (4) S.A. 397 (C).

62. Per De Kock J. at 404 E-F. The case went on appeal Lendalease Finance Co. (Pty.) Ltd. v. Corporacion de Mercadeo Agricola 1976 (4) S.A. 464 (AD) where it was decided on another point altogether. However the court did admit obiter that in recent years the doctrine of sovereign immunity might have undergone a change and that immunity might be restricted to acta jure imperii (at 499). It is very probable that when the matter is again raised in South African courts, judicial notice will be taken of the decision of the Privy Council in The Philippine Admiral supra and that of the Court of Appeal in the Trendex case, supra.

63. 1940 N.P.D. 251.

64. At 254.

65. At 254. Italics added.

enunciated in this case. However, it is important in that it is the first clear statement by the South African judiciary concerning the inter-relationship between the two systems of law. Unhappily, this decision has been overlooked by the courts in subsequent cases and it was only towards the end of 1970, in a trilogy of cases decided by different South African courts, that further express statements were made on this question. In the first of these cases, S. v. Kamotse,[66] one of the accused had been unlawfully arrested in Botswana by Rhodesian police and subsequently transferred to South Africa. On his behalf it was argued that his arrest and trial were unlawful at international law and, since international law forms part of South African law, the court had no jurisdiction to try him. Mr. Justice Viljoen held that the court did have jurisdiction, but stated that he was prepared to

> 'assume for the purposes of this judgement that the rule of international law that one State may not exercise its police powers in the territory of another State, is part of our law'.[67]

This statement, like that of Selke J. in Schumann's case, demonstrated an acceptance of international law as part of South African law, but was also limited to a particular rule of international law. A broader approach was soon to be adopted by the Witwatersrand Local Division in Parkin v. Government of the Republique Democratique du Congo and Another.[68] The applicant was a disabled ex-mercenary of the Congolese army domiciled in Johannesburg at the time of the action. He claimed that the respondent Government owed him the sum of R18,500 for injuries sustained in action. Repeated approaches to the Congolese Government having failed to evoke any response, the applicant applied to the court to attach ad fundandam jurisdictionem certain money standing to the credit of the Congolese Government in a local bank. In approaching the question whether it was 'entitled in law to attach the money of a foreign sovereign to found jurisdiction against such a State'[69] the court stated:[70]

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66. Unreported case of the Transvaal Provincial Division of 14 September 1970. See John Dugard 'International Law is part of Our Law'. (1971) 88 South African Law Journal 13.

67. Point 4 of the transcript, quoted by Dugard ibid.

68. 1971 (1) S.A. 259 (W).

69. Per Myburgh J. at 260.

70. At 261.

> 'The answer to this problem is to be found in international law to the extent that our common law recognises such international law. This court is only concerned with the jurisdiction granted it by South African law'.

The court then invoked English and South African decisions to support the proposition that property of a recognised foreign State is immune from attachment under an order of court. Myburgh J. was thus prepared to go somewhat further than Viljoen J. by recognising as a general principle that, to an undefined extent, customary international law *is* part of South African law.[71]

In the light of Myburgh J.'s statement, the criticism that '*Parkin's* case is irrelevant because it does not deal with the question whether international law is part of South African law'[72] must be refuted.

The third case, *South Atlantic Islands Development Corporation Ltd. v. Buchan*,[73] confirmed the recent judicial trend. The applicant company, which had been granted sole fishing rights within twelve miles of the coastline of Tristan da Cunha, applied for an order interdicting the respondent from fishing within these waters in violation of its rights. The respondent admitted fishing in these waters but challenged the competence of the legislative authority of Tristan da Cunha to extend the island's fishing rights beyond three miles. In order to prove the validity of a twelve mile fishing zone in international law, the applicant filed an affidavit by D.J. Devine, senior lecturer in international law at the University of Cape Town, who declared that, in his opinion, South Africa was bound by international law to recognise the twelve mile fishing zone as she herself had adopted such a zone in terms of section 3 of the Territorial Waters Act.[74]

Counsel for the respondent objected that the affidavit was neither necessary nor admissible since international law is not foreign law, but part of the law of South Africa. In ruling on this point Diemont J. (presenting the unanimous judgment of the court) stated:

71. J.W. [illegible] 'The Relationship Between International Law and the Law of South Africa' (1971) 20 *International and Comparative Law Quarterly* 746 at 748.

72. H. Booysen 'Is Gewoonteregtelike Volkereg Deel van ons Reg?' (1975) [illegible] *Tydskrif vir Hedendaagse Romeins - Hollandse Reg* 315 at 320.

73. 1971 (1) SA 234 (C).

74. Act 87 of 1963.

'(A)lthough I am surprised that there is no decision in which a South African court has expressly asserted that international law forms part of our law, I would be even more surprised if there were a decision asserting the contrary. It appears to have been accepted in both the English and American courts that international law forms part of their own law .... (T)here are also one or two indications in decisions in our courts that judicial notice will be taken of international law .... In my view it is the duty of the court to ascertain and administer the appropriate rule of international law in this case. It follows that Mr. Devine's affidavit is neither necessary nor admissible and must be struck out'.[75]

This important pronouncement has been dismissed by one critic[76] as a mere *obiter dictum* and as a tenuous basis for support of the doctrine that international law forms part of South African law. This criticism cannot be accepted. It is true that, having made the pronouncement, the court then turned to the merits of the application. It held that it did not have jurisdiction seeing that it would be powerless to enforce any judgement 'to stop a fisherman from fishing in the Atlantic Ocean in the waters of a remote British colony situated half way between South Africa and South America'.[77] The pronouncement was, nevertheless, part of the ratio pertaining to one of the important preliminary questions that had to be decided. The view of Professor Dugard[78] is much to be preferred. He commented:

'(T)he Cape court's dictum on the relationship of international law to South African law is to be welcomed as a long-overdue judicial ruling .... [and] for its jurisprudential clarity. It gives support neither to the extreme dualist doctrine "that to become part of municipal law each individual rule of international law must be consciously incorporated into it by legislative act" ... nor to the moderate dualist doctrine of adoption according to which "international law has no validity save in so far as its principles are accepted and adopted by our own domestic law", ... a view which is perhaps implicit in Myburgh J.'s dictum in *Parkin's* case (supra). Instead, the statement that a court should "ascertain and administer the appropriate rule of international law" shows a firm recognition of the intrinsic unity of international law and municipal law'.

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75. At 238.
76. H Booysen op.cit. 319-20.
77. At 240.
78. Dugard op.cit. 15.

In the recent decision of Nduli and Another v. Minister of Justice and Others,[78A] the South African Appellate Division was asked for the first time to pronounce on the relationship of international law and municipal law. The court proceeded on the basis of the following facts. The officer commanding the Natal Division of the Security Branch of the South African Police, in the course of setting a trap for the appellants, had given his men strict orders not to cross the border into Swaziland. In defiance of his orders, two of his men crossed the border, abducted the appellants in Swaziland and then brought them fifteen kilometres into South African territory. Here they were formally placed under arrest by the commanding officer.

The Appellate Division considered that the sole issue in the present investigation was whether a South African court in terms of international law, as applied in South African law, was entitled to try an accused who was apprehended on foreign soil but who was arrested within the Republic and charged with criminal acts triable by a South African court.[78B]

The court prefaced its decision, in which it granted the court jurisdiction, by stating that 'it is obvious that international law is to be regarded as part of our law'.[78C] Unfortunately, the full impact of this statement was dissipated in that no reference to Buchan's case[78D] was made even though this had been cited in argument. The Appellate Division also stressed that the fons et origo of this proposition must be found in Roman-Dutch law[78E] according to which public international law is based on the acceptance of territorial sovereignty of independent States. It maintained in addition, that according to our law only such rules of customary international law are to be regarded as part of our law as are either universally accepted or have received the assent of this country'.[78F] Such statements are rather vague. On the one hand, these findings of the Appellate Division do provide support for the proposition that international law forms part of the law of the land. However, this support appears to be qualified and these qualifications have not been explained adequately. It is disappointing that the Appellate Division did not utilise this opportunity to expound more fully and clearly on this important topic.

78A. 1978 (1) S.A. 893 (A.D.).

78B. At 906 H.

78C. At 906 B.

78D. Supra.

78E. At 906 B.

78F. At 906 C, italics added.

(8) Exceptions to the Rule in South African law that Principles of International Law will automatically be applied by South African Courts

Despite the doctrine that 'international law forms part of our law', customary international law will not be applied by South African courts in every instance. If international law conflicts with South African legislation a South African court will apply the statute in preference to the rule of international law. As has been stated above in relation to British practice,[79] this does not really constitute an exception to the Blackstone doctrine which simply states that international law is part of the common law. Legislation will always take priority over a rule of the common law provided only that it is clear and unambiguous. This may perhaps indicate that the common law (and with it international law) is not as important as legislation, but it by no means proves that the common law (and with it international law) is not part and parcel of the South African legal system.

In the early decision of Alexander v. Pfau[80] it was contended that Law [illegible] of [illegible] of the South African Republic was contrary to the rule of international law that justified the confiscation of property belonging to resident aliens to supply the necessities of war. It was further contended that the Transvaal Supreme Court should therefore not give effect to this local law. Innes C.J. described this latter proposition as a 'bold one' and guarded himself 'from being considered to assent to it'.[81] Wessels J. was even more outspoken:[82]

> 'This court ... is bound to apply the law of the Transvaal as it existed when the seizure was made ... (W)hatever the rule of international law may be, the local law of the late South African Republic must be followed in preference to a conflicting rule of international law'.

The court, however, went out of its way to reconcile the two apparently conflicting rules and managed to resolve the issue on the basis that the local law did not, after all, conflict with international law in this regard. This decision seems to indicate that while statute law takes precedence over conflicting international law South African courts follow their English counterparts and apply the rule of interpretation

79. See above pp.197-8.
80. 1902 T.S. 155.
81. At 159.
82. At 164.

that Parliament did not intend to legislate contrary to a rule of international law. If a statute proves to be ambiguous, a South African court will adopt the meaning more favourable to established rules of international law.

In Ramotse's case,[83] while the court was prepared to concede the existence of a rule of international law in terms of which Ramotse's capture was illegal, it was not willing to apply that rule because it conflicted with a rule of South African municipal law giving the court jurisdiction. The court therefore held that[84]

> '(t)he fact that [Ramotse] may have been captured illegally by Rhodesian forces in Botswana and illegally handed over to the South African authorities cannot affect the jurisdiction of this court. It may give rise to proceedings between Botswana and the Republic and [Ramotse] may possibly even have a remedy against his captors. But this court is not concerned with that'.

As the jurisdiction of the court was based on statute law[85] it follows that the court refused to apply a rule of customary international law because it clearly conflicted with the statutory rules underlying the court's jurisdiction.[86]

In a more recent South African decision[87] it appeared, at least prima facie, as if international law was given priority over a conflicting rule of South African law. The applicant had sought an order declaring a will to be null and void, the residuary heir under the will being the State of Israel. The court was confronted with two opposing principles:

> '(T)he one is the principle of public international law that the courts of a country will not by their process make a foreign state a party to legal proceedings against its will .... The other principle is that all beneficiaries under a will must be joined as defendants in an action wherein is claimed an order declaring that will invalid'.[88]

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83. Supra.

84. Point 4 of the transcript, cited by John Dugard 'International Law is Part of Our Law' (1971) 88 South African Law Journal 13.

85. Criminal Procedure Act 56 of 1955, Section 3; Supreme Court Act 59 of 1959, Section 19; Terrorism Act 83 of 1967, Sections 4, 5 and 7 read together.

86. D.J. Devine 'Qualifications in the Incorporation of International Customary Law into South African Municipal Law' (1973) 1 Natal University Law Review [illegible] at 59-60.

87. Leibowitz v. Schwartz 1974 (2) S.A. 661 (T).

88. At 661.

Despite the fact that the Appellate Division had formerly declared its approval of the latter principle[89] the Transvaal court held that it could relax this principle where an insistence upon exact compliance would result in substantial injustice to one of the parties.[90] It stated:[91]

> 'Plainly, one of the two conflicting principles must yield.... There can be no doubt in my view that it is the second principle which must give way. The first is founded on grave and weighty considerations of public policy, international law and comity. Although I do not minimise its importance in its general application, the second principle concerns a matter only of legal procedure'.

This decision once again demonstrates that South African judges recognise international law as being part of South African law. Booysen[92] argues that the court, in refusing to join the State of Israel as a party against its will, was, in fact, applying 'pure South African law' and that it no longer recognises the doctrine of sovereign immunity as a principle of international law. He contends that while this doctrine may have originated in international law, today the courts no longer see it as a rule of international law, but only as a rule of South African law. The court, he believes, was not choosing between an international and a municipal law, but between two rules of South African law. This argument stems from his theory that international law is not part of South African law, but is merely a source of law.[93] Booysen's theory is not borne out by the language of the court. Nicholas J. clearly describes the doctrine of sovereign immunity as a 'principle of public international law'. Had he regarded this principle as a rule of South African law alone he would not have used such terminology. Nicholas J.'s approach is similar to that of other South African judges in previous decisions when principles of international law had to be applied. The court's attitude is much more consistent with the doctrine that international law forms part of the common law than with any theory that international law is simply a source of law.

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89. Kethel v. Kethel's Estate 1949 (3) S.A. [illegible] (A.).
90. Moluele v. [illegible]chatelet NO 1950 ([illegible]) S.A. 670 (T) at [illegible] makes a similar point.
91. Leibowitz v. Schwartz op.cit. 662.
92. H. Booysen op.cit. [illegible].
93. Ibid. [illegible].

The application of the norms of international law may be somewhat restricted due to the doctrine of stare decisis. Because of this doctrine it is sometimes said that South African courts do not always apply international law as it is at a particular moment in time, but rather that they apply that version of international law as enunciated by the courts themselves. This view is partly validated by judicial practice. For example, Gardiner J. in De Howarth's case[94] held that the court 'must have the same regard as the High Court in England to international law ... but it is open to it, on any particular point, to form its own opinion as to what international law and the comity of nations requires'. The court did not deal with the problem of whether it would regard itself as absolutely bound by one of its own previous decisions on a matter of international law even if that decision were now to reflect an antiquated rule of international law. The notion expressed by Gardiner J. that the court should always be free to formulate its own interpretation as to what the law of nations requires in no way conflicts with the idea that the court should at any given time be able to reassess its previous opinion as to the meaning of a rule of international law.

The doctrine of stare decisis has traditionally played an important role in South African jurisprudence, but has been applied more flexibly by South African courts than by their English counterparts. It is precisely this flexibility that has prompted one writer[95] to voice his doubts as to whether South African courts would follow a binding precedent in defiance of a rule of international law. The element of judicial adaptability, which has, by and large, allowed the courts to keep abreast of current trends in many areas of the law instead of waiting passively for the legislature or the Appellate Division to amend the position, is especially relevant in the field of public international law, not only because international law is a rapidly and continuously developing branch of law, but also because most of its norms have become part of the South African legal system through their application by the courts rather than by any act of transformation on the part of the legislature. Nevertheless, despite the obvious attractions inherent in the idea of relaxing the application of the rule of stare decisis in its application

94. De Howarth v. The S.S. India 1921 C.P.D. 451 at 457.

95. [illegible] 'Our State Cannot Speak with Two Voices' (1971) 88 South African Law Journal 413 at 413-4.

by municipal courts to the principles of international law, it is submitted that, prior to the recent judgement of the British Court of Appeal in Trendex Trading Corporation v. Central Bank of Nigeria,[96] no South African judge would have blatantly denied that the doctrine of precedent applies to rules of international law although many judges might well have softened the effect of the doctrine by distinguishing the case in hand from earlier ones. Since Trendex,[97] whole new horizons have been opened up. Although not bound to do so, South African courts have traditionally tended to follow English decisions in the field of public international law. This practice has continued in recent years despite the judicial trend in other areas of law to ignore English judgements and to look for guidance to Roman-Dutch law. One example occurred in the recent decision of Lendalease Finance Co. (Pty.) Ltd. v. Corporacion de Mercadeo Agricola[98] where the court, when invited by counsel to hold that international law nowadays follows the rule of qualified sovereign immunity, preferred not to decide the issue for itself, but simply to abide by the approach of the English courts on this matter. With their flexible approach towards the rules of stare decisis as well as with their history of following the judgements of English courts in questions of international law, it is entirely possible that South African judges might well adopt the approach of Lord Denning M.R. and Lord Justice Shaw in the Trendex case.[99] While they might stop short of stating categorically, as did Lord Denning, that the principle of stare decisis is not applicable to the norms of public international law, there is much to commend to a bold judge in the formulation of Shaw L.J. that while the rule of stare decisis operates 'to preclude a court from overriding a decision which binds it in regard to a particular rule of international law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule'.[1]

96. (1977) 2 W.L.R. [illegible] (C.A.)
97. Ibid.
98. 1975 (4) S.A. 397 (C) and 1976 (4) S.A. 464 (A.D.)
99. Supra.
1. At 388.

