A CRITICAL ANALYSIS OF THE TREATY-MAKING POWERS OF THE UNION OF SOUTH AFRICA AND THE REPUBLIC OF SOUTH AFRICA

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A CRITICAL ANALY OF THE TREATY-MAKING POWERS OF THE UNION OF SOUTH :A AND THE REPUBLIC OF SOUTH AFRICA

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FORMAL DECLARATION

I. ROSALIE PAM SCHAFFER

hereby certify that this thesis on the Treaty-Making Powers of the Union of South Africa and the Republic of South Africa is my own unaided work and that any assistance received has been acknowledged and all sources of information have been mentioned.

To my knowledge neither the substance of this thesis or any part thereof has been or is being submitted for a degree in this or any other university.

Information used in the thesis has been obtained by me while working for an organization other than the University of the Witwatersrand, but the above-mentioned information has been obtained independently of and has been unconnected with the work for which I have been employed by such organization.

DATED AT MELBOURNE, AUSTRALIA THIS [illegible] DAY OF MAY 1978.

Rosalie Pam Schaffer.

ABSTRACT

The evolution of the treaty-making power in the Republic has been heavily influenced by the fact that South Africa, as one of the 'older' British Dominions, acquired independence through a slow but orderly constitutional process. In the first two chapters of this thesis I have therefore attempted to sketch briefly the forces at work in South Africa in its earliest formative years. This has entailed an examination of certain constitutional law issues (including the prerogative powers of the Crown in relation to treaties and declarations of war) as well as problems of international law. My research in this field led me to London and the wealth of material lodged in the various Commonwealth libraries.

In the third and fourth chapters I have concentrated on more immediate matters, namely, the negotiation and conclusion, ratification and implementation of treaties in present-day South Africa. The dearth of published information on this topic has necessitated the construction of an overall picture by the interweaving of information obtained from the Department of Foreign Affairs with the views of the International Law Commission as expressed in the 1969 Vienna Convention on the Law of Treaties. It should be noted that, although South Africa has not yet ratified the Convention, it recognizes its international validity and attempts, whenever possible, to give effect to its provisions.

Chapter five covers the constitutional limitations on the treaty-making power as well as the inter-relationship of international law with municipal law. In both these related areas South African practice has been moulded on British lines. As a result I have been led to compare the law (both precedent and principle) in South Africa with that of Britain. I have attempted to show, too, that the Blackstone doctrine that 'international law is part of the law of the land' is not applicable to treaties.

A number of States have acquired independence in recent years or are in the process of doing so at the present time. With this in mind, an international conference was convened in Vienna in April, 1977, to discuss succession of States to treaties, and a draft convention was formulated. I have included a chapter on the South African approach to succession of States to treaties not only because the problem is topical but also because it affects the Republic personally. South African courts have been approached on several occasions to decide whether treaties have

survived the defunct Federation of Rhodesia and Nyasaland. With yet another change in the international status of Rhodesia imminent, the matter is far from settled. In addition, the Republic has recently granted independence to Transkei and Bophuthatswana. Although these States have not, to date, been accorded recognition by the international community, their existence is a fact and the problem of their succession to treaties is pressing. I have attempted here to analyse current international attitudes towards succession of States to treaties and to compare these to the approach of the South African Government and the courts.

The final chapter of the thesis covers the South African attitude to interpretation of treaties, set against a background of current international practice. The task of summarizing the approach of the international community has not been easy, especially in view of the fact that the recent provisions on interpretation to treaties in the Vienna Convention on the Law of Treaties have attracted a fair amount of criticism by States and academic writers. South African courts have had scant experience in interpreting treaties. As a result, I have concentrated on assessing the attitude of the Government, which, I believe, mirrors the probable approach of the courts. This attitude was made manifest during the course of the various South-West Africa disputes which were aired before the International Court of Justice.

I would submit in conclusion that the treaty-making power of the Republic of South Africa today reflects a number of influences. The basic pattern was set during those years when South Africa was part of the British Commonwealth of Nations. The British influence has proved to be powerful and durable. Apart from this, recent world trends, exemplified by the Vienna Convention on the Law of Treaties and the draft articles on Succession of States in respect of Treaties, have helped to shape the South African scene. This illustrates the strong desire of the Republic to be regarded as an active participant in the international community despite the increasing hostility of the latter. Finally, events and attitudes peculiar to southern Africa have also played a part in moulding South African practice. These three elements have combined to produce a uniquely South African approach to the exercise of the treaty-making power.

For Raymond.

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ABBREVIATIONS

A.J.I.L.	- American Journal of International Law
Annual Survey	- Annual Survey of South African Law
B.C.R.C.	- British Commonwealth Relations Conference
B.F.S.P.	- British Foreign and State Papers
B.Y.I.L.	- British Yearbook of International Law
C.I.L.S.A.	- Comparative and International Law Journal of Southern Africa
G.A.	- General Assembly (United Nations)
G.A.O.R.	- General Assembly Official Records (United Nations)
G.G.	- Government Gazette (South Africa)
G.N.	- Government Notice (South Africa)
Grotius Society	- Transactions of the Grotius Society
Harvard L.R.	- Harvard Law Review
I.C.A.O.	- International Civil Aviation Organisation
I.C.J.	- International Court of Justice
I.C.L.Q.	- International and Comparative Law Quarterly
I.L.C.	- International Law Commission
I.L.M.	- International Legal Materials
I.L.O.	- International Labour Organisation
L.N.T.S.	- League of Nations Treaty Series
L.Q.R.	- Law Quarterly Review
Parl. Papers	- Parliamentary Papers
P.C.I.J.	- Permanent Court of International Justice
Proc.	- Proclamation
Recueil	- Recueil des Cours. Academie de Droit International de la Haye
Reg. Gaz.	- Regulation Gazette (South Africa)
R.S.A.T.S.	- Republic of South Africa Treaty Series
S.A.L.J.	- South African Law Journal
S.C.	- Security Council (United Nations)
T.H.R. - H.R.	- Tydskrif vir Hedendaagse Romeins-Hollandse Reg
U.G.T.S.	- Union Government Treaty Series
U.K.T.S.	- United Kingdom Treaty Series
U.N.T.S.	- United Nations Treaty Series
Y.B.I.L.C.	- Yearbook of the International Law Commission

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THE EVOLUTION OF THE TREATY-MAKING POWER IN THE UNION OF SOUTH AFRICA AND THE REPUBLIC OF SOUTH AFRICA

Introduction

An appreciation of the present status of the treaty-making power in the Republic of South Africa is impossible without some knowledge of the historical background involved. It is therefore proposed to trace historically the development of Dominion authority within the British Commonwealth of Nations, of which South Africa was a member until May, 1961. The early evolution of the Commonwealth centred mainly on the acquisition of colonial autonomy within the British Empire which involved, primarily, developments in the area of constitutional law. However, once the Dominions began to assert claims to an international personality distinct from that of the Empire as a whole, problems of international law arose. Any discussion of the development of the treaty-making power in the Commonwealth in general and in the Republic of South Africa in particular must, therefore, take account of both constitutional and international law aspects of the historical progression of the Dominions from colonial to sovereign status.

(a) The Position before 1914

(i) Executive and Legislative Powers in the British Colonies

The development of autonomy in the Dominions and their powers in respect of treaty-making begins with the introduction of responsible government.[1] This type of government in the Dominions was inspired by the Durham Report of 1839 which had recommended responsible government as a solution to the difficulties that had arisen in the operation of representative institutions in Lower and Upper Canada.[2] Instructions were sent in [illegible] to the Governor of Nova Scotia and to Lord Elgin in Canada to the effect that they should henceforth act on the advice of Ministers acceptable to the representative legislatures.[3] Responsible

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1. Gunther Doeker The Treaty-Making Power in the Commonwealth of Australia (1966) 1.
2. Halsbury's Laws of England edited by Lord Simonds 3 ed (1953) V 446.
3. E.C.S. Wade and Godfrey Phillips Constitutional Law 8 ed (1970) [illegible].

government was subsequently extended to Newfoundland, Australia, New Zealand and South Africa.