In any event, where the doctrine of precedent applies, it will not operate to exclude a rule of international law merely because it is international law. It should, therefore, be regarded not as an exclusionary rule, but as a rule of interpretation. Even if a lower court holds itself bound by an outmoded interpretation of a rule of international law, it is always open to the higher court to set matters right.

The two real exceptions to the Blackstone doctrine comprise acts of State and executive certificates. Both categories of exception stem from the fact that South African courts recognise that the conduct of foreign affairs is best left to the executive arm of government and that it would be unwise for the State to speak with 'two voices'.

In Van Deventer v. Hancke and Mossop[2] the court refused to question the lawfulness of the premature annexation of the Transvaal by the United Kingdom Government, holding instead that it was bound by an act of State. Innes C.J. stated[3] that 'the act of the Crown in annexing the territory of the South African Republic ... is an act the validity of which this court cannot question'. He held:[4]

> '(I)f this were a foreign court engaged in trying a cause in regard to which the question of when the conquest of the Transvaal was complete ... it is possible that points of considerable intricacy and difficulty would present themselves. But those considerations are not present here. This is a court constituted by the British Crown, exercising and discharging functions derived from the Crown. In its dealings with other States the Crown acts for the whole nation and such dealings cannot be questioned or set aside by its courts. They are acts of State into the validity or invalidity, the wisdom or unwisdom, of which domestic courts of law have no jurisdiction to inquire'.

The act of State doctrine was raised once more in Sachs v. Donges NO[5] where the court rejected the contention that the revocation of a passport was an act of State which could not be questioned by a court of law. The court made it quite clear that the defence of act of State cannot be raised by a subject 'because between His Majesty and one of his subjects there can be no such thing as an act of State',[6] and the revocation of a passport is an executive act directed only against

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2. 1903 T.S. 401.
3. At 411.
4. At 410.
5. 1950 (2) SA 265 (A.D.) at 281.
6. The A.D. cited Walker v. Baird [1892] A.C. 491 at 497 on this point.

citizens. The court did confirm that there are certain classes of prerogative acts which could be defined as acts of State.[7] This obiter dictum lends persuasive authority to the existence of the act of State doctrine in South African law.[8]

In S. v. Devoy,[9] the court considered itself bound by an executive certificate relating to the recognition by the South African Government of Nyasaland.[10] The court felt 'powerless' to enquire into the factual position[11] as 'recognition is a function of the executive branch of Government; it is a political act entailing legal consequences. Once that recognition has been granted by the executive ... it is not for the judicial branch to consider whether that recognition was competent'.[12] With regard to the question whether the South African Government intended an extradition agreement to be in force between itself and Nyasaland, the court also relied on the executive certificate and held that it could not go behind the statement relating to the attitude of the executive set out in the certificate of the Minister of Justice.[13]

The Appellate Division adopted a similar approach.[14] Referring expressly to the certificate signed by the Minister of Justice, the court held:[15]

> 'We were not referred to, nor have I been able to find, any South African authority concerning the conclusiveness or otherwise of such a certificate. It would ... appear to be generally accepted that, in matters of this kind,[16] the courts take a certificate of this nature at its face value'.

In the light of these decisions it would appear likely that when and if other questions relating to acts of State arise, for example, the existence of a state of war or the problem of diplomatic status, the courts will consider themselves bound by executive certificates furnished in respect of these matters.[17]

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7. At 286.
8. D.J. Devine op.cit. 62.
9. 1971 (1) S.A. 359 (N) at 362.
10. Now Malawi.
11. At 362
12. Ibid.
13. At 363.
14. S. v. Devoy 1971 (3) S.A. 899 (AD)
15. At 906.
16. That is, in extradition cases.
17. According to section 4(4) of the Diplomatic Privileges Act 71 of 1951, a certificate furnished by the Secretary of Foreign Affairs is conclusive on the question of diplomatic status. The Act does not, however, cover common law diplomatic immunity and here the courts would still have to decide whether an executive certificate relating to the common law immunity of a diplomat was binding on them.

(e) Constitutional Limitations upon the Power to conclude Treaties

Introduction

A number of limitations are placed on the treaty-making power by the South African Constitution and by the relationship between South African municipal law and international law. In addition, other limitations upon the exercise of the treaty-making power arise from the constitutional position of the South African executive. These latter limitations derive partly from the rules of substantive law prevailing under the South African common law system with regard to the competence of the executive to conclude treaties, and partly from the rules and principles of international law pertaining to the same subject.

(i) Limitations upon the Powers of the Actual Negotiator

Upon examination, a specimen of South African Full Powers indicates that authority is usually conferred on the negotiator in general terms, the only limitation being the description of the subject-matter of the treaty. The South African plenipotentiary, if authorised to negotiate and sign a particular type of treaty (for example, an extradition treaty) will have no power to negotiate and sign a different type of treaty (for example, a trade agreement). South African practice in this regard has been inherited from that adopted under the British constitutional system.

To date there has been no diplomatic incident where the validity of a treaty has been challenged on the ground of lack of authority. This is partly because the treaty is usually subject to ratification and a subsequent ratification constitutes a waiver of any plea with regard to excess of authority by the plenipotentiary who negotiates and signs the agreement. Ratification, which in itself amounts to a limitation upon the powers of the actual negotiator, is still essential in many instances; yet it is not unusual for a plenipotentiary to be authorised to bind the State without the formality of ratification.[18]

18. The most common instance where the plenipotentiary is authorised to bind the State without ratification occurs where the treaty is negotiated by an exchange of notes.

(ii) Municipal Limitations upon the Treaty-making Power

The primary constitutional limitations upon the treaty-making power are to be found in articles 7(3) and 16(2) of the Republic of South Africa Constitution Act.[19] The former provides that the power to negotiate and ratify international conventions, treaties and agreements vests in the State President. The latter qualifies this somewhat by providing that any reference in the Act to the State President implies the State President acting on the advice of the Executive Council.

Other constitutional provisions on the question of conclusion and ratification of treaties as well as of limitations on the treaty-making power result from the operation of the common law in South Africa, from a number of important statutes and from a large body of constitutional usages and conventions inherited mainly from British constitutional practice. It is essential, therefore, to refer, if only briefly, to British practice and doctrine to define the limitations imposed upon the South African treaty-making power.

(A) Conventional Constitutional Limitations under 'Common Law'

In the United Kingdom treaties are not generally self-executing. They require municipal action to give them effect and to this end Parliamentary co-operation is required either in the form of a statute or in some other way. According to McNair,[20] whenever a treaty or any act done in pursuance of it comes into question in a court of law, or requires for its enforcement the assistance of the court, the questions at once arise whether the provisions of the treaty accord with the existing law of the land or whether any action proposed to be taken by the executive or the court to give effect to the treaty has been authorised by the existing law of the land. If the answer to either of these questions is in the negative, Parliament must be induced by the Crown to legislate so as to effect the necessary change in the law or to equip the Crown with the requisite power to execute the treaty. If Parliament refuses to do so, the Crown will not ratify the treaty. If, however, the treaty has already been ratified, the State will be bound by it on the international plane. Despite this, a British court will not be entitled to

19. Act 32 of 1961.
20. McNair The Law of Treaties (1961) 80 ff.

give the treaty municipal effect if it conflicts with the existing law of the land.[21]

McNair[22] points out that, under British practice, there are three classes of treaties in respect of which Parliamentary sanction in the form of a statute is required for their municipal execution and application.[23]

The first such category consists of treaties which require for their execution a change in or addition to the law administered by the courts as well as treaties which involve the imposition of any charge on a private individual.[24]

The classic authority on the fundamental principle of English constitutional law that the Courts will not regard a treaty by itself as being a source of English law when it involves a change in the law or a charge on the subject is the judgement rendered by Sir Robert Phillimore in The Parlement Belge.[25] This case concerned the question of immunity of a ship belonging to the King of Belgium which was involved in a collision with a British vessel. It was held that the Anglo-Belgian Convention Regulating Communications by Post, signed and ratified in 1876, which purported to confer upon Belgian Government mail-steamers the immunity of foreign warships, could not be applied by an English court so as to protect the Belgian steamer against an action for damages arising out of the collision and in this way deprive a British subject of his

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21. The rationale for the above is explained in the statement of principle by Lord Atkin when he delivered the Opinion of the Privy Council in Attorney-General for Canada v. Attorney-General for Ontario [1937] A.C. 326 at 347. He said that '(i)t will be essential to keep in mind the distinction between the formation and the performance of the obligations constituted by the treaty....(T)here is a well-established rule that the making of a treaty is an executive act, while the performances of its obligations, if they entail alteration of the existing domestic law, requires legislative action....(T)he stipulations of a treaty ... do not,... by virtue of the treaty alone, have the force of law'.

22. McNair op.cit. 83 ff.

23. See too Arnold D. McNair 'When Do British Treaties Involve Legislation?' (192) 9 British Yearbook of International Law 59 ff.; and Kaye Holloway Modern Trends in Treaty Law (1967) 291.

24. W.S. Holdsworth 'The Treaty Making Power of the Crown' (1942) 58 Law Quarterly Review 175. Holdsworth in this article provides an historical survey of the development of this rule.

25. The Parlement Belge (1879) 4 P.D. 129.

remedy against the steamer. Although this decision was later reversed by the Court of Appeal[26] on the grounds that immunity does extend under international law to public ships other than war-ships, Sir Robert Phillimore's statement[27] on the operation of treaties remains unaffected. He said:

> 'If the Crown had power without the authority of Parliament by this treaty to order that the Parlement Belge should be entitled to all the privileges of a ship of war, then ... the right of the subject, but for this order unquestionable, to recover damages for the injuries done to him ... is extinguished.
>
> This is a use of the treaty-making power of the Crown ... without precedent and in principle contrary to the laws of the Constitution. Let me consider to what consequences it leads. If the Crown without the authority of Parliament may by process of diplomacy shelter a foreigner from the action of one of Her Majesty's subjects who has suffered injury at his hands, I do not see why it might not also give a like privilege of immunity to a number of foreign merchant vessels or to a number of foreign individuals. The law of this country has indeed incorporated those portions of international law which give immunity and privileges to foreign ships of war and foreign ambassadors, but I do not think it has therefore given the Crown authority to clothe with this immunity foreign vessels, which are really not vessels of war, or foreign persons who are not really ambassadors'.

In the case of Walker v. Baird,[28] the Judicial Committee of the Privy Council, although not required to decide the issue directly, indicated that it was doubtful whether treaties which had not received legislative approval could be enforced.

Some years later, in Republic of Italy v. Hambros Bank,[29] the court refused to apply a financial agreement between the Republic of Italy and the British Government on the grounds that it had not been legislated upon. It held, moreover, that a treaty could not be incorporated into domestic law by allusion when there would have been no difficulty in doing so expressly and when an obvious opportunity for doing so presented itself.

More recently, the Court of Appeal in Corocraft Ltd. v. Pan American Airways Inc.[30] interpreted the meaning of the Warsaw Convention on Carriage by Air[31] which had been incorporated into English law by the Carriage by Air Act of 1932.[32] The court acted in this case according

26. (1880) 5 P.D. 197.
27. At 154.
28. [1892] A.C. 491.
29. [1950] 1 All E.R. 430.
30. [1969] 1 All E.R. 82, (C.A.
31. League of Nations Treaty series Vol. 137 p.11
32. 22 and 23 Geo. 5 c.

to established precedent and in the light of this it is not surprising that one modern commentator[33] could write that '(i)t is a black letter learning that a treaty is not, generally speaking, part of the law of the land unless legislation is enacted'.

There have been a number of decisions in various courts of the Commonwealth to the effect that Parliamentary sanction in the form of a statute is necessary before a treaty becomes internally operative. The Supreme Court of Canada held, in 1932, in the case of Re Arrow River and Tributories Slide and Boom Co.[34] that the Ashburton Treaty of 1842 was not enforceable by the courts as no legislation had ever implemented or sanctioned the treaty.

In 1945 the Canadian Exchequer Court in Bitter v. Secretary of State for Canada[35] rejected the view that a peace treaty has the effect of law quite independently of legislation. The court held that without legislation the treaty 'cannot alter the law or affect the rights of individuals'.

The High Court of Calcutta in Union of India v. Jain[36] held that while treaty-making was an executive act and the treaty concluded by the executive without legislation was complete, legislation might be required to give internal effect to the terms of the treaty.

In South Africa, too, the courts have repeatedly held that treaties will neither affect the rights and duties of South African subjects nor change the existing law of the land unless they have been transformed into South African law by legislative enactment.

In Olivier v. Wessels,[37] a case instituted soon after the close of the Anglo-Boer war to recover a horse seized by the Boer forces from a man who had surrendered to the British during the war, the court suggested for consideration [38]

> 'whether the conditions of surrender agreed to at Vereeniging might not affect the case. He desired to ascertain whether those conditions had been ... incorporated into a statute and become of legal force. Had that been the case ... the question would have arisen whether the effect of those conditions was not merely to indemnify a member of the belligerent forces who did any act in the prosecution of the war, but also to effect a change in

33. K.J. Keith 'Treaties and Legislation' (1970) 19 International and Comparative Law Quarterly 127 at 129.
34. [1932] 2 D.L.R. 250.
35. [1944] 3 D.L.R. 482.
36. 1954 I.I.R. at 256-7.
37. 1904 T.S. 235.
38. At 241.

the ownership of the property with which such member may have dealt'.

The matter was next raised in 1945 when the Cape Provincial Division in Ex Parte Savage[39] held that an alien enemy resident in the enemy's country was prevented from suing because he could not be permitted to enrich himself by the proceeds of a judgement, despite the fact that Article XXIII of the regulations respecting the Laws and Customs of War on Land, adopted at the Hague Conference of 1907, and thereafter assented to by Great Britain, included among other things prohibited 'to declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings'. The court stated[40] that 'it would be necessary for Great Britain to pass legislation giving effect to this rule before it could become part of our law'.

Counsel for the respondent in L. and H. Policansky v. Minister of Agriculture[41] contended that a Customs Agreement entered into between the Union of South Africa and the Government of Northern Rhodesia could confer no rights on third parties, that is, the citizens of the two countries. The court held[42] that this contention was fallacious because section 1 of the enabling Union and Rhodesia Customs Agreement Act[43] had provided that the Agreement 'shall have the force of law within the Union'; therefore, not only the Government of the Union but also its citizens could avail themselves of the provisions contained therein.

In 1948, the Appellate Division in Minister of the Interior v. Bechler; Beier v. Minister of the Interior[44] decided that Article 278 of the Treaty of Versailles did not become directly operative in German municipal law so as to deprive the plaintiff of his German nationality. The undertaking contained in Article 278, while binding on Germany according to the rules of international law, conferred no right on the subjects concerned and did not mean that German subjects automatically lost their German nationality by virtue of that undertaking alone.

By far the clearest statement of principle was expressed by Steyn C.J. in Pan American World Airways Inc. v. S.A. Insurance Co.Ltd.[45] In this

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39. 1914 C.P.D. 827 at 830.
40. Ibid.
41. 1946 C.P.D. 860.
42. At 865.
43. Act 17 of 1930.
44. 1948 (3) S.A. 409 (AD).
45. 1965 (3) S.A. 150 AD. at 161.

case the respondent insurance company, as cessionary of a diamond merchant, sued the appellant carrier for damages arising out of the non-delivery of a registered parcel of diamonds received by the appellant for carriage to New York. The respondent alleged that the appellant had negligently lost the parcel, causing the resultant damages. The appellant, quite apart from denying that a duty of care was owed to the respondent and denying negligence, raised alternative special defences based on the terms of treaties to which South Africa was a party. The treaties in question were the Bilateral Air Transport Agreement between the Governments of South Africa and the U.S.A. of 1947 and the Universal Postal Convention of 1957. The appellant argued that in terms of Article 71 of the Universal Postal Convention, his liability was limited to the equivalent of 25 French francs in South African currency, viz. R10. It was further argued that, in terms of the Bilateral Agreement read with the Universal Postal Convention, the appellant's duties as an air carrier were governed by American law under which the appellant was not liable to the owner or sender of a registered parcel received for conveyance from South Africa to the United States.