Prior to 1840, executive power in the Colonies vested in a Governor appointed by the Crown, assisted by an Executive Council chosen by and responsible to him alone and not to the elected legislature. This had resulted in clashes between the executive and the legislature. The grant of responsible government effected a substantial change and gave the colonies an autonomy in internal affairs, which development was intensified by the subsequent federalising movements in Canada, Australia and, in 1910, the unification of South Africa.[4] In each case, a relaxation of imperial control followed the grant of responsible government, although the Imperial Government did not relinquish all control over colonial affairs.

The constitutional status of the Colonies before 1914 was determined by the various colonial constitutions as well as by the governing Imperial statute. the Colonial Laws Validity Act of 1865,[5] which had been passed to eliminate the doubts that had been cast on the validity of colonial legislation which conflicted with English law. It had been suggested, in a number of judgments delivered in the mid-nineteenth century by South Australian courts, that any legislation passed by a colonial legislature would be void if it was repugnant to the law of England, whether common law or statute. Had such statements been correct, the recent grants of responsible government would have been stultified by disabling the colonial legislatures over a wide field of legislation.[6] The Colonial Laws Validity Act freed the colonies from the doctrine that colonial laws must be consistent with the basic principles of the English common law[7] and it affirmed the power of colonial legislatures to amend their constitutions.[8] However, the Act maintained a substantial degree of colonial subordination, in

4. Malcolm M. Lewis 'The International Status of the British Self-Governing Dominions' (1922-3) 3 British Yearbook of International Law 21 at 22.
5. 28 and 29 Vict., c.63. See Annexure A.
6. Wade and Phillips op.cit. 435-6.
7. See Annexure A, section 3.
8. See Annexure A, section 5.

that the United Kingdom Parliament retained the power not only to legislate for the whole Empire but, in addition to veto any colonial legislation that might conflict with such power.[9]

Furthermore, the idea was prevalent that the Dominions were not able to pass legislation having extra-territorial effect.[10] This belief had led to colonial reliance on the Imperial Parliament at Westminster, which had then either legislated directly for the entire Empire or which had come to the aid of a particular colonial legislature in need of an extra-territorial law for some purpose. This happened in cases such as extradition, foreign enlistment, merchant shipping, copyright, bankruptcy and naturalization.[11] Apart from this, the Imperial Parliament showed an increasing disinclination to interfere with Dominion legislative autonomy. Professor Dicey, describing the position as it prevailed in 1914, wrote:

> 'The power of the Crown i.e. of the British Ministry to veto or disallow in any way any Bill passed by the legislature of a Dominion ... is now most sparingly exercised, and will hardly be used unless the Bill directly interferes with Imperial interests or is as regards the Colonial legislature <u>ultra vires</u>. Thus the Crown, or in other words a British Ministry, will now not veto or disallow any Bill passed by the legislature of a Dominion on the ground that such a Bill is indirectly opposed to the interests of the United Kingdom or contradicts legal principles generally upheld in England, e.g. the principle of free trade.'[12]

A further restriction was placed on Dominion autonomy by the existence of the Privy Council which was empowered to admit appeals from any court in the Dominions. In the case of South Africa, appeals to the Judicial Committee were prescribed by the South Africa Act of 1909.[13] The appellate jurisdiction of the Judicial Committee operated not only to maintain the overriding force of Imperial legislation, but also to preserve uniformity of law as the prerogative of the Crown.[14]

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9. See Annexure A, section 27.
10. <u>McLeod</u> v. <u>Attorney-General for New South Wales</u> [1891] A.C. 455.
11. Lewis op.cit. 22.
12. A.V. Dicey <u>An Introduction to the Study of the Law of the Constitution</u> 8 ed. (1915) Introduction.
13. 9 Edw.VII; ch.9, 1909.
14. Lewis op.cit. 2[illegible]; Appeals from South African courts to the Privy Council were only abolished by the Privy Council Appeals Act 16 of 1950.

(ii) Status of the Dominions in respect of Technical and Commercial Agreements

As early as 1854 the Dominions acquired a voice in the negotiation of technical and commercial treaties. The British Government, through the activities of Lord Elgin, the Canadian Governor-General, had secured acceptance by the United States of America of the so-called Reciprocity Treaty, a trade agreement operating between the United States and Canada. Although the treaty bore no Canadian signature, Lord Elgin, as Governor-General, acted essentially as desired by the Canadian Ministry, in accordance with the system of responsible government. While the treaty was British in form, it recognised that each part of the Empire was distinct in its interests, and established the doctrine that it was proper for special treaties to be negotiated for colonies that required them.[15]

In 1859, the British Government approved an Act of the Canadian Government that increased tariffs on imported goods (including British goods). This established the right of a self-governing colony to determine the tariff on both foreign and British goods. This Act, together with the events of 1854, laid the foundation for the principle of allowing self-governing colonies freely to manage their own trade relations.[16]

This, in turn, meant that the Imperial Government had to come to the aid of the Dominions in the negotiation of their commercial agreements with foreign powers, and the practice was adopted of associating a Dominion representative with the British ambassador to the country concerned during the negotiations. After 1[illegible]4, it became the rule for the Dominion representative to sign together with the British ambassador.[17]

A Colonial Conference was held at Ottawa in 1894 which discussed the principles that were to apply in the future to commercial treaties. These principles were subsequently embodied by Lord Ripon, the Colonial Secretary, in a dispatch dated 28 June, 1895, which provided, inter alia,

15. Arthur Berriedale Keith The Dominions as Sovereign States (1938) 6.

16. W.P.M. Kennedy and H.J. Schlosberg The Law and Custom of the South African Constitution (19[illegible]5) 4[illegible]7.

17. Keith op.cit. 7; Lewis op.cit. 26.

that separate treaties might properly be concluded with colonial co-operation for any colonies that desired them,[18] subject to the proviso that the Imperial Government should be kept informed of the progress of the negotiations. However, the dispatch read further:

> 'Any agreement made must be an agreement between Her Majesty and the sovereign of a foreign State, and it would be to Her Majesty's Government (in the United Kingdom) that the foreign State would apply in case of any questions arising out of the agreement. To give the colonies power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and sovereign States, and would be equivalent to breaking up the Empire into a number of independent States, a result injurious to the colonies and to the mother country, and one that would be desired by neither party.' [19]

This method of negotiation was not altogether satisfactory as far as the Dominions were concerned because it involved the intervention of the Imperial Government not only in the grant of authority to negotiate but also in the signature and subsequent ratification of the treaty.

Further extension of the power of negotiating commercial treaties was conceded in 1907 when it was agreed that a British negotiator need no longer assist the Dominion representative. Imperial control was not, however, altogether abrogated, as the treaty had still to be signed by an Imperial representative. Furthermore, ratification was to take place only after consideration by the Dominion Government and the Imperial Government, and would be accorded only if the latter Government were satisfied that the treaty was in agreement with the principles laid down in 1895.[20]

As a corollary to the decentralisation [illegible] power of negotiating commercial treaties, the Imperial Government introduced the practice of including in its own commercial treaties a clause providing that the treaty should not become applicable to a self-governing Dominion unless the latter gave notice of adherence within a particular time.[21]

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18. Keith op.cit. 8.
19. Dispatch from the Secretary of State for the Colonies to the Governor-General of Canada, the Governors of the Australasian Colonies (except Western Australia) and the Governor of the Cape of Good Hope. [illegible]. 7824 of July 18[illegible]5.
20. Keith op.cit. 8.
21. Sir Kenneth Roberts-Wray Commonwealth and Colonial Law (1966) 250 dates this practice from 18[illegible], while Keith op.cit. 9 contends that this practice began as early as 1877.

In 1899, a further practice was instituted giving self-governing Dominions the right of separate withdrawal in all commercial treaties negotiated by the Imperial Government. The first treaty which contained such a right was a convention between Great Britain and Uruguay of that year.[22] This right was extended to most existing treaties, by agreement with the foreign States concerned, in compliance with a resolution adopted at the Imperial Conference of 1911.[23]

(iii) <u>The Conduct of Foreign Policy</u>

The British Dominions, prior to the first World War, had not attained that degree of autonomy with respect to political treaties that they had come to exercise in regard to commercial treaties. As Doeker[24] points out:

> 'This was not surprising, since the Imperial Government incurred responsibility in the eyes of foreign powers for any international delinquency committed by any part of the Empire.'