Counsel for the respondent contended that 'in South Africa, as in the United Kingdom, the conclusion of a treaty is an executive act, performed by virtue of the prerogative. It is not ... a legislative act which in itself can alter the municipal law'.[46]

The Appellate Division upheld this contention. Steyn C.J. stated:[47]

> 'It is common cause and trite law that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive act and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process. The Universal Postal Convention and the Bilateral Air Transport Agreement are no exceptions. In the absence of any enactment giving the relevant provisions the force of law, they cannot affect the rights of the subjects'.

As there had been no legislative process whereby these international instruments had been embodied in South African municipal law, the court held that they could not affect the rights of South African subjects.

Since this decision, there appears to have been only one further case in which the question of treaties requiring legislation to become

46. At 155.
47. At 161.

internally operative has been discussed. This was the judgement in S. v. Tuhadeleni,[48] once again delivered by Steyn C.J. This case raised a number of important issues as regards constitutional limitations on the treaty-making power. It was contended on behalf of the appellants that the grundnorm for South-West Africa was not the Republic of South Africa Constitution Act,[49] but the Mandate (which is a treaty) together with the various Acts of Parliament which incorporated it into South African law. As a result, when Parliament acts as the Parliament for South-West Africa, it must do so in accordance with this grundnorm. Embodied in this grundnorm are limitations which restrict the power of Parliament to legislate extra-territorially for South-West Africa. These limitations, which confer rights in favour of the inhabitants of the territory, are entrenched by the Mandate, and depend for their protection upon the ability of the court to enquire into and declare invalid any legislation which would impair or destroy their efficiency. It was contended further that when Parliament enacted s.59(2) of the Republic of South Africa Constitution Act,[50] it must have been aware that its effect would be to deprive the courts of this fundamental testing right, thereby rendering the entrenched rights nugatory, and Parliament could, therefore, not have intended that section to apply to legislation relating to South-West Africa.[51]

In reply to this it was argued any extra-ordinary right of protection could only be 'entrenched' in South African municipal law if it was incorporated therein and if Parliament, acting unilaterally, is legally incompetent to revoke it. Only then can Parliament be said to be municipally bound by the limitations embodied in the Mandate. It was conceded that if Parliament were to pass legislation repugnant to the provisions of the Mandate, South Africa would incur international responsibility. But it is only in this international sense that Parliament can be said to be 'bound' by the provisions of the treaty. The position at municipal law is entirely different, because there the provisions of the Mandate, like other treaties, as such, can confer no rights. Any such rights which may flow from the Mandate arise not under the Mandate itself but under the Acts of Parliament which give the provisions of the Mandate the force of law. Since Parliament is not legally bound by its own

48. 1969 (1) S.A. 153 (AD) at 173.
49. Act 32 of 1961.
50. Supra.
51. At 160-161.

enactments (because of the doctrine of Parliamentary sovereignty), it will not be bound by the provisions of a treaty which it has accepted and given effect to. It may alter or revoke them at will, even though by so doing the State may incur international responsibility. The provisions of a treaty, including those of the Mandate, cannot, therefore, be said to be 'entrenched' in our municipal law.[52]

Steyn C.J. held, inter alia,[53] that even if the Mandate had expressly contemplated an absolute restraint on the legislative powers of Parliament, that alone would not have made it part of the law of the land enforceable by South African courts, without the Mandatory introducing such a curb into the constitution in order to bring it into operation.

He held further[54] that the preamble to the South-West Africa Act[55] conferred on the Union Government full power of administration 'subject to the terms of the Mandate'. This amounted simply to a statement that the Mandate imposes obligations, that Parliament should not legislate to violate those obligations and that it intends to observe them. This could not rank as an enactment of a restraint upon the powers of Parliament to be enforced by the courts, especially since this phrase was confined to the preamble and did not appear in any section of the Act.

The Chief Justice had no hesitation in disagreeing[56] with the argument that the mere existence of the Mandate is in our law adequate to produce invalidity in an Act of our Parliament and to confer a testing power on our courts or a testing right on the inhabitants of the territory. Furthermore, he could not conceive of any British court declaring any Act of the British Parliament invalid on the ground that it violated an obligation under a Mandate. Under the South African Constitution our courts had no greater authority.

He held, therefore,[57] that in so far as the provision of s.59(2) of the Republic of South Africa Constitution Act[58] might purport to deprive the courts of their jurisdiction to enquire into the validity of the Terrorism Act[59] and into s.5 of the General Law Amendment Act[60]

52. At 161-3.
53. At 173.
54. At 174.
55. Act 42 of 1925.
56. At 176-7.
57. Ibid.
58. Supra.
59. Act 83 of 1967.
60. Act 62 of 1966.

in their application to the mandated territory of South-West Africa, the provisions of s 59(2) were valid and binding and could not be held to be invalid to the extent to which they were inconsistent with the alleged implied limitations in the Mandate.

Several conclusions may be drawn from this decision. First, any treaty, even if incorporated into South African municipal law by legislation, is not in any way 'entrenched' - Parliament can alter or revoke it at any time, although by so doing it would run the risk of censure at the international level. Furthermore, before a treaty operates at all on the municipal level, it must be translated into South African law by legislation. A treaty which has not been formally incorporated in this way will not be taken into account at all by South African courts. A mere statement of intention contained in the preamble to an Act would not operate to incorporate a treaty into municipal law. From this it is quite clear that a treaty which has merely been published for public information but which has not been the subject of legislation will not operate municipally and will not be enforced by South African courts.

The above-mentioned decisions indicate that, if the terms of a treaty involve the imposition of any charge on the subject or change in the law, the South African executive cannot effectively implement its treaty-making power without the co-operation of Parliament. These limitations can be described as virtually identical with those imposed in the United Kingdom.

One other related question should be considered briefly at this point. This is whether a South African court would find that a treaty affects public policy in the Republic even though it has not been incorporated by an Act of Parliament into municipal law. Considerations of public policy have always played an important albeit an unheralded role in Anglo-American jurisprudence, a fact which prompted Mr. Justice Oliver Wendell Holmes in The Common Law[61] to remark that '(t)he very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, what is expedient for the community concerned.'

Over the years the courts have professed a reluctance to create new heads of public policy. McCardie J. in Naylor Benzon and Co.Ltd. v. Krainische Industrie Gesellschaft[62] discussed the matter of not creating

61. Oliver Wendell Holmes The Common Law (1881) 35

62. [1918] 1 K.B. 331, confirmed by the Court of Appeal [1918] 2 K.B. 486 (C.A.)

new heads of public policy at some length but concluded that, despite this reluctance, the courts have not hesitated to apply the doctrine of public policy whenever the facts demanded its application. He said:[63] '[t]he truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time'.[64]

The relationship of unincorporated treaties and public policy was discussed by the High Court of Ontario in the case of Re Drummond Wren[65] where a restrictive covenant attaching to land which prohibited the land being sold to 'Jews or to persons of objectionable nationality' was declared void on the grounds of public policy. During the course of the judgement, the court took judicial notice in this regard of two treaties to which Canada had subscribed, the first being the Charter of the United Nations. Mackay J. held that in terms of Articles 1 and 55 of the Charter, Canada was pledged to promote 'universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion'.[66] Furthermore, he was influenced by the provisions of the Atlantic Charter to which Canada was a signatory, and which advocated the principles of freedom from fear and freedom of worship.[67] Mackay J. praised the courts for their wise use of the doctrine of public policy as an 'active agent in the promotion of the public weal',[68] which had obviated the need for rigid constitutional guarantees. He added:[69]

> 'While courts and eminent judges have, in view of the powers of our legislators, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good'.

In the recent matter of Photo Agencies (Pty.) Ltd. v. The Commissioner of Swaziland Royal Police and the Government of Swaziland, heard in the High Court of Swaziland,[70] the applicant sought an order to have returned

63. Ibid. 342.
64. This view was exemplified by the decisions which were discussed by the House of Lords in Nordenfelt v. The Maxim Nordenfelt Guns and Ammunition Company Ltd. [1894] A.C. 535.
65. Annual Digest and Reports of Public International Law Cases 1943-5 p.178.
66. At 179.
67. Ibid.
68. At 181.
69. Ibid.
70. Civ. T. 198/75.

to it certain goods which were in the possession of the Royal Swaziland Police. The facts, briefly, were these. During May, 1975, the applicant had ordered a consignment of shotguns from a supplier in Brazil and gave as its address Mbabane, Swaziland, despite the fact that the arms were really intended for importation into South Africa. This was done to avoid a breach by the seller of United Nations resolutions which placed an embargo upon the supply of arms and ammunition to South Africa by member countries. In previous similar purchases the arms had been sent to neighbouring countries 'via Jan Smuts Airport' but the relevant consignment documents and, in particular, the air waybill reflected Jan Smuts Airport as the airport of 'final destination'. This meant that the air carrier ceased to be responsible for the goods at Jan Smuts Airport. Upon arrival at Jan Smuts the goods were routinely placed in a customs shed where the applicant, through its clearing agent, was able to establish its legal title and to take delivery.

With this particular consignment however, the air waybill erroneously indicated Mbabane as the airport of 'final destination'. This resulted in the goods being handed at Jan Smuts Airport to Swazi Air for onward transmission to an airport in Swaziland. When Swaziland customs found them to consist of firearms and when the consignee could not be traced in Swaziland, the consignment was handed to the Royal Swaziland Police.

The respondents contended that not only had the arms been imported into Swaziland in contravention of the provisions of a number of statutes, but also that the application was based on grounds which were contrary to recognized public policy, namely, the implementation and enforcement of a resolution of the Security Council.

The applicant answered <u>inter alia</u> that the Security Council resolution had not been translated into the domestic law of Swaziland and that therefore the court should take no cognisance of it. In this way the court was faced with deciding whether it could take judicial notice of Security Council resolutions (which had not been incorporated into Swazi law) in deciding questions of public policy.

Nathan C.J. preferred to discuss the application on the ground that the arms were imported into the country in contravention of a number of statutes. However, without deciding whether Security Council resolutions were binding on member States of the United Nations, he held that member States were, at the least, under a <u>moral</u> obligation not to do, or be a party to the doing of, any act which would defeat the purpose of or render nugatory a resolution of the Security Council.[71] Although the court was asked as a matter of public policy not to lend its assistance in a transaction which ran counter to such resolutions, Nathan C.J. stressed that he preferred not to approach the matter from the standpoint of public policy because this would be breaking new ground as far as the court was concerned and under the legal system of Swaziland, with its traditional conservatism (it is similar to South African courts in this respect), courts are reluctant to introduce new spheres of public policy.[72]

While the court dealt only with Security Council resolutions, unincorporated treaties would, in all likelihood, receive much the same treatment. In South Africa, the courts have stressed time and again that treaties will not form part of South African law unless legislated upon. In none of these cases did the courts consciously approach the matter from the standpoint of public policy or take the view that, despite the treaty not being part of the law of the land, it could, nevertheless, influence their judgements in so far as these were concerned with questions of public policy.

The reception of English common law in the nineteenth century has as its concomitant the incorporation of many British constitutional doctrines including those dealing with the prerogative powers of the Crown which are of particular importance in the realm of foreign affairs. South Africa has also adopted the English system of responsible or cabinet government, which ensures that the conduct of foreign affairs is at all times in accordance with policies approved by a legislative majority. Generally, at least as regards treaties which may require changes in the law or which affect legal rights, South Africa (like the United Kingdom) has adopted a quasi-dualist approach and requires treaties to be transformed into domestic law by legislative action.

In order to facilitate this process, a number of statutes make provision for the negotiation and conclusion of treaties and set out

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71. Compare the approach of Mackay J. in Re Drummond Wren (supra) at 181 where he held that the court had at least a moral duty to lend aid to all forces of cohesion and similarly to repel all fissiparous tendencies which would imperil national unity.

72. The court mentioned in passing the Canadian case of Re Noble and Wolf 1948 O.R. 579; 1949 O.R. 504 which held that General Assembly resolutions should not be given effect to unless incorporated by legislation into the law of the land.

exactly what legislative action will be required before the treaty becomes binding internally. These statutes include the following:

(1) The Merchant Shipping Act.[73] This empowers the State President to ratify any amendment of the International Collision Regulations, the Load Line Convention and the Safety Convention, and, by proclamation in the Government Gazette to amend the Schedule to the Act to give effect to such amendments[74] provided that a copy of the proclamation is tabled before the Senate and the House of Assembly within fourteen days of such publication in the Gazette if Parliament is in session or, if it is not, within fourteen days after the commencement of its next ensuing ordinary session.[75]

(2) The Aviation Act[76] which, *inter alia*, implements certain international aviation conventions,[77] similarly empowers the State President to issue any proclamations necessary for carrying into effect these conventions and to ratify any amendments by proclamation in the Gazette.[78] Once again any amendments which have been ratified in this way must be tabled before both Houses of Parliament.

(3) The Childrens Act,[79] which allows the Governor-General[80] to enter into agreements with the heads of government of any territory in Africa for the reception into and retention in a reform school in South Africa of persons under the age of twenty-one, whose detention in a reform school has been ordered by a competent court or officer of the said territory.[81] also provides that after the agreement has been entered into the Minister shall publish a note of that fact together with a summary of the terms of the agreement in the Government Gazette.[82]

(4) The Prisons Act[83] makes similar provisions in respect of persons sentenced by a competent court of any territory in Africa to a term of imprisonment.[84]

73. Act 57 of 1951.
74. Section 356 bis (1).
75. Section 356 bis (2).
76. Act 74 of 1962.
77. Convention on International Civil Aviation and the International Air Services Transit Agreement, both drawn up at Chicago on 7 December 1944.
78. Section 3(1)
79. Act 33 of 1960.
80. Since 1961 substitute State-President for Governor-General.
81. Section 53(1)(a).
82. Section 53(1)(b).
83. Act 8 of 1959.
84. Sections 30(1) and (2).

(5) The Public Health Act[85] empowers the Governor-General[86] to conclude agreements with the British Government or with the Government of any British Dominion or any foreign country providing for the reciprocal notification of outbreaks of any epidemic or disease or any other matters affecting the public health relations of South Africa with other countries. Once again, the terms of such agreements must be notified in the Government Gazette.[87]

(6) The Post Office Act[88] allows the Postmaster General to enter into conventions and agreements with other postal and telegraph administrations, and if these are approved by the State President and published in the Gazette these agreements shall have the same force as if contained in this Act.[89] The Act provides further for the tabling of these agreements.[90]

(7) In terms of the Income Tax Act,[91] the State President may enter into agreements with foreign Governments to prevent or mitigate the levying under the law of the Republic and of a foreign country income tax in respect of the same income.[92] Such an agreement must be proclaimed in the Government Gazette[93] and tabled before the Senate and House of Assembly.[94]

Similar provisions for the avoidance of double taxation are contained in the Estate Duty Act[95] in regard to the collection of estate duty.[96]

The second category of treaties which require parliamentary co-operation for their application within the United Kingdom and South Africa are those which confer on the Crown (or in the Republic, the Executive) new powers not already possessed by those bodies.[97] This category is best illustrated by treaties of extradition. The English common law prevents the Crown from surrendering to another

85. Act 30 of 1919.
86. Today the State President.
87. Section 85.
88. Act 44 of 1958.
89. Section 2(4).
90. Section 2(5).
91. Act 58 of 1962.
92. Section 108(1).
93. Section 108(2).
94. Section 108(4).
95. Act 45 of 1955.
96. Section 26.
97. McNair The Law of Treaties op. cit., 93.

State fugitive criminals who have committed crimes abroad and who have sought refuge in Great Britain, and this common law right is enforceable by a writ of habeas corpus. Therefore if the Crown wishes to bind itself by treaty to extradite fugitive criminals, it must secure the necessary authority by Parliament in the form of legislation.[98] This principle of English law has been incorporated into the South African legal system. Consequently, the South African Extradition Act[99] which empowers the State President to conclude extradition treaties,[1] makes the treaty conditional upon publication by the State President by proclamation in the Government Gazette.[2] Such a treaty will cease to be in force after the publication of a like proclamation that it is no longer in force.[3]

It is noteworthy that the Civil Aviation Offences Act of 1972,[4] designed to incorporate into the law of South Africa, by way of direct enactment, three international aviation conventions[5] which create the offence of hijacking and which oblige the contracting States to exercise jurisdiction over certain offences and either to prosecute or extradite offenders, unlike the Extradition Act,[6] does not provide for the necessity of any parliamentary action, despite the fact that Section 5(1) provides that

> '(e)very offence contemplated in section 2 shall be deemed to be an offence in respect of which provision is made for extradition by the State in terms of every extradition agreement, as defined in section 1 of the Extradition Act (Act No. 67 of 1962), entered into with any other country'.