Political treaties were made by the Crown on the advice of the Imperial Ministry, which treaties were binding on the Dominions whether or not their Governments consented to them.[25] The Dominions, with rare exceptions, were excluded from participation in the conclusion of such treaties.[26] Despite this, the Imperial Governmen from as early as 1857, adopted the approach that colonial interests (as distinct from purely Imperial interests) had to be considered during negotiations.[27]

In some political treaties concluded with foreign States the Imperial Government inserted a clause granting the Dominions the power of separate adherence; nevertheless this practice was not always followed. The Hague Convention of 1[illegible] and 1[illegible], as well as the General Act of Algeciras regarding Morocco in 1906 were all signed

22. Lewis op.cit. 27.
23. Cd. 5745 p.18.
24. Doeker op.cit. 3.
25. Lewis op.cit. 23.
26. Robert B. Stewart 'Treaty-Making Procedure in the British Dominions' (1938) 32 <u>American Journal of International Law</u> 467.
27. Frith op.cit. 10.

by Imperial Ministers for the Empire as a whole and the Dominions were not given the power of separate adherence to them.[28] The same procedure was followed with the signing of the Anglo-French Entente of 1904 and the Anglo-Russian Convention of 1907. The former was basically a military alliance directed against potential German aggression as at the time both France and Great Britain were growing fearful of Germany's rapidly increasing naval and military strength. France and Russia were at this period already allies and the 1907 Anglo-Russian Convention had the effect of combining the Franco-Russian Alliance and the Anglo-French Entente in a higher unit of co-operation. So far no Dominion had raised the question of Dominion participation in general foreign policy. However, the failure of the Imperial Government to consult the Dominions before signing the Declaration of London in 1909, evoked widespread criticism.[29] As a result, the Imperial Conference of 1911 resolved that in the future the Dominions, where practicable, should be consulted before international obligations affecting them were undertaken.[30] The Imperial Government, despite this, declined to relinquish its exclusive responsibility for the determination of matters of high policy in the realm of foreign affairs.[31] While Dominion negotiators might henceforth negotiate and sign treaties, they inevitably acted, as regards signature, together with Imperial representatives. The outcome was that the treaty bound the Crown as a unity, although the obligation might be restricted[32] (for example) to South Africa alone. In this way the diplomatic unity of the Empire was maintained.

While there was consensus that the treaty-making power during that period vested in the Crown, treaties which altered the law of the land or affected the rights and duties of British citizens would only become operative internally by legislative action taken by the

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28. Lewis op.cit. 23-4; Keith op.cit. 12.
29. Keith op.cit. 12-13; Halsbury's Laws of England op.cit. 453.
30. Cd. 5745 p.15.
31. Cd. 5745 p.71.
32. Keith op.cit. 13.

Imperial Parliament and made applicable to the entire Empire, or, in the absence of such Imperial legislation, by an Act of the Dominion Parliament.[33] Sir William Anson remarked that this practice seemed 'to follow from the general principles of the [English] Constitution'.[34]

In 1912, for the first time, negotiators were appointed by the King on the advice of the Dominion Governments, tendered through the Colonial and Foreign Offices, to act on behalf of the various Dominions at the Radio-telegraphic Convention of that year. Special full powers were issued for each delegation,[35] although the United Kingdom delegates received the ordinary, unqualified full powers which authorized them to sign for the whole Empire.[36] A similar procedure was followed in 1914 when a conference on the Safety of Life at Sea was held.[37] The significance of these procedures lies in the fact that the votes of the various plenipotentiaries representing the United Kingdom and the Dominions might, for the first time, be differently cast.[38]

(iv) War and Peace

The question of war and peace strikingly illustrates the slowness of the transition of Dominion status from dependence to independence, although, paradoxically, participation by the Dominions in the first world war may be regarded as the prime factor in the eventual hastening of this process.[39] The United Kingdom Government, subject to its responsibility to the Imperial Parliament at Westminster, exercised sole authority in all matters relating to the declaration of war and the maintenance of peace.[40] It was not bound to consult the Dominion Governments in regard to these matters. As a result, the Dominions recognised that they might become embroiled in a war about which they had not been consulted.[41] As early as 1870, a Royal Commission appointed by the Governor of Victoria recommended that the

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33. Lewis op.cit. 24.
34. William Anson The Law and Custom of the Constitution 2 ed (1896) I 103.
35. Keith op.cit. 14.
36. Roberts-Wray op.cit. 250.
37. Keith loc.cit; Roberts-Wray loc.cit.
38. Lewis op.cit. 28
39. Roberts-Wray op.cit. 251.
40. Stewart op.cit. 467.
41. Lewis op.cit. 25.

Australian colonies should be given the right of concluding treaties. This would have had the effect of making them sovereign States and would have enabled them to remain neutral had the United Kingdom declared war. There was also some talk in the Cape as to whether the Cape Colony could remain neutral in the Anglo-Boer War of 1899-1902.[42] Neither of these ideas was, however, seriously entertained by the Dominions. They accepted the constitutional position to be such that if part of the Empire was at war, the whole must be at war.[43]

In any event, the declaration of war by the Crown in 1914 automatically brought the Dominions into hostile relations with Germany, and separate declarations by the Dominions were unnecessary. The German Foreign Office announced on 13 April 1914 that 'Germany must be considered at war with all British Colonies.'[44]

(v) The Establishment of Foreign Offices in the Dominions

Yet another factor illustrating the degree of control exercised by the Crown over the treaty-making powers of the Dominions lies in the fact that, prior to 1914, the Dominions had no Foreign Offices, nor did they send or receive diplomatic agents. Australia and Canada created Departments of External Affairs as early as 1900 and 1909 respectively, but it was not the purpose of those Departments to conduct and control foreign affairs and international relations.[45]

The attitude of the British Colonial Office was plain:

> 'A Foreign Power can only be approached through Her Majesty's Representative, and any agreement entered into with it, affecting any part of Her Majesty's Dominions, is an agreement between Her Majesty and the Sovereign of the foreign State .... To give the Colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and sovereign States, and would be equivalent to breaking up the Empire into a number of independent States .... The negotiation, then, being between Her Majesty and the Sovereign of the foreign State, must be conducted by Her Majesty's representative at the Court of the foreign Power, who would keep Her Majesty's Government informed of the progress of the discussion, and seek instructions from them as necessity arose. It could

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42. Roberts-Wray loc.cit.
43. Sir Wilfred Laurier did point out, during the Canadian Naval Debates of 1910, that the actual extent to which the Dominions would participate in hostilities would be a matter for each Dominion to decide for itself.
44. Daily Chronicle 14 August 1914 as quoted in Lewis op.cit. 35-6.
45. Dooker op.cit. 6.

> hardly be expected, however, that he would be sufficiently cognisant of the circumstances and wishes of the Colony to enable him to conduct the negotiation satisfactorily alone, and it would be desirable generally, therefore, that he should have the assistance, either as a second Plenipotentiary or in a subordinate capacity, ... of a delegate appointed by the Colonial Government.'[46]

As a result of the constitutional position of the Dominions, all overseas diplomatic negotiations affecting South Africa prior to 1914 were handled by the British Crown. After the formation of the Union of South Africa, diplomatic activity was channelled through the British Foreign Office, which was aided by the South African Prime Minister and the Governor-General of South Africa, in their capacities as representatives of the British Government and Crown. The Union had no international status. It was simply a colonial subordinate of the British Empire.[47]

Before the First World War, South Africa lacked even the basic diplomatic machinery vital for the conduct of its own foreign affairs and treaty-making powers. Bekker[48] contends that one example of the far-reaching results of the lack of such machinery was the handling of the South-West Africa affair at the end of the nineteenth century. On 3 February, 1884, the British Government sent a telegram to the Government of the Cape of Good Hope requesting the latter to proclaim British jurisdiction over Angra Pequena (the name given to part of South-West Africa at that time) and the adjacent territory. The Governor of the Cape replied by asking that the matter be postponed until after the general election which was then in progress, as many of the Ministers were unavailable. Three months later, in reply to a further request by the British Government, the new Cape Government begged a further postponement of ten days. On 29 May, 1884, the Governor of the Cape advised that it was finally ready to annex the territory on behalf of the British Government. This advice was, however, three days too late - Bismarck had already annexed the territory on 26 May, 1884.

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46. Dispatch from the Secretary of State for the Colonies to the Governor-General of Canada, the Governors of the Australasian Colonies (except Western Australia) and the Governor of the Cape of Good Hope C.7824 of July, 1895.

47. M.J. Bekker <u>Histories-Empiriese Studie van die Suid-Afrikaanse Diplomatieke en Konsulêre Diens as Staatkundige-Organisasie</u> Dissertation for the Degree of M.A. Potchefstroom University (1973) p.36.

48. Bekker op.cit. [illegible]

Thus the lack of a permanent department to handle South African foreign affairs cost South Africa not only the right of possession of the territory, but led ultimately to the present day problems surrounding the Mandate over South-West Africa. Bekker's interpretation of these events, viz., that South Africa's failure to annex Angra Pequena and the surrounding territory resulted from the lack of diplomatic machinery vital for the conduct of foreign affairs, is open to doubt. C. Headlam, in his article 'The Race for the Interior' in The Cambridge History of the British Empire[49] attributes the failure of the Cape Government to act timeously simply to the existence of the parliamentary crisis which had arisen with the defeat of the Scanlen ministry. It was not until Thomas Upington, the new Prime Minister, had appointed a new cabinet that the Cape Government could properly turn its attention to the question of the annexation of Angra Pequena.

It was only after the 1926 Imperial Conference that the first Department of External Affairs was created. On 1 June, 1927, the Prime Minister, General Hertzog, became the first Minister of External Affairs (a tradition which continued for twenty-eight years). Professor Dr. H.D.J. Bodenstein of Stellenbosch University was appointed as the Secretary of the Department.[50] In the 1927/8 parliamentary debates, General Hertzog expressed the situation to be as follows:

> 'The Governor-General is no longer the representative of the British Government in South Africa, but solely of His Majesty the King. Therefore, all the work of the Office of the Governor-General for the British Government, all the communications between that Government and ourselves no longer takes place between him and the British Government, with the result that the work of the office of the Governor-General has merely been transferred to the Department of External Affairs.'[51]

Prior to this development, however, the majority of treaties were negotiated by the British Government. Treaties which were directly negotiated by Dominion Governments were exceptional and of minor importance.[52] In these instances, as Oppenheim noted,[53] the

49. 2 ed. vol.8 (1963) at [illegible]6-8.
50. Bekker op.cit. 59.
51. House of Assembly Debates vol.10, col. 15[illegible] (29 February, 1928).
52. Keith op.cit. 6.
53. L. Oppenheim International Law - A Treatise 8 ed (1955) I Peace 198.

Dominions 'simply exercised for the matters in question the treaty-making power of the mother country, which had been to that extent delegated to them'.

(vi) Summary

By 1914 the Dominions had obtained some voice in treaty participation. As far as technical and commercial treaties were concerned, the Dominions had achieved a large measure of freedom. It had become customary for technical and commercial treaties negotiated by the Crown to be made applicable only to the United Kingdom and to its overseas possessions not enjoying responsible government. Clauses were insertec specifically exempting Dominions with responsible government from the operation of such treaties, but allowing for the right of separate adherence should the Dominions desire this.

On the other hand, the Imperial Government at Westminster effectively controlled Dominion legislation, judicial appeals, and, in particular, foreign political relations. In Oppenheim's view, the Dominions 'had no international position whatever, because they were, from the point of view of international law, mere colonial portions of the mother country'.[54] Their right to representation at international administrative conferences and to enter into certain treaty arrangements of minor importance with other States were not sufficient, in the absence of any other external attributes of sovereign status, to give the Dominions any separate legal existence in international law. Oppenheim regards the exercise of these rights simply as a delegation by the mother country of its treaty-making power to the Dominion in question, although he does concede that the situation was 'somewhat anomalous'.

54. Ibid.

(b) Developments during World War I

Active participation by the Dominions in World War I led to recognition by the Imperial Government of their claims to share in the deliberations on and control of Imperial war policy.[55] Although the supreme command in all matters of army, air force and navy vested throughout the war with the British high command, the Dominions were not excluded from a share in their control.[56] In 1917, the Dominion Prime Ministers were invited to attend a series of special and continuous meetings of the British War Cabinet.[57] Two bodies resulted from these meetings, viz. the Imperial War Cabinet and the Imperial War Conference.[58]

The Imperial War Cabinet comprised the British War Cabinet and the Dominion representatives sitting together under the presidency of the Prime Minister of the United Kingdom. Its main functions were to discuss the conduct of war in particular, and Imperial war policy in general. The Dominion representatives were on a footing of equality with members of the British War Cabinet. They had equal powers of initiation and examination of policy, and retained responsibility to their own electorates.[59]

The Secretary of State for the Colonies presided over the Imperial War Conference in which Dominion representatives once again acted on a footing of equality with British Ministers. This body was primarily concerned with non-war problems affecting the Empire as a whole.[60]

During 1917, these bodies reached two important decisions which affected the constitutional and international development of the Dominions. First, the Imperial War Cabinet resolved to hold meetings 'annually, or at any intermediate time when matters of urgent Imperial concern required to be settled'.[61] Secondly, the Imperial

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55. War Cabinet Report, 1917, Parl.Papers, Cd 9005 of 1918 p.1.
56. Keith, op.cit. 15.
57. General Smuts served throughout the war on this Cabinet.
58. Lewis op.cit. [illegible]
59. War Cabinet Report, 1917, Parl.Papers, Cd 9005 of 1918 p.7.
60. Lewis, loc.cit.
61. War Cabinet Report, 1917, Parl.Papers. Cd 9005 of 1918 p.7. As a result of this resolution the Imperial War Cabinet met between June and July of 1918, and again in November 1918, when it remained in continuous session (under the name of the British Empire Delegation) until the Treaty of Versailles was signed in June 1919.

War Conference resolved to summon a special Imperial Conference after the war to consider the 'readjustment of the constitutional relations of the component parts of the Empire' on the basis of

> 'full recognition of the Dominions as autonomous nations of our Imperial Commonwealth ... [and recognition of] the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations.'[62]

These resolutions were of relevance from a constitutional point of view in that they established the right of the Dominions to be consulted on all important matters of Imperial policy. From an international point of view they made no formal advance in the treaty-making powers of the Dominions. This was largely because the war years were not suitable times in which to press claims for separate international personality. Ultimately, however, these events prepared the way for the establishment of the international status of the Dominions which took place after peace was concluded.[63]

(c) Developments in the Inter-War Period

(i) The Paris Peace Conference of 1919

A major advance in the treaty-making powers of the Dominions was made at the close of the war at the Paris Peace Conference. Sir Robert Borden, the Prime Minister of Canada, achieved the recognition of the separate existence of the Dominions in lieu of a single Imperial delegation comprising both British and Dominion delegates.[64] On the other hand, the Dominions were equally determined to retain their identity with the British Empire as a whole as one of the Joint Powers represented at the Conference, and to obtain what benefits they could from this identification. As a result, the position occupied by the Dominions at the Conference has been described as 'anomalous'.[65] As 'belligerent Powers with special interests', Canada, Australia, South Africa and India were each represented by two Plenipotentiary Delegates,

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62. War Cabinet Report, Parl.Paper, Cd. 90[illegible] of 1918, p.9.
63. Lewis op.cit. 31.
64. Keith op.cit. 15.
65. Verloren Van [illegible] [illegible] [illegible] ed (1967) 58.

New Zealand was represented by one such Delegate. In addition to this direct representation, it was stipulated that the representatives of the Dominions (and of India) be included in the representation of the British Empire delegation by means of a panel system.[66] In this way the Dominions were accorded fuller representation than that granted to the smaller allied nations which were co-belligerents in the war.