This omission may perhaps be explained on the basis that any ensuing extradition of such an offender would presumably be effected through the operation of the Extradition Act itself.

98. Arnold D. McNair 'When Do British Treaties Involve Legislation?' (1928) 9 British Yearbook of International Law 59 at 60.
99. Act 67 of 1962.
1. Section 2(1)
2. Section 2(3)(a).
3. Section 2(3)(b).
4. Act 10 of 1972.
5. The Convention on Offences and Certain Other Acts Committed on Board Aircraft; the Convention for the Suppression of Unlawful Seizure of Aircraft; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.
6. Supra.

The various treaties of peace concluded with enemy powers after the Second World War have been made applicable under South African municipal law by legislation similar to that used in the case of extradition treaties. The Treaties of Peace Act[7] provides for the tabling of these treaties in both Houses of Parliament.[8] In addition, it provides that the treaties will only come into effect '(i)f both Houses of Parliament have by resolution passed in the same session ... approved of any such proclamation'.[9]

The third category of treaties mentioned by McNair[10] which require for their implementation in municipal law some form of parliamentary sanction are treaties which create a direct or contingent financial obligation on the country. When South Africa became a member of the United Nations, for example, and was thereby committed by the Charter of the United Nations to contribute a substantial sum of money, the allocation of the money was approved by Parliament, despite the fact that approval of the Charter was given only after the treaty had already been signed and ratified.

The Estate Duty Act[11] and the Income Tax Act[12] referred to above, perhaps also fall into this category in the sense that they create an indirect financial burden on the State by depriving it of taxes which it would otherwise be entitled to.

The Customs and Excise Act[13] stipulates the procedure necessary to convert certain international commercial agreements[14] into municipal law, and states that

> '(a)ny amendment made under this section before the date upon which Parliament meets for the first time for the dispatch of business in any session during which the Minister introduces the Appropriation Bill, shall, unless Parliament otherwise provides, lapse thirty days after the end of the session of Parliament during which the Minister introduced such Bill ....'[15]

The question as to whether (in Britain) Parliamentary sanction is necessary for the cession of British territory is a controversial one.[16]

7. Act 20 of 1948.
8. Section 2(3)(a).
9. Section 2(3)(b).
10. McNair The Law of Treaties op.cit. 94.
11. Act 45 of 1955, section 26.
12. Act 58 of 1962, section 108.
13. Act 91 of 1964.
14. The Ottawa Agreement of 1933; the General Agreement on Tariffs and Trade signed in Geneva in 1948; and the Convention on Nomenclature for the Classification of Goods in Customs Tariffs signed in Brussels in 1950.
15. Section 48(6).
16. Holdsworth op.cit. 177 ff.; McNair loc.cit.

Both Holdsworth[17] and McNair [18] submit that the Crown has an unfettered prerogative power to cede territory by a treaty of peace at the close of a war. Whether it can cede territory without the consent of Parliament in any other circumstances is doubtful.[19]

It appears that Parliamentary approval is not required as a matter of strict law for cession of territory which had been acquired by conquest or by cession and which had never been the subject of legislation by Parliament.[20] For example, no Act of Parliament was passed when Britain abandoned sovereignty over the Orange River Territory in 1854. Despite this, there have been a number of treaties of cession from about 1890 onwards where Parliamentary sanction in the form of a statute was obtained.[21] These instances have led McNair[22] and Holdsworth[23] to comment that there may be a constitutional convention in the making whereby treaties involving the cession of British territory are submitted for the approval of Parliament, which approval takes the form of a statute.

In South Africa, to date, there have only been two instances in which the South African Government has relinquished sovereignty over part of its territory. This occurred when the Transkei was given independence. Parliamentary sanction was obtained in the form of the Status of the Transkei Act[24] which came into operation on 26 October 1976 by proclamation in the Government Gazette.[25] The Act declared the Transkei to be a 'sovereign and independent State' which had ceased to be 'part of the Republic of South Africa'.[26] The Act provided further that '(t)he Republic of South Africa shall cease to exercise any authority over the said territory'.[27] It should be stressed that Transkei did not achieve independence by means of a treaty of cession - there was no such treaty between South Africa and the newly-created State of Transkei.

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17. Holdsworth loc.cit.
18. McNair loc.cit.
19. This question was discussed, inconclusively, in Damodar Gordhan v. Deoram Kanji (1876) I [illegible] 2 (P.C.), on appeal from the High Court of Bombay.
20. McNair op.cit. 95.
21. McNair op.cit. 96.
22. Ibid.
23. Holdsworth op.cit. 18[illegible].
24. Act 100 of 1976.
25. Proclamation 213 of 15 October 1976 Government Gazette 5314.
26. Section 1(1).
27. Section 1(2). Bophuthatswana gained independence in the same way as Transkei on 6 December 1977.

Independence was granted simply by an Act of the South African Parliament. This factor serves to distinguish these events from the British cases which deal with treaties of cession and which, therefore, cannot be regarded as a precedent for South African purposes.

In terms of its policy of 'separate development', the Government of the Republic of South Africa intends to grant independence to other 'homelands' if and whenever their leaders should desire this. It seems likely that the manner in which Transkei achieved its independence will be used as a precedent and that Parliamentary sanction in the form of a statute will become standard practice whether or not a treaty of cession is involved.

In all the above categories Parliamentary sanction is required *ratione materiae*, that is, by reason of the inherent nature of the treaty. The actual treaties themselves do not, as a rule, contain any stipulation for Parliamentary approval as a pre-requisite for the coming into force of the treaty.

(B) Form of Approval by Parliament

Whenever the approval of Parliament is required for the municipal operation of a treaty, this approval may be given in a number of ways. Very often, a statute is enacted which has the effect of altering the existing law to accommodate the provisions of the treaty or to empower the State President to do so by way of Proclamation.[28] On occasion, the statute will merely approve the treaty in question.[29]

Mention must also be made of the modern practices of tabling, promulgation and proclamation of treaties. Certain of the Acts referred to above provide that measures taken by the executive officer concerned in terms of a particular treaty must be promulgated in the *Government Gazette* and/or tabled before the Senate and the House of Assembly as a prerequisite for their municipal entry into force.[30] The practice of tabling treaties aims primarily to secure publicity for their discussion in Parliament. It should be mentioned that where

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28. See, for example, the Aviation Act [illegible] of 1962 section 3(1) and the Merchant Shipping Act 57 of 1951, section 356 bis (1), referred to above.
29. For example, the Treaties of Peace Act 20 of 1948, section 2(3), referred to above.
30. For example, the Post Office Act 44 of 1958, section 2(4) and (5); the Income Tax Act 58 of 1962, section 108.

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treaties are to be laid on the table, this generally takes place <u>after</u> promulgation in the <u>Gazette</u> and the treaty is by that time a <u>fait accompli</u>. However, if the treaty is of particular significance to the Republic, the executive may consult Parliament by means of tabling either before the treaty has been signed, or, more likely, after signature and before ratification.

Even where a treaty is required to be tabled, no formal expression of parliamentary concurrence is necessary; neither a resolution approving the treaty, still less an Act, will be required. It is the absence of disapproval which will be taken as the approval of the legislators assembled in Parliament.[51]

It has for many years been the practice of the English Crown to present treaties to Parliament <u>after</u> their conclusion. Since 1892 this practice, in the United Kingdom, has taken the form of publication in the 'treaty series'. In 1932 the Union Government began to publish South African treaties in its own treaty series, and this practice was continued after the Union became a Republic. This type of publication cannot really be labelled a constitutional limitation on the treaty-making power as it merely serves to inform Parliament of the existence of the treaty.

It has been suggested that the official promulgation of a treaty, unlike publication, is an act of transformation, because although promulgation is not the basis of the validity of the law promulgated, it is considered to bring it into force, while publication is merely said to draw public attention to the existence of the treaty.[52] Such a distinction may be difficult to maintain. Publication can be seen in two different lights; either as an essential preliminary to the internal binding force of a treaty - this is by reference to the doctrine that individuals must be informed of the law with which they are expected to comply; or as declaratory, not constitutive, of the beginning of the internal effectiveness of a treaty.

The requirement that most treaties need the approval of Parliament for their municipal operation has led to support for the idea that public

51. Doeker op.cit. 204.

52. Felice Morgenstern 'Judicial Practice and the Supremacy of International Law' (1950) 27 <u>British Yearbook of International Law</u> 42 at 50-1.

international law is not part of the law of the land, viz., the dualist theory. This idea may well be fallacious. It should be borne in mind that the Blackstone doctrine relates, strictly speaking, to customary international law only, and not to treaties. The reason why treaties require 'transformation' into municipal law is a practical one, and not a doctrinal reason. According to Morgenstern[33] this means that

> 'there is nothing inevitable about the practice; when there are means of overcoming the practical difficulties these States may act upon principles more consistent with the development of the supremacy of international law.... Traditionally heads of State and Governments fulfil both legislative and executive functions in the international sphere. States with a democratic constitution have therefore been reluctant to give treaties conducted by such unrepresentative organs the force of law within the State without express acceptancy by their own representative legislative organs. Thus in England [and South Africa] treaties require legislation because, as they are concluded by the Crown alone, they might be the means for the Crown to impose burdens upon the subject to legislate for him without the concurrence of Parliament'.

D.P. O'Connell[34] confirms that the practice of transforming treaties into municipal law has an historical explanation dating back to the seventeenth century - it does not have an ideological explanation. Members of State concerned with foreign policy belonged to the executive, not to the legislative branch of Government. The asserted incapacity of the executive to legislate for the country by treaty was a manifestation of the constitutional struggle concerning the prerogative. The upshot of this struggle was that the conclusion of treaties remained a prerogative power, but the exercise of this power had no effect internally, except through the intervention of Parliament. Even where a statute has been enacted to give effect to a treaty, it is the statute itself, not the treaty, which has the force of law.

(C) Nature of the Obligation on the State to bring its Municipal Law into Conformity with Treaties and to maintain it so.

From past practice, it is possible to infer that the South African Government takes the view that if it enters into a treaty engagement it expects *ipso facto* to bring its municipal law into conformity with the

33. Morgenstern op.cit. 54-5.
34. D.P. O'Connell *International Law* 2 ed. (197[illegible]) [illegible]

treaty. However, if it does not, this fact alone cannot give rise to a right of complaint by the other party. A variety of situations may arise. The treaty may be ratified by an organ which is not competent to accomplish the formality or which does not comply with the constitutional procedure prescribed for ratification. In terms of the Vienna Convention on the Law of Treaties,[35] a State may, normally, not escape its international obligations on this ground alone. The Convention[36] provides:

> 'A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance'.

Before a violation will be regarded as manifest it must be 'objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'.[37]

Oppenheim[38] makes the comment that the matter is 'not free from difficulty ... the security of international transactions [might] be jeopardised if the parties to a treaty cannot rely on the ostensible authority of the organs accepting binding obligations on behalf of their State'. On the other hand he realizes that a negotiating State cannot assume the function of an arbiter of controversial questions of the other State's constitutional law. He concludes[39]

> 'although a treaty is voidable at the option of the State concerned, if it has been entered into in disregard of the limitations of its constitutional law and practice, that State ... [waives] its right to assert the invalidity of the treaty if for a prolonged period it has failed to do so, or if it has obtained advantage from it'.

Oppenheim[40] adds that, even where a contracting State does avoid the treaty, it will, nevertheless, be liable for damages in cases where the injured party cannot properly be expected to have had knowledge of the constitutional limitations in question.

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35. Article 46.
36. Article 46(1)
37. Article 46(2).
38. L. Oppenheim International Law - A Treatise 8 ed. (1955) I [illegible]
39. Ibid.
40. Ibid.

Another problem may arise if the treaty is properly ratified but its provisions are contrary to existing municipal law. In this instance, both monists and dualists agree that the treaty is, nevertheless, valid. The dualists reach this conclusion by their distinction between international law and municipal law. Since the former is not concerned with the latter, municipal norms cannot affect international norms. The monists arrive at a similar conclusion by applying the doctrine of the supremacy of international norms over municipal norms.

This view has been upheld on numerous occasions by the Permanent Court of International Justice. In its Advisory Opinion in the Greco-Bulgarian Communities,[41] the court stated that 'it is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty'.[42]

41. 1930 P.C.I.J., Ser.B, No.17 at 32.

42. See, too, Jurisdiction of the Courts of Danzig 1928 P.C.I.J. Ser.B, No.15, at 25-6.

6 SUCCESSION TO TREATIES IN SOUTH AFRICA

6.1 Theories of Succession

Introduction and Terminology

The problem of State succession to treaties arises when one national community transfers territory to another. This transfer may be effected by a variety of ways - by peaceful or violent annexation, by cession or secession, by emancipation of subject regions or by any other form of territorial resettlement which results in one State ceasing to exist or to rule in a given territory while its place is taken by another. The State acquiring territory from another may be described as the 'successor State', the State divesting itself of territory as the 'predecessor State'.

'Universal' or 'total' succession occurs when the legal identity of a community is completely subsumed by another. If only part of a State's territory is lost, leaving that State's personality and identity unimpaired, the succession is said to be 'partial'.[1] The consequences of a change in sovereignty will vary according to the degree to which the personality of the State is affected. Thus personality has been described as the key to the problem of State succession.[2] This is especially true as regards State succession to treaties because treaties generally attach to the legal personae involved in their conclusion. Where 'universal' succession has occurred, the predecessor State loses not only its international identity but its legal order is rendered ineffective.[3] As a result, there can be no transmission to the successor State of political rights and duties under international treaties, except those which may be acquired by devolution.[4] However, rights and duties of a local character are generally regarded as transmissible.[5] With 'partial' succession the international personality of the State is not completely destroyed and,

1. L. Oppenheim International Law - A Treatise I Peace 8 ed. (1955) 157-8.
2. W.E. Hall A Treatise on International Law 8 ed. (1924) 114.
3. Marek Identity and Continuity of States in Public International Law 2 ed. (1968) 4.
4. D.P. O'Connell International Law I 2 ed. (1970) 368.
5. McNair Law of Treaties (1961) 601.

as a result, the predecessor State will continue to bear its international rights and obligations, except in so far as those rights and obligations are necessarily modified by the territorial changes which have taken place. As a rule, treaties creating local obligations will pass to the successor State but the latter is under no obligation to abide by treaties of a political nature.[6]

The definition of State succession has given rise to some difficulties. O'Connell[7] describes State succession as 'the factual situation which arises when one State is substituted for another in sovereignty over a given territory'. From this the questions may be posed whether a State's international rights and duties arising from treaties remain unaffected by the change in sovereignty and whether they are automatically succeeded to, as a matter of law, by the successor State. Sir Humphrey Waldock, Special Rapporteur on the Succession of States and Governments in respect of Treaties, in his first report to the International Law Commission of the United Nations, preferred to define State succession as 'a change in the possession of competence to conclude treaties with respect to a given territory'.[8] Waldock employed the term 'competence' rather than 'sovereignty' because it would cover a wider range of international situations including international mandates, territories under trusteeship, protectorates and maritime zones over which the coastal State may exercise limited jurisdiction.[9] However, in the ensuing debate on State succession,[10] the view was expressed by other members of the International Law Commission that the concept of 'sovereignty' was indispensable to any definition of State succession because it is intended precisely to exclude certain situations such as those resulting from a military occupation. As a result, in the Special Rapporteur's Second and Third Reports,[11] succession was defined as 'the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory'. Since then this definition has undergone

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6. Charles de Visscher Theory and Reality in Public International Law revised ed. (1968) 179-80.
7. D.P. O'Connell State Succession in Municipal Law and International Law I (1967) 3.
8. U.N. Document A/CN. 4/202, para. 2(a), Draft Article 1.
9. Okon Udokang Succession of New States to International Treaties (1972) 106-7.
10. GAOR, 23rd Sess., Suppl. No.9 (A/7209/Rev. 1) p.25; (1969) 8 International Legal Materials 172.
11. U.N. Document, A/CN. 4/224. Article 1 of the Draft Articles on Succession of States in respect of Treaties.

further changes and in the latest draft,[12] which was submitted to the first session of the United Nations Conference on Succession of States in respect of Treaties,[13] succession of States was deemed to mean 'the replacement of one State by another in the responsibility for the international relations of the territory'.[14] As this formed part of the definitions article, the matter could not be settled until consideration of the other articles was virtually complete. It was therefore stood over to the second session.