In March 1919, a memorandum was circulated by Sir Robert Borden on behalf of the Dominion Prime Ministers to the effect that :

> 'all the treaties and conventions resulting from the Peace Conference should be so drafted as to enable the Dominions to become Parties and Signatories thereto. This procedure will give suitable recognition to the part played at the Peace Table by the British Commonwealth as a whole, and will, at the same time, record the status attained there by the Dominions. The procedure is in consensus with the principles of constitutional Government that obtain throughout the Empire. The Crown is the Supreme Executive in the United Kingdom and in all the Dominions, but it acts on the advice of different Ministries within different constitutional units and under Resolution IX of the Imperial War Conference, 1917, the organisation of the Empire is to be based on equality of nationhood.'[67]

The principles formulated in the memorandum were accepted. The Dominion representatives were duly given full powers by the King and signed the Versailles Treaty on behalf of their own countries.[68] The Treaty reads:

> 'For this purpose the High Contracting Parties represented as follows: ...
>
> HIS MAJESTY THE KING OF THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND AND OF THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, by :-
>
> The Right Honourable David Lloyd George M.P. ...
> [names of other British delegates follow]
>
> And
> for the Dominion of Canada, by: ______;
> for the Commonwealth of Australia, by: ______;
> for the Union of South Africa, by: ______;
> for the Dominion of New Zealand, by: ______;
> for India, by: ______' 69

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66. The Practice and Procedure for the Negotiation and Ratification of Treaties and Agreements 2 B.C [illegible] (1937) 77 at 78.
67. See Correspondence and Documents Relative to the Representation of Canada at the Peace Conference and to the Ratification of the Treaty of Peace with Germany Canada, Sessional Papers 1919, Special Session No. 41, as quoted in Doeker op.cit. 11; also quoted as Canadian Sessional Papers 41, J by Lewis op.cit.32.
68. Halsbury's Laws of England op.cit. 453.
69. See Treaty of Versailles, United Kingdom Treaty Series 1919 no.4.

The wording is significant in that it presumes the formal unity of the British Empire only after every Dominion Parliament had signified its approval and had advised His Majesty accordingly.[70]

The right of the Dominions to be regarded as separate international personalities with full treaty-making powers was re-inforced by their admission as original members of the League of Nations.[71] Once again, individual membership of the League was not permitted to interfere with the principle that the British Empire remained a unit. The Empire as such was accorded membership of the League and a permanent place on its Council. Beside it, as at once independent League members and, at the same time, component parts of the Empire, were grouped Canada, Australia, South Africa, New Zealand and India. The Dominions were entitled to representation in the Assembly of the League as sovereign States and were eligible for election to the Council. Thus their equality with other members of the League was assured.[72]

As original members of the League, the Dominions became eligible for selection to the International Labour Organisation. They enjoyed direct and separate representation at all General International Labour Conferences.[73]

The treaty-making powers of the Dominions were strengthened further when the League appointed certain of them as Mandatory States over former colonies of the German Empire. The Union of South Africa was given a 'C' Mandate over South-West Africa, New Zealand was appointed Mandatory over Samoa and Australia over certain islands in the South Pacific Ocean. Significantly, these Mandates were received by the Dominions direct from the Secretariat of the League, without correspondence having been conducted through the Imperial Government. As a result, these Dominions were responsible for the due performance of these Mandates not to the Imperial Government but directly to the League of Nations.

The form of expression of the conferment of the Mandate over South-West Africa in the second paragraph of the preamble to the Mandate

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70. For a full discussion of South Africa's position see pp. 65-8 below.
71. See Annex to the Covenant of the League.
72. [illegible] see below pp. 66-8. Cape Times 9 September 1919.
73. Lewis op.cit. 73; Keith op.cit. 16.

which reads that the 'Mandate should be conferred upon His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa...' might point to the conclusion that the Mandate was conferred upon the British Crown. However, this clashes with the third paragraph of the preamble as well as with Article of the Mandate itself. The former states that 'whereas His Britannic Majesty for and on behalf of the Government of the Union of South Africa has agreed to accept the Mandate ...', while the latter echoes this by providing that 'the territory over which a Mandate is conferred upon His Britannic Majesty for and on behalf of the Government of the Union of South Africa ...'. There are a number of cogent reasons why the Mandate had to be conferred on South Africa and not upon the British Crown.[78] First, only a State could administer a mandated territory, a rubric for which the 'British Crown' could not qualify. Article 2 of the Covenant of the League of Nations specifies that 'advanced nations' would be 'Mandatories on behalf of the League' - in the case of South-West Africa the Union was selected as the 'advanced nation' because of its geographical contiguity to the mandated territory. Moreover, while the Union was a founder member of the League, 'His Britannic Majesty', namely King George V, was not himself a member of the League of Nations. Article 22, by reference to 'other members of the League' contemplates that Mandatories must be members of the League. This contention is reinforced by Article 7 of the Mandate which confers compulsory jurisdiction on the Permanent Court of International Justice in disputes between the 'Mandatory' and 'another member of the League'.[79]

There are a number of judicial interpretations of the situation which lend support to the view that the Mandates were indeed conferred on the individual Dominions rather than on the British Crown. The earliest of these decisions was reached by the South African Appellate

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78. L.J. Blom-Cooper 'Republic and Mandate' (1961) 24 Modern Law Review 256 at 257.

79. See, too, C.J.R. Dugard 'South-West Africa and the Supremacy of the South African Parliament' (1969) 86 South African Law Journal 194 at 195, who supports the view that the Mandate for South-West Africa was conferred upon South Africa as a sovereign independent State despite the fact that full independence was only realized in 1931 with the passing of the Statute of Westminster 22 Geo.V, c.

Division in R. v. Christian,[77] a case which posed the question whether a citizen of South-West Africa owed allegiance to the Crown so as to make him liable to the charge of treason. In the course of the judgement De Villiers J.A.[78] stated that the Mandate had not been conferred on the 'British Empire' but upon the Union Government as an independent sovereign State and a member of the League of Nations.

Much the same approach was taken by Van den Heever J. in R. v. Offen[79] where he stated :

> 'The Mandate was conferred on the Union .... The language used in the instruments referred to may have been confusing because of the embarrassing situation in which members of the Commonwealth found themselves, but the intention is quite clear. The Covenant was an international document and the parties to it were "States" or "nations".'

He went on to say[80] that the mode of expression in the different recitals of the preamble made no difference, but that 'for the purpose of the allocation of Mandates the King acted as head of State of a separate member, the Union'.

The New Zealand Court of Appeal in Tagaloa v. Inspector of Police,[81] dealing with the similar Mandate over Samoa, likewise decided that the Mandate was conferred 'directly on the Dominion .... The authority is given by the League of Nations directly to the Dominion as a member of the League'.

The unanimity of the Commonwealth courts on this point was manifested by the judgement of Evatt J. in Ffrost v. Stevenson,[82] a case of the High Court of Australia dealing with the mandated territory of New Guinea. The learned judge stated :

> 'The New Guinea Act correctly assigns the authority of the Commonwealth[83] over the territories to the action of the Principal Allied and Associated Powers in nominating it as Mandatory and section 5 of the Act gives statutory authority to the Governor-General not to accept the Mandate from the hands of the King but to accept the Mandate so soon as it is issued to the Commonwealth from the Council of the League of Nations. In other words, the greatest care was taken by the Commonwealth advisers to protect the international status of the Commonwealth as such and to this end the King, acting through the Commonwealth Ministers, accepted the Mandate directly from those who in the eyes of international

77. 1924 A.D. 101.
78. At 119.
79. 1934 S.W.A. 73 at 84.
80. Ibid.
81. [1927] N.Z.L.R. 883 at 901.
82. (1937) 59 C.L.R. 528
83. References in this extract to the 'Commonwealth' are to the 'Commonwealth of Australia'.

> [illegible] had the power to grant it .... All the documents show that whatever authority was obtained by the Commonwealth in relation to New Guinea was by original grant to itself (the Commonwealth being of course identified with the King in Right of the Commonwealth.'