The absence of a general rule of State succession to treaties in international law has given rise to competing schools of doctrinal thought. Basically, two main groups of theories have evolved. The first group achieves a total or, at least, a large measure of legal continuity. The second group negatives this continuity and leaves the successor State in a condition of legal vacuum. It is, perhaps, apposite to examine briefly the general theoretical position of the law of State succession in order that the past and current attitudes of the South African executive and judiciary may be assessed against it.

(i) Theories of Continuity

(A) The Theory of Universal Succession

The classical writers, who evolved the earliest doctrine of State succession, resolved the problem of political change by seizing on the Roman law analogy of 'universal succession' upon death. Under Roman law, rights and duties of the deceased passed *ipso jure* to his successor. These rights and duties derived from absolute natural right and therefore remained constant, retaining their identity despite accidental changes in the identity of those who were from time to time their bearers.[15] In similar fashion the personality of the State was regarded as immutable, irrespective of changes in the identity of its agents, and, as a result neither revolution nor cession of territory could affect the fundamental

12. Contained in the Report of the International Law Commission on the work of its 26th Session, (1974) 2 Yearbook of the International Law Commission.
13. The Conference was convened in Vienna from 4 April to 6 May 1977.
14. Draft Article 2(1)(b).
15. Grotius De Jure Belli ac Pacis II, IX, 9,10,12.

character and basic constancy of that personality. Rights and obligations flowing from it were identified as 'absolute natural rights' and were as such in themselves constant.[16] Once a sovereign concluded a treaty in the public interest, his commitments related not only to h[illegible] but to the people through whom, in terms of his social contract, he ultimately derived his authority.[17] Territory was regarded as a form of property and property was affected by those legal arrangements made for it by the ruler.[18] Hence rights and obligations contracted by the ruler in the exercise of his public functions continued to bind the State after that particular ruler had lost his authority.

(B) The Theory of Popular Continuity

This thesis[20] developed some time after the theory of universal succession came into vogue and, while it aimed at legal continuity, it achieved considerably less than that attained in the former theory. The differentiation between personal and public obligations of the ruler emphasized by the theory of universal succession was here replaced by a distinction be[illegible] social and political commitments. When a change in sovereignty occurs, according to this theory this involves no more than a change in the fictitious element in political organisation, leaving the real element intact. As a result, commitments of a political nature, such as treaties, which attach to the element of sovereignty, will lapse, while obligations of a patrimonial nature, including economic and juridical matters, which attach to the social fabric, will remain intact.

(C) The Theory of Organic Substitution

The theory of organic substitution[21] had its roots in the late nineteenth century in Germany in the work of Von Gierke and his theory of corporate association.[22] Von Gierke postulated that as the State is no more than the ultimate social organism, the solution to the problem

16. D.P. O'Connell op.cit. 9.
17. Grotius op.cit. XIV, 1,2.
18. Ibid. VIII, 4.
19. Ibid. XIV, 10.
20. See D.P. O'Connell op.cit. 11 for details.
21. D.P. O'Connell op.cit. 12-13 discusses this theory.
22. Von Gierke Die Genossenschaftstheorie und die Deutsche Rechtsprechung (1887) 809-905.

of State succession is the same as it would be in the event of the disappearance of any other social grouping. Social organisms, unlike natural organisms, do not often disappear on death. Although its identity is lost with the destruction of its hard core of life, the organic forces that previously governed it remain unaffected. All the property belonging to the former composite organism pass to the new organism as a single entity.

Max Huber adapted these elements of Von Gierke's thesis to the question of State succession thereby extending the theory of universal succession. He believed that once a State is superseded by another, the factual elements of people and territory are integrated in a new organic being. The problem becomes one of distinguishing those legal institutions which attach to the factual elements and therefore survive the change from those which attach to the organisational elements and do not survive it. He concluded that when a State came into existence by secession or separation from the parent State, it remained bound by all the treaties of the predecessor State except for treaties of an explicitly political nature, such as treaties of alliance and guarantee.[23]

It may be seen that Huber's theory was not very different from the original theory of universal succession, and, indeed, Huber has been regarded as the most influential advocate of the universal succession theory during the second half of the nineteenth century. Nevertheless, O'Connell[24] comments that this theory is different in that

> 'it offers a new explanation by denying that there is either succession of bearers in an identical legal relationship [25] or a juridical continuity in the bearers themselves [26] and argues instead for a substitution in respect of both bearers and their rights and duties. The successor State takes over nothing; rather it absorbs the factual situation brought about by the predecessor's legal commitments and ... substitutes itself in the juridical incubus deriving from the previous life centre and embodied in the organic structure of the integrated society....(T)his means that the successor State takes over all the rights and duties of its predecessor save those which are essentially political'.

23. Okon Udokang op.cit. 124.
24. D.P. O'Connell op.cit. 13.
25. As occurs in the theory of universal succession.
26. As occurs in the theory of popular continuity.

(D) The Theory of Self-abnegation

The theory of self-abnegation[27] was developed by the jurist Jellinek at the turn of the twentieth century.[28] Jellinek's solution to the problem of State succession is premised in his general theory of international law according to which the State, either in the exercise of its own will or as an act of auto-limitation, agrees to regulate its behaviour towards other States in terms of international law. Successor States may inherit the commitments of their predecessors through this process of self-abnegation. Formally, the new State is free to inherit or reject whatever rights and obligations it chooses, but, in fact, the new State in its own self-interest will not materially disturb the pre-existing legal order. It can, therefore, be seen that this theory, like the previous positive theories of State succession, places the emphasis on continuity rather than disruption, although in this case the legal bonds of continuity are based on the tacit consent of all interested parties.

(ii) Negative Theories

Introduction

In the late nineteenth century negative theories of State succession began to emerge mainly because it soon became apparent that the practice of newly emergent States did not accord with the theory of universal succession. Unfortunately, the negative theories represented a reaction to the theory of universal succession in particular and, as a result, went to the opposite extreme and denied all the major premises of the earlier doctrines.

(A) The 'Clean-slate' Doctrine

In terms of the 'clean-slate' doctrine, law is an expression of sovereign will and is dependent for its survival on the continued existence of this will. Once a change of sovereignty occurs this will lapses and, as a result, the legal order of a State collapses.[29] The

27. O'Connell op.cit. 14-15.
28. Jellinek Allgemeine Staatslehre (1900); O'Connell ibid. cites the 1960 reprint of the 5 ed. (1960).
29. D.P. O'Connell op.cit. 15ff.

sovereignty of the predecessor State over the 'lost' territory is abandoned and a legal vacuum is created between the expulsion of one sovereign and the creation of another.[30] Any succession that in fact occurs does so only by virtue of an act of will of the successor State.[31] Professor Arrigo Cavaglieri, one of the proponents of the 'clean-slate' theory, has acknowledged that successor States have often accepted the treaty obligations of the predecessor States, but has maintained that such succession was purely voluntary and based on considerations of equity, convenience or political interest. He insists that 'there is no general rule of law which obliges the annexing State to take upon itself the juridical consequences of acts of the extinguished State'.[32] Sovereignty as such is not transferable and neither it nor territory can be the object of assignment. Thus the 'clean-slate' proponents argue that the notion of State succession is fallacious and if any continuity of legal rights and obligations does occur in practice, this is entirely attributable to extra-legal factors.[33]

(iii) Modern State Theory and Practice

The two extreme positions exemplified by the positivists and the negativists do not accurately reflect the views and practises of newly independent States. The doctrine of universal succession has been widely rejected by legal theorists and by States because the analogy of State succession with the universal succession of Roman law is no longer a tenable proposition as the rights and duties of individuals are not properly comparable with those of States. Furthermore, theories of succession basing themselves on the continued identity of the absorbed territory are thought to be incorrect in ascribing to the territory after a change in sovereignty the capacity to retain rights and duties.

On the other hand, the 'clean-slate' theory in its traditional form has itself come under attack. As Kelsen[34] has noted, even if territorial

30. D.P. O'Connell The Law of State Succession (1956) 8.

31. Ibid.

32. Cavaglieri 'Règles Générales du Droit de la Paye' (1929) 1 Recueil 315 at 378.

33. D.P. O'Connell State Succession in Municipal Law and International Law I (1967) 16f.

34. Kelsen 'Théorie Générale du Droit International Public' (1932) 4 Recueil 121.

changes involve replacements of sovereignty, international law may, nevertheless, attach to them legal consequences, including the consequences of a juridical succession. O'Connell[35] adds by way of definition that sovereignty connotes a supreme legal competence within a particular territory and that, therefore, a change in sovereignty implies nothing more than the substitution of one such competence for another. While the successor State does not in any way 'continue' the sovereignty of its predecessor, this does not necessarily imply that the successor State is altogether free of responsibility for the acts of its predecessor because one cannot simply pretend that the territory in question and its inhabitants disappear when a change of sovereignty takes place. As a result, it is generally accepted that certain treaty obligations may well devolve on the successor State.[36] The traditional position of the law on State succession to treaties is, perhaps, best expressed by Lord McNair:[37]

> 'The general principle is that newly established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations, save in so far as obligations may be accepted by them in return for the grant of recognition to them or for other reasons, and except as regards the purely local or 'real' obligation of the State formerly exercising sovereignty over the territory of the new State'.

The modern approach to State succession to treaties, as evidenced by State practice, seems to be far more pragmatic than the rigid and confining theories of the eighteenth and nineteenth centuries, but it is well nigh impossible to extract any single rule of State succession from the anomalous and inconsistent conduct of States. On the one hand, it has become increasingly apparent that newly-independent States, especially those on the African continent, have recognized the need for some legal continuity at least, if they are to achieve any appreciable degree of internal and international stability.[38] On the other hand, there is no doubt that these newly-independent States do not regard themselves as the

35. D.P. O'Connell op.cit. 26.
36. Oppenheim op.cit. 158.
37. McNair loc.cit.
38. D.P. O'Connell op.cit. 39.

automatic successors to the treaty obligations of their erstwhile colonial master States. On the contrary, they have felt free to choose whether to accept or reject such treaty commitments. The desirability of securing succession to treaty obligations by new States does not and cannot diminish the significance of the factor of the parties' intentions in determining what types of treaties will survive the change in sovereignty.[39] These intentions do not hinge on legal considerations but rather on economic and political factors with the result that whatever succession has taken place has been haphazard and at random. This element of intention and of freedom of choice has been enshrined in the Draft Articles on the Succession of States in respect of Treaties prepared by the International Law Commission, Article 15 of which provides:

> 'A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates'.[40]

The United Nations Conference on Succession of States in respect of Treaties met in the Hofburg in Vienna from 4 April until 6 May, 1977. Altogether eighty-nine States participated in the Conference, although, unfortunately, South Africa was not one of these. The Conference had as its main working document the Report of the International Law Commission on the work of its 26th Session, Chapter 2, as well as the commentary on and text of the Draft Articles on Succession of States in respect of Treaties prepared by the Commission. Draft Article 15 was adopted by the Conference which thereby gave primacy to the 'clean-slate' principle as the operative principle for succession of newly-independent States whether ex-colonial or formed from two or more territories. 'Clean-slate' in its modern sense has a slightly different meaning from the traditional use of the term where it meant that a State succeeded to none of the treaties of its predecessor in title. 'Clean-slate'[41] is today a metaphor for the principle that a newly-independent State is <u>not obliged to succeed</u> to treaties of its predecessor State; however, it may elect to succeed to most of them.[42]

39. Okon Udokang op.cit. 140.
40. (1974) 2 Yearbook of the International Law Commission.
41. Or 'tabula rasa'.
42. One notable exception to this freedom of election to succeed, also approved by the Conference, lies in Draft Article 11 which provides that a succession of States does not affect boundaries established by treaties or obligations and rights established by treaty and relating to the regime of a boundary.

Nevertheless, the enthusiastic adoption by the Conference of Draft Article 15 evidenced the astuteness of the two Rapporteurs who had handled the subject in the Commission, namely, Sir Humphrey Waldock and, after him, Sir Francis Vallat; both of whom had discounted the principle of continuity which had been favoured by many authoritative western commentators, notably Professor D.P. O'Connell and his colleagues in the International Law Association[43] and substituted instead the 'clean-slate' principle in its modernized application.

It has been noted by one authority[44] that in practice a 'treaty-vacuum' rarely arises. Two devices have repeatedly been used by newly-independent States to secure succession to treaties entered into on their behalf by their predecessor States, namely, devolution agreements and unilateral declarations.

(a) Devolution Agreements

Devolution agreements were widely used by ex-British territories on attaining independence in order to secure succession to treaties in general.[45] These agreements concluded between predecessor State and successor State provided that treaty rights and obligations of the predecessor State should be assigned or should devolve upon the successor State.

The earliest devolution agreement was a formal treaty concluded between Britain and Iraq in 1931, which provided:[46]

> 'The High Contracting Parties recognize that, upon the entry into force of this Treaty, all responsibilities devolving under the Treaties and Agreements referred to in Article 7 hereof[47] upon His Britannic Majesty in respect of Iraq will, in so far as His Britannic Majesty is concerned, then automatically and

43. See, for example, D.P. O'Connell 'The Present State of the Law on State Succession' The Present State of International Law (197?) 331.
44. J. Mervyn Jones 'State Succession in the Matter of Treaties' (1947) 24 British Yearbook of International Law 360 at 373.
45. This was not, however, the position with Central and East African ex-British territories which preferred to utilize unilateral declarations instead.
46. United Kingdom Treaty Series No. 15 of 1931.
47. The responsibilities referred to were the Treaties of Alliance between Britain and Iraq of 1922 and 1926.

completely come to an end, and that such responsibilities, in so far as they continue at all, will devolve upon His Majesty the King of Iraq alone.

It is also recognised that all responsibilities devolving upon His Britannic Majesty in respect of Iraq under any other international instrument, in so far as they continue at all, should similarly devolve upon His Majesty the King of Iraq alone, and the High Contracting Parties shall immediately take such steps as may be necessary to secure the transference to His Majesty the King of Iraq of these responsibilities'.

The devolution agreement between Britain and Jordan[48] was couched in similar terminology. Both agreements were simple and direct in their approach to the problem of State succession to treaties, and were manifestly intended to secure a devolution.[49] However, a number of later devolution agreements used much more ambiguous and vague terminology.[50] A typical example of this latter type of devolution agreement is that entered into between the Governments of Britain and Malaya in 1957.[51] This agreement provided:

'(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument are, from 31 August, 1957, assumed by the Government of the Federation of Malaya in so far as such instruments may be held to have application to be in respect of the Federation of Malaya.

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Malaya are, from 31 August, 1957, enjoyed by the Government of the Federation of Malaya'.

The above example of a devolution agreement shows how difficult it is to interpret and apply the intentions of the contracting states in this regard. Some of the questions posed[52] include the following: Why are 'obligations and responsibilities' and 'rights and obligations' dealt with disjunctively? Why is the term 'which arise from any valid international instrument' mentioned only in paragraph (i) and, in any event, what is the precise meaning of this phrase? Why is the expression 'in so far as such instruments may be held to have application to ... Malaya' confined to

48. United Nations Treaty Series vol.6, p.144.

49. D.P. O'Connell 'Independence and Succession to Treaties' (1962) 38 British Yearbook of International Law 84 at 119.

50. O'Connell ibid.

51. United Nations Treaty Series vol.279 p.287; reprinted in United Nations Legislative Series Materials on Succession of States ST/LEG/SER. B/14 (1967) 76.

52. See D.P. O'Connell op.cit. 120, where he criticizes the substantially similar devolution agreement between Britain and Ghana: United Nations Treaty Series vol.287, p.233.

paragraph (i) while the expression 'in virtue of the application' is used in paragraph (ii)? Who is entitled to 'hold' whether such instruments mentioned in paragraph (i) 'have application'? From this it is clear that a devolution agreement, if not clearly and deliberately worded, may create more problems as regards succession to treaties than it purports to solve.

Despite the manifest ambiguities present in the later devolution agreements in particular, many writers have contended that they are not devoid of all practical and legal effect. The intention of the predecessor State in entering into such agreements is clearly to divest itself publicly of all rights and responsibilities vis-à-vis the successor State as well as to assign these rights and duties to the latter. Whether devolution agreements have ever achieved this goal is uncertain but the agreements might well have the effect of absolving the predecessor State from ensuring that its former dependency complies with the treaties in so far as they apply to the dependency after independence. Third States will, at least, be put on notice particularly where the devolution agreement is registered with the United Nations and subsequently published by that body.[53] A.P. Lester[54] would take the matter still further by stating that once the devolution agreement has been registered with the United Nations[55] it is regarded as binding in international law. It is doubtful whether the mere fact of registration would today be sufficient to render a devolution agreement absolutely binding on the parties, especially in view of Draft Article 8(1) of the Draft Articles on Succession of States in respect of Treaties which provides:

> 'The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor States towards other States parties to those treaties <u>in consequence only</u> of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State'. (Italics supplied.)

53. K.J. Keith 'State Succession to Treaties in the Commonwealth: Two Replies' (1964) 13 International and Comparative Law Quarterly 1441 at 1442-[illegible].

54. A.P. Lester 'State Succession to Treaties in the Commonwealth' (1963) 12 International and Comparative Law Quarterly 475 at 50[illegible].

55. And it would appear that all devolution agreements concluded before 1967 were so registered: D.P. O'Connell State Succession to Municipal Law and International Law op.cit. 37[illegible].

Although nothing is mentioned in this Article of the effect of registration with the United Nations, it is unlikely that registration alone would suffice to get around the implications of Article 8(1), especially in view of the fact that either the predecessor State or the successor State may register the agreement. It would appear that apart from conclusion and registration of the agreement, there must, in addition, be some other act on the part of the successor State which proves its intention to abide by the terms of the devolution agreement and to succeed to treaties. While any ambiguity in the terms of a devolution agreement is, perhaps, deliberate and designed to afford an escape when politically justified,[56] it could be argued that once the devolution agreement is made public it constitutes a serious statement of intention of the parties concerned and, in the light of the recent statements of the International Court of Justice in the Nuclear Tests case,[57] other States, particularly those whose interests might be affected by the agreement, may be able to rely on its terms and hold both the predecessor and successor States to their word; for, as noted by Keith,[58] devolution agreements 'demonstrate that many newly-independent States consider that they remain bound by at least some treaties [and] the parent States must also have this view'. The existence of a devolution agreement permits at least a presumption of continuity to arise.[59]

The possible effect of devolution agreements on third States who were not parties to it is still a matter of dispute. McNair, in referring to the alleged intention of the devolution arrangements between India and Pakistan to achieve a transmission of rights and duties, described the third State's point of view by stating[60] that :

> 'it is by no means certain that de jure the desired effect has resulted, apart from purely local obligations....(T)he arrangement is an attempted novation and assumes the consent of the other parties to those treaties; it is not difficult to imagine circumstances in which a State might be quite willing to contract obligations of a certain character with the old India but not with the new India or Pakistan alone'.

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56. D.P. O'Connell 'State Succession to Treaties in the Commonwealth: Two Replies' (1964) 13 International and Comparative Law Quarterly 1441 at 1451.
57. 1974 I.C.J. Reports 253 discussed above at pp. 72-3.
58. K.J. Keith 'Succession to Bilateral Treaties by Seceding States' (1967) 61 American Journal of International Law 521 at 540-1.
59. D.P. O'Connell State Succession in Municipal Law and International Law op.cit. 365.
60. McNair op.cit. 650.

The general principle to be applied as regards the applicability of treaties in international law is pacta tertiis nec nocent nec prosunt.[61] Third States which are not parties to the devolution agreement will not be bound by its terms unless they have acquiesced therein. Elihu Lauterpacht suggests[62] that third States may regard the devolution agreement as an offer by the new State to remain bound, subject to certain conditions and limitations, by the commitments of its predecessor State towards the third State. If the third State accepts this offer, a new, unwritten treaty will, in effect, be created in similar terms to the treaty originally concluded between it and the predecessor State.

As all devolution agreements are lodged with the Secretary-General of the United Nations, third States will usually be served with formal notice of the intended assignment of treaty rights and obligations. If the third State acknowledges this assignment, the devolution agreement will most probably result in a novation of treaties. If it does not formally acknowledge the assignment but nevertheless continues to exercise rights and to discharge obligations under the treaty, a novation may be implied.[63] The real problem, as Professor D.P. O'Connell[64] sees it, arises when third States simply do nothing at all. Can a presumption of novation ever arise in such a case? In the majority judgement in the Reservations to the Genocide Convention case,[65] the principal judicial authority on tacit consent, the Court held that great allowance must be made for tacit assent to reservations by which the author of an 'incompatible reservation' may be regarded by the other signatories as a party to the treaty. The implication is that if a signatory does not wish to be committed to rights and duties vis-à-vis the reserving State, it must make some objection to the offending reservation. The majority of the Court therefore concluded that an implied right of reservation is possible and that a vinculum juris may be created with non-objecting parties. O'Connell[66] concludes from

61. A.P. Lester loc.cit.
62. E. Lauterpacht 'The Contemporary Practice of the United Kingdom in the Field of International Law - Survey and Comment, VII' (1958) 7 International and Comparative Law Quarterly 514 at 529.
63. D.P. O'Connell State Succession in Municipal Law and International Law op.cit. 371.
64. Ibid.
65. 1951 I.C.J. Reports 15.
66. D.P. O'Connell op.cit. 372.

this that as far as incompatible reservations to a treaty are concerned, mere silence amounts to tacit consent, and a similar situation is entirely conceivable as regards silence by third States in the face of a devolution agreement.[67]

The Draft Articles on Succession of States in respect of Treaties totally avoid the problem of both express and tacit consent by third States to devolution agreements. The Draft Article in question[68] does not even reflect the possibility of third States acquiescing in a devolution agreement between a predecessor and successor State although, presumably, this acquiescence must have been implicit in the very provision for devolution agreements itself. It is interesting to note that while the comparable Draft Article found in the Special Rapporteur's Second and Third Reports[69] does at least make mention of the possible relationship between successor States and third States,[70] the final draft eliminates all mention of third States. It simply provides that '(n)otwithstanding the conclusion of such an agreement, the effects of a succession of States to treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present articles'. It would appear as though this omission was deliberate and aimed to avoid the difficult questions raised of the rights and obligations of third States arising out of a devolution agreement. As it stands, Draft Article 8 is unsatisfactory in that it achieves nothing more than a bare denial that successor States are bound in a treaty relationship with third States. It ignores the fact that devolution agreements have had a direct effect on the attitudes and behaviour of States and the United Nations. First, they have been referred to by many successor States in lodging declarations of succession with the depositaries of multilateral treaties, which have,

67. As a sequel to the Court's decision, the Secretary-General of the United Nations, by resolution of the General Assembly, abandoned the practice of the League of Nations of enquiring of all parties whether they assented to a reservation. It adopted instead the policy of merely communicating the reservation to the other signatories: D.P. O'Connell loc.cit.

68. See Draft Article 8 above.

69. U.N. Doc. A/CN. 4/224, Draft Article 3(1) and (2).

70. Draft Article 3(2) provides that 'when a predecessor and a successor State conclude such a devolution agreement, the obligations and rights of the successor State in relation to third States under any treaty in force in respect of its territory prior to the succession are governed by the provisions of the present articles'.

in turn, accepted these declarations.[71] Secondly, they have influenced the practice of the Secretary-General of the United Nations who, in a summary of his practice as depositary of multilateral treaties, has referred to 'the importance of the provisions set forth in the devolution clause relating to obligations arising out of multilateral agreements previously applied in the territory of the new State. The Secretary-General, in performing his functions as depositary, has paid the closest regard to those clauses...'[72] Thirdly, devolution agreements have been referred to by the United States of America as the explanation for listing British treaties against the successor States in its treaty lists,[73] which shows that third States do attach validity to these agreements.

(b) Unilateral Declarations

An alternative method of succession to treaties pursued by many newly-independent States[74] consists in the issue of a declaration that treaty relationships will be maintained for a limited period during which the new State will decide which treaties, both bilateral and multi-lateral, it wishes to continue indefinitely and which to discontinue altogether.

One type of unilateral declaration is that made by Tanganyika in 1961 after it had declined to conclude a devolution agreement with the United Kingdom.[75] The declaration, dated 9 December, 1961, that the Government of Tanganyika sent to the Secretary-General of the United Nations, has become known as the 'Nyerere doctrine'[76] and clearly reveals an intention to succeed at least in the interim. It reads:[77]

> 'The Government of Tanganyika is mindful of the desirability of maintaining to the fullest extent compatible with the emergence into full independence of the State of Tanganyika, legal continuity between Tanganyika and the several States with which, through the actions of the United Kingdom, the territory of Tanganyika was prior to independence in treaty relations. Accordingly, the Government of Tanganyika takes the present opportunity of making the following declaration:
>
> As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties

71. D.P. O'Connell loc.cit.
72. Summary of the Practice of the Secretary-General as Depositary of Multi-lateral Agreements U.N. Doc. ST/LEG/7 (7 August, 1959) paragraph 133.
73. D.P. O'Connell loc.cit.
74. These include Tanganyika, Uganda, Zanzibar and Lesotho.
75. D.J. Harris Cases and Materials on International Law (1973) 627.
76. D.P. O'Connell op.cit. 116.
77. The text of the 'Nyerere doctrine' may be found in Materials on the Succession of States U.N. Doc. ST/LEG/SER. B./14 (1967) p.177-8.

> for a period of two years from the date of independence (i.e. until 8 December, 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of those treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.
>
> The Government of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multi-lateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument - whether by confirmation of termination, confirmation of succession or accession. During such interim period of review any party to a multi-lateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty'.

As a sequel to this declaration, Tanganyika during the course of 1962 informed the Secretary-General of the United Nations that the rights and obligations of the United Kingdom in respect of Tanganyika, arising out of 42 international instruments relating to GATT, were to be considered as the rights and obligations of Tanganyika as from the date of independence; that Tanganyika considered itself bound by the 1946 Convention on the Privileges and Immunities of the United Nations; and by the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.[78]

The Government of Tanganyika's own interpretation of its unilateral declaration was that all personal treaties lapsed after the expiry of the two year period and only real treaties were succeeded to. By real treaties it understood boundary and communication treaties.[79] Despite this, on 31 December, 1964, the Tanganyikan Cabinet, after resolving to continue all extradition treaties and certain judicial assistance treaties, wrote to the other signatories mentioning that, as these treaties had lapsed pursuant to customary international law, it would be necessary to agree to their revival. All the other signatories agreed to revive them.[80]

It may be noted that on 2 July, 1962, the permanent representative of the United Kingdom to the United Nations, following the unilateral declaration sent by Tanganyika to that body, sent a disclaimer of responsibility to the Secretary-General which was circulated among member States. This disclaimer provided that as from the date of Tanganyika becoming a sovereign

78. Ibid.
79. Tanganyika Parliamentary Debates (Hansard) National Assembly, 1st session, 11 June 1962, col.263 as cited by D.P. O'Connell op.cit.116.
80. D.P. O'Connell op.cit. 116-7.

independent State,[81] the United Kingdom 'ceased to have the obligations or rights which they formerly had as the authority responsible for the administration of Tanganyika'.[82]

When Uganda gained independence in 1962 it elected not to sign a devolution agreement with Great Britain but, instead, to follow the precedent set by Tanganyika.[83] The Ugandan Government sent a unilateral declaration to the Secretary-General of the United Nations which was circulated by the latter to all member States.[84] This was followed by a disclaimer of responsibility sent by the United Kingdom to the Secretary-General, which was duly circulated by him among member States.[85] The Ugandan declaration is substantially similar to the Nyerere doctrine, although, in Uganda's case the period of review is fourteen months, both in respect of multilateral and bilateral treaties.

By 31 December, 1966, the Ugandian Government had completed the examination of most of its treaties. The Ugandan Cabinet resolved to continue all extradition treaties and wrote to the other signatories inviting them to treat the exchange of notes as constituting new agreements on the same terms as the old. It confirmed some judicial assistance treaties but rejected all commercial and consular treaties. It decided, in addition, to accede to all multilateral treaties.[86] The Ugandan Government adopted the policy that, pursuant to its unilateral declaration, all treaties which had not been revived by exchanges of notes had lapsed, and it notified other signatories only when desirous of continuing a treaty relationship. This procedure followed by Uganda differed from that of Tanganyika in that, while Uganda entered into correspondence with another signatory only if it wished to revive a treaty which, according to its declaration, had lapsed; Tanganyika wrote to all signatories advising them whether it wished to revive a treaty or not.[87]

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81. 9 December, 1961.
82. Materials on Succession of States U.N.Doc. ST/LEG/SER. B/14 (1967) p.178.
83. Ibid. 179.
84. The text of this declaration is set out in Materials on Succession of States op.cit. 179-80.
85. Ibid.
86. D.P. O'Connell op.cit. 117.
87. Ibid.

Declarations similar to those of Tanganyika and Uganda have since been made, *inter alia*, by the Governments of Botswana, Lesotho, Nauru, Kenya and Malawi.

On 15 September, 1964, the Zambian Government issued a unilateral declaration to the Secretary-General of the United Nations with the request that it be circulated among member States and specialized agencies of the United Nations. The Zambian model,[89] which has subsequently been followed by Barbados, Guyana and Mauritius,[90] differs somewhat from the Nyerere doctrine in that while it acknowledged that 'many treaty rights and obligations of the Government of the United Kingdom in respect of Northern Rhodesia were succeeded to by Zambia upon independence by virtue of customary international law' it feared that certain treaties might have lapsed in terms of customary international law and that, therefore, 'it seems essential that each treaty should be subjected to legal examination'. The Zambian declaration, unlike the Nyerere doctrine, did not set any time limit for this examination process, merely proposing that once the examination process was complete the Zambian Government would 'indicate which, if any, of the treaties which may have lapsed by customary international law the Government of Zambia wishes to treat as having lapsed'.

Under the second and third drafts of the International Law Commission's Draft Articles on Succession of States in respect of Treaties[91] a unilateral declaration, whereby a successor State communicated to a third State its consent to the provisional application of a treaty pending a decision with regard to its maintenance in force, modification or termination, would result in the treaty continuing 'to apply provisionally as between the successor State and the third State unless ... the treaty [came] into force automatically as between the States concerned under general international law independently of the declaration or the application of the treaty in relation to the successor State would be incompatible with its object and purpose'.[92] The onus was placed on the third State to object to the continued application of any treaty within

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88. Harris op.cit. 628.
89. Contained in (1969) 2 Yearbook of the International Law Commission 64, text reproduced Harris op.cit. 629.
90. Ibid.
91. U.N. Doc. A/CN 4/224.
92. Ibid., Draft Article 4(2)(a) and (b).

three months of receiving such notification of provisional application from the successor State.[93] While this Draft Article cloaks unilateral declarations with substantial, if only temporary, validity, the same cannot be said about the comparable Draft Article 9 of the latest draft which was adopted by the United Nations Conference in Vienna earlier this year.[94] This Article simply provides that neither the successor State nor other States party to treaties of the predecessor State will become subject to obligations or rights in consequence only of the making of a unilateral declaration by the successor State providing for continuance in force of treaties of the predecessor State in respect of the territory of the successor State. Instead, 'in such a case [namely, where a unilateral declaration has been made] the effects of the succession of States on treaties ... are governed by the present articles'.[95] One interpretation of Draft Article 9 is that while it recognises that the 'clean-slate' principle is not to be prejudiced in any way, it nevertheless recognises that the right of the successor State to opt in to treaties to which it desires to succeed is not wholly a unilateral exercise which it can perform without regard to the attitudes and consent of the other treaty parties. Nevertheless, by itself it accords little if any binding force to a unilateral declaration. This is to be regretted especially as it is difficult to see how a unilateral declaration made by a newly independent State in the exercise of its sovereign independence could be regarded as tainted by the former colonial relationship and therefore suspect, as, perhaps, are devolution agreements. In mitigation of such harsh consequences, Draft Article 9 should be read together with Draft Articles [illegible] and 27, which relate to the provisional application of multilateral and bilateral treaties. The general rule as regards multilateral treaties would appear to be that

> '(i)f, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied

93. Ibid., Draft Article 4(2)(c). Draft Article 4(3) went on to list five instances in which this provisional application of the treaty would terminate.

94. 1977.

95. Draft Article 9(2).

> provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed....[However this rule will not apply] if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty'. 96

Similarly, bilateral treaties which, at the date of succession were in force or were being applied provisionally to the territory of the successor State, are regarded as applying provisionally between the successor State and the other State concerned if they expressly so agree or if, by reason of their conduct, they are to be considered as having agreed to continue to apply the treaty.[97] In this way a unilateral declaration followed either by express or implied approval of third States parties to the treaty in question would provide at least provisional maintenance in force of such treaty.