(ii) The Imperial Conference of 1923

The precedent of separate representation for the Dominions created at the Paris Peace Conference[84] was not followed at the peace conference between the Allied Powers and Turkey held at Lausanne.[85] On this latter occasion Britain yielded to French objections concerning the separate representation of the Dominions at the conference. On 24 July, 1923, the Treaty of Lausanne was signed by British plenipotentiaries alone. When ratification was to be expressed, the Governments of South Africa, Australia, New Zealand and India signified their concurrence. Canada, however, raised the objection that as it had not been a signatory it could scarcely be expected to give parliamentary approval to the Treaty: and without such approval the Canadian Government could accept no responsibility as to ratification.[86]

On 2 March, 1923, the Pacific Halibut Fisheries Treaty was negotiated and signed by American and Canadian plenipotentiaries without any British intervention.[87] For the first time a treaty had not only been negotiated by a Dominion representative alone, but also signed by him alone.[88]

The above two incidents led to an investigation at the Imperial Conference, which opened in London on 1 October, 1923, of the whole subject of the negotiation, signature and ratification of treaties.[89]

A Resolution of this Conference defined a treaty as

> 'an agreement which, in accordance with the normal practice of diplomacy, would take the form of a treaty between Heads of

84. And maintained by and large at the Disarmament Conference in Washington 1921-2.
85. In 1922-3.
86. Verloren van Themaat op.cit. 197.
87. Keith op.cit. 17-18; Roberts-Wray op.cit. 252.
88. For the history of this Treaty see Malcolm M. Lewis 'The Canadian-American Halibut Fisheries Treaty' (1923-4) 4 British Yearbook of International Law 1[illegible]; see, too, Norman Mackenzie 'Two Recent Canadian Treaties' (1[illegible]) [illegible] British Yearbook of International Law 191.
89. Imperial Conference 1923: Summary of Proceedings Cmd.1987 pp.13-15.

States, signed by plenipotentiaries provided with full powers issued by the Heads of the States, and authorizing the holders to conclude a treaty.' 90

The provisions of the Resolution relating to the Heads of States treaty were as follows:

'1. Negotiation.

'(a) It is desirable that no treaty should be negotiated by any of the governments of the Empire without due consideration of its possible effect on other parts of the Empire, or, if circumstances so demand, on the Empire as a whole.

'(b) Before negotiations are opened with the intention of concluding a treaty, steps should be taken to ensure that any of the other governments of the Empire likely to be interested are informed, so that, if any such government considers that its interests would be affected, it may have an opportunity of expressing its views, or, when its interests are intimately involved, of participating in the negotiations.

'(c) In all cases where more than one of the governments of the Empire participates in the negotiations, there should be the fullest possible exchange of views between those governments before and during the negotiations. In the case of treaties negotiated at International Conferences, where there is a British Empire Delegation, on which, in accordance with the now established practice, the Dominions and India are separately represented, such representation should also be utilised to attain this object.

'(d) Steps should be taken to ensure that those governments of the Empire whose representatives are not participating in the negotiations should, during their progress, be kept informed in regard to any points arising in which they may be interested.

'2. Signature.

'(a) Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the government of that part. The Full Power issued to such representative should indicate the part of the Empire in respect of which the obligations are to be undertaken, and the preamble and text of the treaty should be so worded as to make its scope clear.

'(b) Where a bilateral treaty imposes obligations on more than one part of the Empire, the treaty should be signed by one or more plenipotentiaries on behalf of all the governments concerned.

'(c) As regards treaties negotiated at International Conferences, the existing practice of signature by plenipotentiaries on behalf of all the governments of the Empire represented at Conference should be continued, and the Full Powers should be in the form employed at Paris and Washington.

90. Cmd. 1987 p.13.

'[illegible]. Ratification.

'The existing practice in connection with the ratification of treaties should be maintained.

This procedure is as follows:-

(a) The ratification of treaties imposing obligations on one part of the Empire is effected at the instance of the government of that part:

(b) The ratification of treaties imposing obligations on more than one part of the Empire is effected after consultation between the governments of those parts of the Empire concerned. It is for each government to decide whether Parliamentary approval or legislation is required before desire for, or concurrence in, ratification is intimated by that government.' 91

While the Resolution did not cover all controversial issues on the subject, it did form the foundation upon which further conventions relating to the treaty-making powers of the Dominion could be built. The Resolution, in effect, approved the Canadian action regarding the Pacific Halibut Fisheries Treaty by providing that a treaty which affected one part of the Empire only should be signed by a representative of that part and should be ratified only at its request. It also approved the practice of including Dominion representatives in the British Empire delegation to international conferences.

The Resolution went on to deal with informal agreements other than treaties as defined above:

> 'Apart from treaties made between Heads of States, it is not unusual for agreements to be made between governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments, and signed by representatives of those governments, who do not act under Full Powers issued by the Heads of the States: they are not ratified by the Heads of the States, though in some cases some form of acceptance or confirmation by the governments concerned is employed. As regards agreements of this nature the existing practice should be continued, but before entering on negotiations the governments of the Empire should consider whether the interests of any other part of the Empire may be affected, and, if so, steps should be taken to ensure that the government of such part is informed of the proposed negotiations, in order that it may have an opportunity of expressing its views.' 92

91. Cmd. 1987 pp. 13-15.

92. Cmd. 1987 p.14.

Examined as a whole, it will be seen that the 1923 Imperial Conference tended to consolidate the position of the Dominions in regard to their treaty-making power rather than to advance their international status.[93] The second part of the Resolution[94] recognised the propriety of the practice whereby the Dominions entered into informal agreements of a technical or administrative nature with foreign States, negotiations being directly conducted with the Consular Officers accredited to the Dominion Governments. The Resolution suggested only that Dominions negotiating such agreements should bear in mind the interests of other parts of the Empire.

The terminology used in connection with the Dominions and Great Britain, viz.. 'Governments of the Empire' and 'Parts of the Empire' is notable in that it implied that the ultimate unit was still the Empire which consisted of a number of self-governing and less independent parts.[95] This indicates that while the Dominions had been granted powers not usually allocated to territories with colonial status, it could not be said that the Dominions enjoyed full international status at the close of the Conference, nor did they possess attendant treaty-making capacity.

(iii) <u>The Imperial Conference of 1926</u>

The 1926 Imperial Conference was particularly important in that it acknowledged the extension of Dominion autonomy from internal to external affairs.[96] The Union of South Africa together with Ireland had taken the initiative in insisting that clarity be obtained in this regard.[97] As a result, the famous Balfour Report of the Committee on Inter-Imperial Relations at the Imperial Conference of 1926 defined 'Commonwealth status' as follows:[98]

> 'They are autonomous communities within the British Empire, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.'[99]

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93. Hoeker op.cit. 15.
94. Cmd. 1987 p.14 as cited above.
95. Verloren van Themaat op.cit. 19[illegible].
96. <u>The Development of the Machinery and Methods of Separate Action in Foreign Affairs</u> R.I.I.A. ([illegible]) 28.
97. Verloren van Themaat op.cit. 199.
98. The British Commonwealth consisted of Great Britain and the self-governing Dominions, while the British Empire included non-self-governing territories as well.
99. Imperial Conference, 1926: Summary of Proceedings Cmd.2768 p.14.

This definition emphasized that the 'root principle' governing Inter-Imperial relations was the 'equality of status' between Britain and the Dominions. Thus, as far as the Imperial Government was concerned, the Dominions were, in the future, to be regarded as separate subjects of international law.[1]

As regards the treaty-making powers of the Dominions, the Balfour Report first reviewed the situation as it pertained in 1923:

> 'It was agreed in 1923 that any of the Governments of the Empire contemplating the negotiation of a treaty should give due consideration to its possible effect upon other Governments and should take steps to inform Governments likely to be interested of its intention.' 2

The 1923 Resolution had left it to the negotiating State to decide whether any other Dominion was 'likely to be interested'. The Balfour Report recommended that the negotiating State be obliged to inform all other Commonwealth Governments of its intention to conclude a treaty, and in this way to allow each Commonwealth Government to express its views. If no adverse comments were expressed 'with reasonable promptitude', the negotiating State might proceed 'on the assumption that its policy [was] generally acceptable', but

> 'before taking any steps which might involve the other Governments in any active obligation, [it had to] obtain their definitive assent .... [Moreover] the initiating Government may assume that a Government which has had full opportunity of indicating its attitude and has made no adverse comments will concur in the ratification of the treaty.' 3

The Balfour Report criticised the practice regarding treaties negotiated under the auspices of the League of Nations where

> 'adherence to the wording of the Annex to the Covenant for the purpose of describing the contracting party has led to the use in the preamble of the term "British Empire" with an enumeration of the Dominions and India if parties to the Convention but without any mention of Great Britain and Northern Ireland and the Colonies and Protectorates. These are only included by virtue of their being covered by the term "British Empire". This practice, while suggesting that the Dominions and India are not on a footing of equality with

1. Halsbury's Laws of England op.cit. 454 notes that the effect of this Conference was to recognise the independent status of the Dominions in international relations.
2. Cmd. 2768 p.22.
3. Ibid.