Conclusions

From the trends which emerged at the United Nations Conference on Succession of States in respect of Treaties, it would appear that any Convention on the subject will have as its central focus a modernized version of the 'clean-slate' theory. Nothing will be allowed to derogate from the right of newly-independent sovereign States to decide for themselves which bilateral and multilateral treaties will remain in force in respect of their territories. At the same time, however, the basic human desire for stability, reflected in the practice of concluding devolution agreements and, more recently, in the growing number of unilateral declarations, suggests that the dominant attitude of newly-independent States has been and will continue to retain many treaties in force. There is an awareness among successor States that not all treaties concluded on their behalf by their erstwhile colonial rulers are per se to their detriment. The practical application of the 'clean-slate' theory involves the successor State in both advantages and disadvantages. On the one hand, the sovereign independent status of the newly-independent State cannot fail to be enhanced by granting it a completely free choice in the matter of succession to treaties. In addition, at the psychological

96. Draft Article 26(1) and (5).
97. Draft Article 27.

and practical levels of government it is beneficial that each and every treaty be reconsidered by the new Government, for only by this process will the successor State become fully aware of its potential international rights and obligations and by so doing obtain not only the maximum advantage to itself but contribute its share towards the advancement of the international community. On the other hand, the 'clean-slate' theory will certainly involve any newly-independent State in a vast amount of work. As the law stands at present, the State will be obliged to consider all its treaties, and, once it has decided to continue with a treaty, it still remains for the State to obtain the consent of other parties to the treaty. The whole process therefore becomes a slow and tedious task, especially for a new State which has not yet had the opportunity to come to grips with its internal constitutional structure quite apart from its role on the world stage. Any tendency by a new State to neglect international issues should be countered by third States which should apply pressure on newly-independent States to reconsider treaties as timeously as possible.

(b) South African Practice

(i) Department of Foreign Affairs

(A) Succession to Treaties of the Boer Republics

(a) The Orange Free State

In 1848, the territories north of the Orange River were declared by proclamation to be subject to the sovereignty of the Queen of England.[98] The proclamation provided that the inhabitants of the territory should 'be governed by the Laws, Ordinances, Etc. of the Colony of the Cape of Good Hope' and that Her Majesty was to be the 'paramount and exclusive authority' in all international disputes as to territory or 'in any cause whatever tending to interrupt the general peace and harmony of South Africa'. By Letters Patent dated 22 March, 1851, the territories were constituted a distinct and separate Government, to be administered by the Governor of the Cape of Good Hope.

98. Proclamation dated 3 February, 1848: Great Britain, House of Lords, Sessional Papers, vol. 7, July 1848, p.63.

Some time later, by a proclamation of 1854,[99] the Queen abandoned for herself, her heirs and successors all dominion and sovereignty over the said Orange River territory and ordered her officers and Ministers, military and civil, to be withdrawn from the territory with all convenient speed. This proclamation was followed by the Convention of Bloemfontein[1] which, _inter alia_, "finally freed the inhabitants of the Orange River territory from their allegiance to the British Crown', declaring them 'to all intents and purposes a free and independent people and their Government to be treated and considered thenceforth a free and independent people'.[2] As a result of this development, in an opinion of the British Colonial Office Law Officers[3] dated 5 February, 1900,[4] it was recognized that

> '(t)he status of the Orange Free State as thus established had continued unaltered up to the present time [and] (t)hat it [the Orange Free State] had concluded treaties with foreign Powers on an equal footing and without any interference or intervention on the part of the British Government'.[5]

It would seem, therefore, that the status enjoyed by the Orange Free State up to the commencement of the Anglo-Boer war in 1900 was that of an independent State, this independence having been granted by the British Crown and formally constituted by the Convention of Bloemfontein of 1854. The Bloemfontein Convention was not abrogated merely by the action of the Orange Free State in participating in the war. This was a consequence of the fact that the Convention was regarded as a dispositive treaty in that it created a status of independence and defined the boundaries of the territory.

(_b_) The South African Republic

The Sand River Convention of 1852, while not relieving the 'emigrant farmers beyond the Vaal River', who had originally quitted the Cape Colony in 1835, of their allegiance as British subjects, guaranteed them 'in the fullest manner ... the right to manage their own affairs and to govern themselves without any interference on the part of Her Majesty the Queen's Government'.

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99. Proclamation dated 30 January, 1854. Great Britain, House of Lords, Sessional Papers, vol. 13, April 1854, p. 93.

1. 23 February, 1854. B.F.S.P. vol.56, p.351.
2. Report of Law Officers to the Colonial Office dated 5 February, 1900.
3. Richard E. Webster and Robert B. Finlay.
4. Quoted in full by McNair _The Law of Treaties_ (1961) 706-710.
5. Ibid. 707.

In 1858 these 'emigrant farmers' styled themselves the South African Republic, and, as reported by the Law Officers,[6] 'as such Republic they acted and were recognized by foreign Powers as an independent State, making treaties with Portugal and Belgium on a sovereign footing. That ... continued to be the position of the South African Republic until 1877'.

In 1877, the newly created South African Republic, finding itself in dire straits, being both insolvent and continuously threatened with destruction by black tribes, indicated its willingness to come under British rule. As a result, Sir T. Shepstone issued a proclamation[7] declaring the South African Republic to be a British territory and it was brought under the Government of the Crown as a dependency acquired by cession, attaining in this way the status of a British Crown Colony. The Boers, however, never well disposed towards foreign rule, rebelled in December 1880 and peace was negotiated a year later with the signing of the Pretoria Convention.[8] The terms of this Convention 'guaranteed on behalf of Her Majesty that complete self-government, subject to the suzerainty of Her Majesty, her heirs and successors, will be accorded to the inhabitants of the Transvaal territory on the terms and conditions, and subject to the reservations and limitations' which were appended in a number of articles.

Subsequently, on 27 February, 1884, after a conference with delegates from the Transvaal, a new Convention called the London Convention was substituted for the Pretoria Convention. The London Convention neither explicitly re-enacted nor cancelled that portion of the Pretoria Convention which had granted self-government to the South Africa Republic; however, in the correspondence relating to the London Convention sent by the Earl of Derby to Sir H. Robinson, the South African Republic was described as 'a country having self-government as conceded under the Convention of Pretoria'.[9] In addition, the position was confirmed in a dispatch addressed by the Colonial Office to the High Commissioner for South Africa dated 16 October, 1897.[10]

It seems, therefore, that the status enjoyed by the South African Republic at the outbreak of the Anglo-Boer war in 1900 was one of self-

6. Ibid.
7. Dated 12 April, 1877: [illegible] vol. [illegible] p.40; C. 1776 p.152.
8. October 1881.
9. Quoted in the report of Webster and Finlay, McNair op.cit. 708.
10. Ibid.

government, subject to the suzerainty of the Crown, as constituted first in the Pretoria Convention of 1881 and later modified by the London Convention of 1884. The war did not, in the opinion of the Law Officers, Webster and Finlay, terminate the two Conventions as they belonged to the category of dispositive treaties which had created a definite status for the territory.[11]

It may be noted that prior to the commencement of the Anglo-Boer war in 1900, the Orange Free State and the South African Republic had negotiated a number of treaties, not only with each other but with the Cape Colony, Natal and neighbouring States as well. These included postal and telegraphic conventions, railway agreements, many treaties of friendship and commerce as well as a number of extradition treaties and boundary agreements.[12]

(c) <u>The Status of the Orange Free State and South African Republic in 1900 and the Effects of the Anglo-Boer War on Treaties hitherto concluded by these Republics</u>

During the Anglo-Boer war Britain formally annexed the Orange Free State and the South African Republic.[13] At this time the British Government as well as the courts[14] were adherents of the 'clean-slate' theory of State succession, the terms of which dictated that when the territory of one State had been annexed by another resulting in a merger, the treaties of the extinct State came to an end, at least in the absence of any other treaty obligations resting on the annexing State which required it to maintain treaties in force, and provided the treaties could not be classified as dispositive treaties. The British Government accordingly took the view that, in general, all treaties which had been concluded between the two Republics and other States had lapsed by the fact of annexation. The question arose with regard to one particular treaty, namely, the Treaty of Friendship and commerce concluded between the South African Republic and Portugal on 11 December, 1875,[15] whether the

11. Ibid. 709.
12. These treaties and agreements were all listed in the <u>Cape of Good Hope : South African Treaties, Conventions, Agreements and State Papers Subsisting on the 1st day of September 1898</u> (1898), portion of the index whereof is attached hereto as Annexure E.
13. Proclamation dated 1 September, 1900: B.F.S.P. vol. 92 p.547; Cd.426 p.1
14. <u>West Rand Central Goldmining Co.</u> v. <u>R.</u> [1905] 2 K.B. 391 (C.A.).
15. Listed in the index to the <u>Cape of Good Hope : South African Treaties, Conventions, Agreements and State Papers Subsisting on the 1st day of September 1898</u> (1898): Annexure E.

fact that Great Britain as suzerain of the South African Republic had assented to such treaties made any difference in the application of this rule. In reply the Law Officers advised the British Government[16] that 'the fact of such assent can in no way affect the lapse of the Treaty when the Transvaal has become part of His Majesty's dominions'.[17] All that the Law Officers were prepared to concede was that the factor of British suzerainty might have some bearing on the question of policy as to how far the Crown should be prepared to enter into new treaty obligations containing provisions similar to those present in treaties of the South African Republic which had lapsed through the annexation.[18]

Another example which illustrates the attitude adopted by the British Government towards succession to treaties of the two Boer Republics lies in its treatment of the arrangement which existed between Portugal and the South African Republic regarding railway traffic and the recruitment of black labour.[19] This was also deemed to have expired and was replaced by a new Convention with Great Britain in 1901.[20]

When at the close of the war a peace treaty, that is the Treaty of Vereeniging, was signed on 31 May, 1902, it contained no reference to a possible succession by the British Government to treaty obligations of the two Boer Republics. This omission may be interpreted as confirmation of the fact that the British Government regarded all such treaty obligations as having lapsed. In fact, instead of former treaties of the Orange Free State and South African Republic being succeeded to by the British Crown, the converse applied - the British Government took the view that these two territories automatically became subject to British treaty obligations once they became foreign possessions of the Crown.[21] Exactly when these changes took place is debateable as there are two possible dates involved, the first being the date of annexation by Britain of the territories, namely, 1 September, 1900; the second being the 31 May, 1903. The latter date is perhaps preferable, stemming as it does from the actual

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16. On 16 February, 1901.
17. Opinion of 16 February, 1901. F.O. Confidential Paper (7763), no.30; Appendix no. 73.
18. Ibid.
19. Concluded in 1884.
20. B.F.S.P. vol. 95 (1901) p.931.
21. Further in this regard see McNair op.cit. 636-7.

treaty of peace and the final capitulation of the Boers. In any event, the card index of the treaty section of the South African Department of Foreign Affairs reflects 31 May, 1902, as the date on which British treaties became binding on the territories of the two Republics.

One other problem, that of succession to treaties establishing boundaries, remains to be raised. In the Letters Patent providing for the government of the new British colony of the Transvaal,[22] the boundaries were described as comprising 'all places, settlements and territories which formed part of the territories of the South African Republic at the date when the said territories were annexed to and became part of our dominions'. Had the Letters Patent stopped at this point they would have indicated the British Government's acceptance of established boundaries, and this would have been in keeping with the widely held view that dispositive treaties, which include boundary agreements, were succeeded to despite the general application of the 'clean-slate' theory. The rationale with regard to succession to boundary treaties is well explained by Keith:[23]

> 'The successor State takes what he has conquered or what is ceded to him. He conquers or accepts a country with fixed boundaries as settled by European history, and he cannot claim to undo cessions which have already been carried out. The real fact is, of course, that a treaty of this sort is no longer a contract: the contract has passed into a conveyance and the transactions cannot, therefore, be affected by the fact that one of the parties to the original conveyance has changed.'

The Letters Patent, however, clearly altered existing boundaries by providing that the districts of Vryheid and Utrecht were to be excluded from the Colony together with 'such parts of the district of Wakkerstroom as may be defined and delimited by any Boundary Delimitation Commission ... appointed for that purpose'. After such definition and delimitation were complete the Governor was instructed to 'declare by proclamation the boundaries of the Colony, and the boundaries so declared shall from the date of such proclamation be the boundaries thereof'. It is clear from this document that the British Government no longer considered the London Convention of 1884 as the instrument in force as defining the boundaries of the Transvaal and other British territories, including the Bechuanaland Protectorate. Despite the fact that the London Convention

22. Dated London 23 September, 1902.

23. A.B. Keith <u>Theory of State Succession</u> (1907) 22.

created certain boundaries, the British Government did not regard itself as succeeding to these. For practical purposes, however, the boundaries of the new British colony of the Transvaal did not undergo any radical changes. They remained based to a large extent on the boundaries created by the London Convention. This perhaps evidences the fact that treaty stipulations defining a boundary form 'historical matter' which, together with other facts may be resorted to for the purpose of ascertaining the quantum of a piece of territory, and that it is therefore unnecessary to consider whether the stipulations of boundary treaties and other dispositive agreements survive a change in status or not.[24]

While there has not been much British practice on the subject of boundary treaties, it may be noted that when Alaska was ceded by Russia to America in 1867, the British Government adopted the attitude that the United States was bound by the recitals from an Anglo-Russian Commercial and Boundary Convention of 1825, at least in so far as 'the geographical limits of the ceded territory are concerned. Those recitals, although they do not constitute direct treaty engagement between Great Britain and the United States, make Articles III and IV of the Convention of 1825 evidence against the United States that Great Britain has an established title to the line of demarcation described in those Articles'.[25]

(B) The South Africa Act of 1909

When South Africa became a union in 1910, the position in regard to succession to treaties concluded by the former colonies was fairly straightforward. The matter was governed directly by the legislation which gave birth to the fledgling union, namely, the South Africa Act of 1909.[26] Article 148(1) of this Act provided that

> '(a)ll rights and obligations under any conventions or agreements which are binding on any of the Colonies shall devolve upon the Union at its establishment'.

This piece of legislation, enacted by the Imperial Parliament at Westminster, is illustrative of the general tendency, so far as the older Dominions were concerned, for succession to treaties to take place.[27]

24. McNair op.cit. 657.
25. Opinion of the British Law Officers of 26 December, 1867, F.O. 83/2225; Appendix no. 33.
26. 9 Edward VII, chapter 9.
27. Okon Udokang Succession of New States to International Treaties (1972) 181 noted that succession was especially prevalent as regards treaties of a technical or commercial character.

The devolution of treaties within the Commonwealth, particularly in regard to the older Dominions, was often achieved by an Act of the United Kingdom Parliament along the lines of the South Africa Act.

As between Great Britain and the Union, the South Africa Act operated to achieve assignment of all the treaties of the former colonies as a matter of internal constitutional law. This occurred by virtue of the continuity of the legal system. What of assignment at the international level? While the treaties in question would normally have lapsed on the international plane on a change of status such as occurred in South Africa in 1910 (the 'clean-slate' theory being then in vogue), nevertheless, in this instance they were kept in force after the assignment by tolerance on the part of the other parties to those treaties. D.P. O'Connell notes that succession occurred in respect of all the Dominions and was never controverted either by the Dominions themselves or by third States affected by such succession.[28] It may also be noted that the Union of South Africa had no independent treaty list in these early years - these only began in 1932 - it relied totally on the treaty lists supplied by the British Foreign Office.

Section 148(2) of the South Africa Act affords an interesting study. It provides that

> '(t)he provisions of the railway agreements between the Governments of the Transvaal, the Cape of Good Hope and Natal, dated the second of February nineteen hundred and nine shall, as far as practicable, be given effect to by the Government of the Union'.