> Great Britain as participants in the treaties in question, tends to obscurity and misunderstanding and is generally unsatisfactory.'

As a means of overcoming this difficulty, it was recommended that all treaties other than agreements between Governments

> 'whether negotiated under the auspices of the League or not should be made in the name of Heads of States, and, if the treaty is signed on behalf of any or all of the Governments of the Empire, the treaty should be made in the name of the King as the symbol of the special relationship between the different parts of the Empire .... In the case of a treaty applying to only one part of the Empire it should be stated to be made by the King on behalf of that part.' [4]

It was also decided that plenipotentiaries for the Dominions should be issued with full powers by the King, acting on the advice of the Government concerned. The full powers were to indicate that part of the Empire for which the plenipotentiaries were to sign. The following specimen form of treaty, as recommended, was attached as an appendix to the Committee's Report:

SPECIMEN FORM OF TREATY

The President of the United States of America, His Majesty the King of the Belgians, His Majesty the King [<u>here insert His Majesty's full title</u>], His Majesty the King of Bulgaria, &c., &c.,

....

Desiring ... .

Have resolved to conclude a treaty for that purpose and to that end have appointed as their Plenipotentiaries:

The President ....

....

His Majesty the King [title as above]:

for Great Britain and Northern Ireland and all parts of the British Empire which are not
[illegible]
AB.

for the Dominion of Canada,
CD.

for the Commonwealth of Australia,
EF.

for the Dominion of New Zealand,
GH.

for the Union of South Africa
IJ.

for the Irish Free State,
KL.

for India,
MN.

---

4. Cmd. 2768 pp. 22-3.

....

who, having communicated their full powers, found in good and due form, have agreed as follows:

....

....

In faith whereof the above-named Plenipotentiaries have signed the present Treaty:

AB..........................
CD..........................
EF..........................
GH..........................
IJ..........................
KL..........................
MN..........................

(or if the territory for which each Plenipotentiary signs is to be specified:

(for Great Britain, &c.)..................AB.
(for Canada)...............................CD.
(for Australia)............................EF.
(for New Zealand)..........................GH.
(for South Africa).........................IJ.
(for the Irish Free State).................KL.
(for India)................................MN.)

The Balfour Report also clarified the position as regards the coming into force of multilateral treaties registered under the auspices of the League of Nations. It resolved that any ratification clause should 'take the form of a provision that the treaty should come into force when it has been ratified on behalf of so many separate Members of the League'. This would ensure that 'ratification on behalf of different parts of the Empire which are separate Members of the League should be counted as separate ratifications.'[5]

The Report discussed in some detail representation of the Dominions at international conferences.[6] In so doing it built on the foundations which had been laid at the Imperial Conference of 1923. The underlying principle involved was that each Dominion had to decide whether it desired to be represented at such a conference or whether it was content to leave the negotiations in the hands of those parts of the Empire more directly concerned.

5. Cmd. 2768 p.24.
6. Ibid. pp.24-5.

As far as the conduct of foreign affairs in general was concerned, the Report

> 'frankly recognized that in this sphere ... the major share of responsibility rests now, and must for some time continue to rest, with His Majesty's Government in Great Britain. Nevertheless, practically all the Dominions are engaged to some extent ... in the conduct of foreign affairs, particularly those with foreign countries on their borders.' 7

(iv) The Imperial Conference of 1930

The task of those statesmen attending the Imperial Conference of 1930 was primarily to consolidate the position concerning the negotiation and conclusion of treaties that had emerged at the Imperial Conferences of 1923 and 1926. The 1930 Conference emphasized the aspect of communication and the system of consultation in relation to the conduct of foreign affairs generally and treaty negotiations in particular. It summarized the main points as follows:

> '(1) Any of His Majesty's Governments conducting negotiations should inform the other Governments of His Majesty in case they should be interested and give them the opportunity of expressing their views if they think that their interests may be affected.
>
> (2) Any of His Majesty's Governments on receiving such information should, if it desires to express any view, do so with reasonable promptitude.
>
> (3) None of His Majesty's Governments can take any steps which might involve the other Governments of Her Majesty in any active obligations without their definite assent.' 8

The Conference underlined the fact that it was of particular importance in relation to treaty negotiations that any Government which believed that it was likely to be interested in the negotiations conducted by any other Government should have the earliest possible opportunity of expressing its views. In order to avoid causing embarrassment to the negotiating Government, other interested Governments were urged to relay their comments at the earliest instant.

It was recommended at this Conference, as it had been at the Conference of 1926, that the instrument of ratification, as well as

7. Ibid. pp.25-6.

8. Imperial Conference, 1930: Summary of Proceedings Cmd.3717 p.27.

the treaty itself, should list those parts of the Commonwealth that had assumed treaty obligations.

If the agreement took the form of an agreement between Governments, it was to be negotiated without any intervention by the Crown and without the use of the Great Seal of the Realm. In such an agreement His Majesty was not regarded as a contracting party. If the treaty took the form of a treaty between Heads of State, then the 1930 Conference reaffirmed that all documents involved in the negotiation, signature and ratification were to be issued by the Crown at the request of the Government in question.[9]

In addition, the Imperial Conference of 1930 approved[10] the Report of the 1929 Conference on the operation of Dominion Legislation[11] and, in the following year, the main recommendations of that Report appeared in the Statute of Westminster.

(v) The Statute of Westminster

The Statute of Westminster[12] was not directly concerned with the external status of the Dominions, but rather with their internal constitutional-law problems. One of the main provisions of the Statute repealed the Colonial Laws Validity Act, 1865, in its application to the Dominions. No law of a Dominion would, henceforth, be void on the ground of repugnancy to an Act of the Imperial Parliament or to the English common law.[13] The Dominion Parliament was empowered to amend or repeal Acts of the Imperial Parliament in so far as they formed part of the law of a Dominion[14] and to legislate with extra-territorial effect.[15] The Statute also gave statutory effect to a long-standing convention of the United Kingdom Parliament, viz., not to pass legislation extending to a Dominion except at the request and consent of the Dominion concerned.[16] The Statute of Westminster thus clarified the powers of Dominion

9. Stewart op.cit. 468.
10. Cmd. 3717 pp. 17-21.
11. Cmd. 3479.
12. 22 & 23 Geo.V c.4.
13. Section 2.
14. Ibid.
15. Section 3.
16. Preamble to the Statute of Westminster read with section 4 thereof; see too A.V. Dicey An Introduction to the Study of the Law of the Constitution 10 ed (1960) Introduction p.ll.

Parliaments in accordance with the principles expressed by the 1926 and 1930 Imperial Conferences, by giving them full control over matters of Dominion concern.