It is questionable whether these railway agreements were treaties in the full international sense of the word as an application of the _inter se_ doctrine would have prevented such an interpretation. This doctrine[29] ensured that agreements between different parts of the British Commonwealth were not to be regarded as treaties between sovereign independent States nor were they to be governed by international law. Moreover, in 1909, the four South African colonies had reached various stages of self-government but they could not be regarded in any way as sovereign independent States. On account of the _inter se_ doctrine, the British Government had insisted that changes in government institutions within the Commonwealth were of significance only in municipal law.[30] Section 148

28. D.P. O'Connell 'Independence and Succession to Treaties' (1962) 38 _British Yearbook of International Law_ 84 at 97.

29. Discussed above at pp. 60-4.

30. D.P. O'Connell 'The Crown in the British Commonwealth' (1957) 6 _International and Comparative Law Quarterly_ 103 at 119.

of the South Africa Act seems to have been drafted with the idea of avoiding constitutional chaos by emphasising continuity of international agreements rather than with the aim of according South Africa full international personality. Indeed, the Act specifically reserved the right of concluding treaties, agreements and conventions for the British sovereign.[31] The prevailing attitude of the British Government towards treaty responsibility had been clarified in 1901 with the formation of the Australian Commonwealth, when the Dutch Government had complained of the failure of the Government of South Australia to fulfil the obligations contained in an Anglo-Dutch treaty concerning the treatment of merchant seamen. The Imperial Government had replied by stating that treaty obligations rested on the King and thus directly on the Imperial Government to which foreign States had therefore to look for redress. The King was the contracting party for each unit of the Empire and he alone remained personally responsible under the treaties irrespective of any constitutional changes which had taken place under his sovereignty.[32] There is no doubt that these statements similarly reflected the attitude of the Imperial Government towards the formation of the Union of South Africa in 1910. And, as A.P. Lester commented:[33]

> 'This view was convenient for foreign States; it accorded with the rule of international law that changes in municipal law do not affect international obligations; it was easy for it to be carried over to the different context in which units of the Empire became independent States in international law'.

When the Union of South Africa, along with the other Dominions, acquired international status in 1919, they, the United Kingdom and other countries accepted the position to be that they had inherited treaty rights and obligations of all kinds which had any possible territorial application to them and not only treaties in which they were specifically mentioned. C. Wilfred Jenks[34] attributed the relative ease with which this position was accepted by other States to the fact that it represented the culmination of a process of historical development in the course of which the Dominions had been progressively associated with the acceptance and

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31. Section 8.
32. D.P. O'Connell op.cit. 1[illegible]-9.
33. A.P. Lester 'State Succession to Treaties in the Commonwealth' (1963) 12 International and Comparative Law Quarterly 475 at 486.
34. C. Wilfred Jenks 'State Succession in Respect of Law-making Treaties' (1952) 29 British Yearbook of International Law 105 at 130.

implementation of treaty obligations.[35]

The Statute of Westminster of 1931[36] which was incorporated into South African law by the Status of the Union Act of 1934[37] had no effect on the problem of succession to treaties in South Africa. The two Acts, the former an Act of the Parliament at Westminster, the latter an Act of the South African Parliament, were not at all concerned with the international status of the Union, but with the important constitutional issue of which Parliament was capable of legislating for the territory. Neither Act mentioned executive responsibility - the prerogative of treaty-making remained at that stage vested in the British Crown. As there was no question of any new international status being conferred on the Union by these two Acts, the question of State succession to treaties remained in abeyance until 1961 when South Africa became a Republic.

(C) <u>The Republic of South Africa Constitution Act of 1961</u>

The instrument which effected the change from union to republic was the Republic of South Africa Constitution Act,[38] section 112 of which provided as follows:

> 'All rights and obligations under conventions, treaties or agreements which were binding on any of the Colonies incorporated in the Union of South Africa at its establishment and were still binding on the Union immediately prior to the commencement of this Act shall be rights and obligations of the Republic, just as all other rights and obligations under conventions, treaties or agreements which immediately prior to the commencement of this Act were binding on the Union'.

The first part of this provision relates mainly to treaties concluded by the former South African Colonies <u>after</u> 1900,[38A] as no treaties were thought to have survived the annexation of the Orange Free State and South African Republic during the Anglo-Boer war. Treaties concluded by any of the 4 colonies between 1900 and 1910, which were succeeded to by the Union of South Africa in 1910, and which were still in force in 1961, were assigned to the new Republic of South Africa. In addition,

35. Similar observations have been made by A.P. Lester op.cit. 506.

36. 22 & 23 Geo.5, c.4.

37. Act 69 of 1934.

38. Act 32 of 1961.

38A. Pre-1920 treaties binding on the Cape and Natal were also affected by s. 112. Both were British territories which had been granted responsible government, the Cape in 1872, Natal in 1893. Both had concluded a number of treaties, whose binding force remained unchanged by events taking place in the trekker republics.

all treaties which immediately prior to 1961 were binding on the Union of South Africa now became binding on the new Republic of South Africa.

The 1961 legislation was not simply another step in the constitutional evolution of the territory, but comprised a real change in State sovereignty and international personality. When South Africa left the British Commonwealth of Nations simultaneously adopting a republican form of government, all constitutional links with the British Empire were severed and the British sovereign was deposed as the South African Head of State. Section 112 of the Republic of South Africa Constitution Act was, therefore, vitally important in securing State succession to treaties. By enacting such a provision, the South African Parliament was following in the British tradition of securing succession by providing for it in the constitution. It is on this account very similar in style to section 148(1) of the South Africa Act of 1909,[39] which was a product of the British Parliament at Westminster and it is very likely that those responsible for drafting the 1961 constitution used the earlier one as their prototype.

The Republic of South Africa could have chosen to effect succession to treaties by negotiating a devolution agreement with Great Britain or by issuing a unilateral declaration of its intention to succeed to treaties, agreements and international conventions. The reason for choosing the vehicle it did, namely, via a provision in the constitution, probably lies in a survey of the historical development of the older British Dominions towards independence. Theirs was a gradual and largely peaceful evolution towards complete independence acquired through Imperial constitutional adjustments. Okon Udokang[40] contends that these constitutional adjustments, though of a municipal character, created certain consequences in international law. In his opinion,

> '(t)he recognition of the international legal capacity of the Dominions by other States implied a recognition of the effect of such constitutional changes on the international plane. This, together with the prevalence of the juridical notion of the indivisibility of the Crown ... may well have rendered unnecessary the need for the British Government to enter into devolution agreements with the Dominions as a mechanism for transferring treaty rights and obligations'.

39. 9 Edward VII, chapter 9.

40. Okon Udokang op.cit. 105-6.

The emphasis as regards the older Dominions centred on the gradual and prolonged stages of constitutional adaptation which had been instrumental in establishing their separate identities as international *personae* even *before* their attainment of sovereign Statehood. Compared with them the newer countries of the British Commonwealth of Nations were suddenly thrust into independence in the years following the Second World War. Deprived of such gradual constitutional adaptation and growing world recognition as autonomous States but realizing the importance of ensuring the continued operation of international treaties entered into by their erstwhile colonial overlords, these newly independent African States were forced to develop new methods of publicising their intention to succeed to treaties, namely, devolution agreements and unilateral declarations. South Africa, like the other 'older' Dominions, had no need of the international publicity surrounding the use of devolution agreements and unilateral declarations to make its position clear to the rest of the international community. Long before 1961 it had been regarded as an independent State with treaty-making powers and when it finally did attain complete independence from Great Britain it had already established treaty relationships with most other nations. Succession to treaties concluded prior to 1961 was just another logical step in a path well trodden.

(D) Succession to Treaties in Transkei

The territory known as Transkei, bordered on three sides by the Cape Province, Natal and the Kingdom of Lesotho and on its fourth by the Indian Ocean, is the first of the so-called South African 'Bantustans' or 'homelands' to gain full independence from the Republic through a process of peaceful evolution.

In its approach towards the problem of succession to international rights and obligations incurred on its behalf by the Republic of South Africa, the Government of Transkei has manifested an unorthodox approach by choosing to use the method of succession to treaties developed by the older British Dominions (including South Africa) rather than the recent practice of the rest of the African continent. In brief, Transkei has attempted to achieve succession through legislation rather than by concluding a devolution agreement with South Africa or by issuing a unilateral declaration of its intention to continue with treaty rights and obligations.

In 1963, the South African Parliament passed the Transkei Constitution Act[41] which conferred self-government on the territory.[42] No mention was made in this Act of succession to treaties and other international agreements, but it would have been premature to do so at that stage as the Transkei had not yet attained complete independence but was merely made 'a self-governing territory within the Republic of South Africa'.[43]

Subsequently, in 1976, a further statute was enacted by the South African Parliament[44] in which Transkei was designated 'a sovereign and independent State'.[45] Henceforth, Transkei would 'cease to be part of the Republic of South Africa'[46] and, as a result, the Republic would 'cease to exercise any authority over the said territory'.[47] Section 4 of this statute is particularly important as regards succession to treaties. It provides:

> 'All treaties, conventions and agreements binding on the Republic immediately prior to the commencement of this Act[48] and capable of being applied to the Transkei shall be binding on the Transkei, but the Government of the Transkei may denounce any such treaty, convention or agreement'.

This legislative enactment is in some ways similar to a devolution agreement[49] in that it is obviously intended to invest the emergent State with all the rights and obligations of those treaties capable of being applied to Transkei, and, at the same time, to absolve South Africa from its treaty obligations in so far as they extended to the territory now comprising Transkei. Whether section 4 achieves either objective is open to doubt as ultimately the question of succession to treaties must rest outside the ambit of the South African Government and in the hands of Transkei itself and the other States parties to the treaties in question. As at the time of writing, Transkei has no separate international status as far as the international community is concerned, but is still regarded as an integral part of the Republic of South Africa. Its

41. Act 48 of 1963.
42. Ibid., article 1.
43. Ibid.
44. Status of the Transkei Act 100 of 1976.
45. Ibid., section 1(1).
46. Ibid.
47. Status of the Transkei Act, op.cit., section 1(2).
48. The Status of the Transkei Act 100 of 1976 came into operation on 26 October, 1976, under Proclamation 213 GG 5314 of 15 October 1976.
49. It is not, however, a devolution agreement because only one State, namely, South Africa, is involved and in any event Transkei at this time was not yet a sovereign independent State.

sovereign independence has not been recognized by any Government other than the South African Government, and in view of this fact, it cannot be said that any of these States has regarded South Africa as being released from treaty obligations extending to Transkei. This state of affairs may very well lead to practical complications. Take, for example, the extradition treaty concluded in 1968 between the Governments of South Africa and Swaziland.[50] If Swaziland wished to extradite a criminal from the territory comprising Transkei, it would regard the said extradition agreement as the proper channel to utilise and would, in all likelihood, choose to limit its dealings solely to the South African Government. If the latter then declared that it was unable to carry out its obligations in terms of the treaty as Transkei was now a sovereign independent State and that Swaziland should negotiate directly with Transkei, the Government of Swaziland could hold the South African Government legally responsible in international law for breach of its treaty obligations.

In any event, South Africa cannot by this piece of legislation impose its absolute will on Transkei and thereby force the Transkeian executive to declare its succession to treaties. At best, the Status of the Transkei Act is an expression of the desire of the South African treaty-making authority to see treaties with South Africa 'capable of being applied to the Transkei' continue in force as between the Government of the Transkei and the other contracting parties. Taken on its own, then, section 4 of the Status of the Transkei Act would not be enough to achieve the desired succession to treaties.

Section 5 of the Status of the Transkei Act is also deserving of mention. It provides that

> '(a)ll treaties, conventions and agreements entered into between the Government of the Republic and the Government of the Transkei prior to the commencement of this Act[51] and still in force at such commencement, shall remain in force as international treaties, conventions or agreements in so far as the parties thereto are concerned'.

In addition, for the purposes of implementing any such treaty, convention or agreement, 'any Department of State ... or any person receiving

50. Extradition Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland: Republic of South Africa Treaty Series 4 of 1968.

51. 26 October, 1976.

financial assistance from the State may perform any function outside the Republic which it would be capable of performing therein'. On 17 September, 1976, approximately one month before Transkei became independent, a number of 'treaties' and agreements were concluded between the two Governments. These agreements covered a wide variety of topics, ranging from agreements to regulate the movement of citizens across the borders between the Republic and Transkei, to the mutual admission of attorneys, notaries and conveyancers, to the combating of sea pollution, to the construction of telecommunication routes, to the registration of voters and conduct of elections, to the movement of meat and meat products between the two countries and to the employment by the South African Government of Transkeian citizens. As could be expected, a number of agreements provided for South African aid to Transkei in fields such as forest technology, health and food matters, hospitals, loan facilities, the secondment of judges, education and administration. All the agreements were concluded in anticipation of the forthcoming Transkeian independence and provided for entry into force on the date of independence.[52] Section 5 of the Status of the Transkei Act may be seen as making provision for the succession of treaties concluded between the Governments of the Republic of South Africa and Transkei prior to the latter's independence. Although at that stage Transkei could not, strictly speaking, conclude treaties as it was not yet a sovereign independent State, nevertheless, it was a self-governing territory on the eve of independence.[53]

Succession to treaties by Transkei has not, however, been left to the South African Parliament to achieve. The Republic of Transkei itself subsequently enacted the Republic of Transkei Constitution Act of 1976,[54] article 68 of which states that

> '(a)ll rights and obligations under conventions, treaties and other similar agreements which were binding on the Government of Transkei immediately prior to the commencement of this Act shall be rights and obligations of the Republic of Transkei'.

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52. All these agreements were published for general information in GN 1976 GG 5320 of 22 October 1976 Reg.Gaz. 2384.

53. It is interesting to note that most of the 'treaties' concluded between the Governments of South Africa and Transkei on 17 September contain clauses allowing for modification or withdrawal - an indication that the South African authorities took a realistic attitude towards succession of treaties by Transkei.

54. Transkeian Government - Transkei Official Gazette vol.13 No.46 of 26.10.76. Government Notice No.101 in terms of section 3 of the Status of the Transkei Act 100 of 1976.

By enacting this provision, the Transkeian Parliament has clearly taken as its model section 148 of the South Africa Act of 1909[55] as well as section 112 of the Republic of South Africa Constitution Act of 1961.[56] By so doing it has ignored the precedent set by most newly independent States on the African continent. Transkei has chosen not to send a unilateral declaration to the Secretary-General of the United Nations to be circulated among member States. This omission may result from the fact that all member States, with the exception of South Africa, have refrained from recognizing Transkei as a sovereign independent State. Can article 68 of the Transkei Constitution Act nevertheless be regarded as a type of unilateral declaration, bearing in mind that such declarations have taken different forms? It might well be argued that registration of the declaration with the United Nations is not an absolute requirement for its validity, but merely desirable from the publicity point of view as being the most convenient method of making known the intention of a newly independent State to succeed to the treaty rights and obligations of its predecessor.

Even if article 68 of the Transkei Constitution Act could not be regarded as a unilateral declaration, it is not devoid of legal effect, especially in the light of the opinion of the International Court of Justice in the Nuclear Tests case[57] where it was decided that statements contained in a communiqué issued by the office of the President of the French Republic[58] and others made by the President of France at a press conference[59] and yet others made by the French Minister of Defence[60] to the effect that France would cease to conduct atmospheric nuclear tests following the conclusion of the 1974 series of tests, were creative of legal obligations.[61] *A fortiori* an undertaking to succeed to treaties contained in a formal document such as the constitution of a new country,

55. 9 Edward VII, chapter 9.
56. Act 32 of 1961.
57. 1974 I.C.J. Reports 253.
58. Ibid., 265.
59. Ibid., 266.
60. Ibid.
61. See on this subject an article by Thomas M. Franck 'World Made Law: The Decision of the International Court of Justice in the Nuclear Test Case' (1975) 69 American Journal of International Law 612.

would also be binding. The court stated[63] that what confers on a declaration the character of a legal undertaking is the <u>intention</u> with which it is made. If an undertaking is couched in specific terms and is made publicly and with an intent to be binding, then despite the fact that it is not made within the context of international negotiations proper, it will be binding on the State concerned. The provision as regards succession to treaties in the Transkeian constitution would qualify in these terms to be regarded as binding on the Government of Transkei. Therefore, while Transkei has not seen fit to conform to the practices of most newly independent States as regards succession to treaties, it has, like them, opted for legal continuity and has chosen to abide by the treaties concluded on its behalf by the Republic of South Africa. The vehicle for achieving such succession has not been a separate treaty between the predecessor and successor State, nor a unilateral declaration in the usual sense, but legislation. This course of action may prove unwise from a political point of view in that it may further increase the differences between Transkei and other newly independent African States, and add yet another obstacle in the way of its ultimate recognition as a sovereign independent State.

This precedent carries with it a warning for South-West Africa/Namibia. The South African Government which at present controls the external affairs of the region, has indicated publicly its intention to grant Namibia full independence within the next two years. The question of succession by Namibia to treaties concluded by the South African Government and extended to the area is bound to arise. It should be borne in mind that the closer Namibia conforms to the example set by other newly independent States in this regard and the less it sets up the South African method of succession to treaties as its model, the more readily it will be accepted into the international community.

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63. 1974 I.C.J. Reports 266. It should also be noted in this regard that similar problems beset the newly-independent State of Bophuthatswana, which achieved independence in the same way as Transkei on 6 December, 1977.