In an attempt to put beyond all doubt the fact that the Imperial Parliament was no longer the supreme law-making body for the Union, the Union Parliament, in 1934, enacted the Status of the Union Act.[17] This Act had three important effects. First, it declared the Union Parliament to be the sovereign legislative body for the Union.[18] Secondly, it provided that those parts of the Statute of Westminster relating to South Africa as one of the Dominions 'shall be deemed to be an Act of the Parliament of the Union and shall be construed accordingly'.[19] The object was to ensure that the Statute of Westminster would remain applicable to South Africa even if repealed by a subsequent Act of the Imperial Parliament.[20] Thirdly, the Status Act ruled that the King, acting personally or through a Governor-General, would exercise his executive powers in relation to the Union 'in regard to any aspect of its domestic or external affairs' on the advice of his Union Ministers.[21] Any Imperial intervention in the affairs of the Union was thus clearly ruled out.[22]

Not content with these measures alone, the Union Parliament also enacted the Royal Executive Functions and Seals Act.[23] This Act provided[24] for the striking of a Royal Great Seal and a Royal Signet for the Union which were thereafter used to seal all documents in place of the British seals.[25] The Act decreed[26] that whenever, for any reason,

17. Act 69 of 1934.
18. Section 2.
19. Section 3.
20. See further K.C. Wheare <u>The Statute of Westminster and Dominion Status</u> 5 ed. (1953) 244.
21. Status of the Union Act 69 of 1934 section 5.
22. Not until 1942 and 1947 did Australia and New Zealand respectively adopt the Statute of Westminster. Canada and Ireland did not deem it necessary to incorporate the Statute into their own law at all.
23. Act 70 of 1934.
24. Section 1.
25. Ireland had passed a similar Act in 1931.
26. Section 6(1).

the King's signature to any instrument requiring the sign-manual could not be obtained, or would result in undue delay, the Governor-General should, subject to such instructions as might from time to time be given by the King on the advice of his Union Ministers, execute and sign such instrument on behalf of the King. The Governor-General-in-Council was required to authorize such action,[27] the Great Seal of the Union was to be affixed,[28] and the instrument to be countersigned by a minister of State for the Union.[29]

Ever since 1930, the Governor-General had been an officer of the Union, appointed and removable by the Union Government. He could not receive any instructions as to the exercise of his authority except on the proposal of the Union ministry. All this ensured that the complete exercise of royal power in external affairs vested in the Union Government.[30]

One author[31] has written that the Status of the Union Act and the Royal Executive Functions and Seals Act proceeded

> 'upon the assumption that the Imperial Conference decisions of 1926, declaring that the Dominions and the United Kingdom are "equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs", should be regarded as sufficient evidence of South Africa's constitutional right to control all its affairs external and internal alike. Upon such assumption the two Acts of 1934 proceed to declare status and provide for a method of exercising all the powers and capacities incident to such status.'

(d) <u>The 'Cape Town Agreements' between South Africa and India</u>

(i) <u>History</u>

The introduction of Indians into Natal first took place in 1860, when, after several years of agitation by the Natal Legislative Council, the British and Indian Governments finally agreed to the establishment of the indentured labour system.[32] The period of indenture was

27. Section 6(2).
28. Section 4(3).
29. Section 4(1).
30. Keith op.cit. 27.
31. Herbert Vere Evatt <u>The King and His Dominion Governors</u> (1936) 303.
32. M. Vane 'The South African Indians and UNO' (194[illegible]) 28 <u>Quarterly Review</u> 162 at 16[illegible].

originally three years but was later extended to five years, after which time the Indians were allowed to remain in Natal as free labourers.

Many Indians took advantage of the scheme and settled in Natal after concluding their terms of indenture, together with their wives and families. They became hawkers, market gardeners and domestic servants and also found employment on the railways and in the coal mines.

However, many Indians returned to India complaining of ill-treatment on the sugar estates, illegal withholding of wages and lack of medical attention. As a result the Indian Government and the Commissioner of Land and Emigration in London suspended all further emigration until conditions had improved and reforms had been instituted. This was, perhaps, the earliest indication that the Indian Government meant to concern itself with the question of the treatment of Indians in South Africa.

Indian traders and merchants began to arrive in Natal soon after the labourers made their first appearance. They conducted business not only with the Indians, but also with the Zulus and Europeans. As they prospered and threatened to become formidable rivals to the Europeans in commerce and industry, so they incurred the mounting anger and resentment of the latter.

As soon as Natal was granted responsible government in 1893,[33] it took action to curtail the rights of the Indians. A tax of £3 per annum was imposed on Indians who had completed their terms of indenture, on Indian women and on children over the age of sixteen. The object was to induce these people to return to India. In 1896 the 80,000 Indians now resident in Natal were excluded from the parliamentary franchise.[34]

A limited number of Indians (about 13,000) had meanwhile settled in the Transvaal. The Transvaal was formally annexed by Britain in 1881 with the signing of the Pretoria Convention on 3rd August 1881. This Convention was superseded by the London Convention, signed on 27 February, 1884,[35] Article 14 of which allowed all persons, not

33. Law No.14 of 1893.
34. Act 8 of 1896.
35. T.H. Van Reenen Land : Its Occupation and Ownership in South Africa (1962) 8.

being Natives, who subjected themselves to the laws of the Republic:

(a) to enter freely, to travel and to reside in the Republic with their families;

(b) to hire or possess houses, factories, stores and shops;

(c) to trade either personally or through such agents as they saw fit to appoint;

nor were these persons to be subjected, either as to their persons or to their belongings, to taxes to which the citizens of the Republic were not subjected.

The immediate effect of these provisions was an influx of Indians into the Transvaal. This caused an outcry among the burghers and the Volksraad was pressured to do something about the matter. As early as 1885 a Transvaal Republican Law[36] excluded Indians from acquiring citizenship[37] and owning land.[38] Before this law was passed, the Volksraad entered into protracted correspondence with the Imperial Government, but eventually decided that the law would not be objected to as being contrary to the spirit of the London Convention.[39] The Asians, indignant at this measure, petitioned the Imperial Government in an attempt to thwart the operation of the law and during the ensuing years the Imperial Government exerted such diplomatic pressure on the Volksraad in connection with the application of this law. The Indian question had, even at this early stage, achieved international proportions and earned the attention of the Imperial Government.[40] The irony of this situation was that after the cessation of hostilities between Boer and British in 1902, the Imperial Government in the Transvaal decided to implement the policy of the former Republican Government and to this end the Indemnity and Peace Preservation Ordinance of 1902[41] was enacted. This allowed only those Asians then in the province to live there while others might enter only on receipt of a permit. This ruling was confirmed by Ordinance 5 of 1903.

36. Law No. [illegible] of 1885.
37. Article 2(a).
38. Article 2(b).
39. Van Reenen op.cit. 9.
40. This friction between the British and Republican Governments was one of the causes of relations between them reaching breaking point culminating in the outbreak of the Boer War.
41. Act 38 of 1902.

Thus representatives of the Imperial Government achieved the control over the influx of Asians into the Transvaal which the Republican Government had been thwarted in doing because of the intervention of the Imperial Government.

When the Transvaal was granted responsible government in 1906,[42] legislation was enacted to restrict the entry of Indians. The so-called Black Act[43] was also passed which compelled Indians over the age of eight years to carry passes bearing the thumb print of the owner.[44] These measures led to the first passive resistance campaign in which Mahatma Gandhi was to feature so prominently. As a result of the campaign only 500 Indians registered voluntarily. General Smuts appealed to the Indians to register of their own accord in which case, according to Gandhi's version, Smuts undertook to secure the repeal of the Act provided the majority of Indians registered. In the end the Act was not repealed and only those who had registered were exempted from carrying passes. The Indians then burnt their passes in protest. The Transvaal Government retaliated by passing the Transvaal Immigrants Regulation Act[45] in order to prevent Indians from entering the Transvaal altogether.

This Act empowered the Minister of the Interior to prohibit as immigrants 'any person or class of persons deemed by the Minister on economic grounds ... to be unsuited to the requirements of the Union or any particular province thereof'.[46] Later that year the Minister issued regulations declaring all Asian persons to be unsuited on economic grounds to the Union and to every province in which he was not already domiciled. The effect of these regulations was to make all Asians prohibited immigrants and to restrict the free movement of Asians from one province to another.[47] Those who entered in defiance of the law were deported

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42. By letter patent dated 6 December 1906, see H.R. Hahlo and Ellison Kahn The Union of South Africa: The Development of its Laws and Constitution (1960) 112.
43. Act 36 of 1908.
44. Section 9 of Act 36 of 1908 read with s.9(a) of GN 950 of 1908; R. v. Ain Hong 1913 TPD 708.
45. Act 22 of 1913.
46. Section 4.
47. C.J.R. Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 South African Law Journal 181 at 191.

to Natal. Many once again crossed the border and were promptly sentenced to terms of imprisonment. Certain Indians were even shipped back to India.

The Indian Government retaliated in 1911 by refusing to allow any future migration of indentured labourers to Natal. Meanwhile, the Supreme Court ruled[39] that a marriage according to Muslim or Hindu rites, being potentially polygamous, was not recognized by our law. This meant that most Indian marriages would not be recognized. In 1913 the Indians in Natal passively resisted the £3 poll tax and Gandhi led striking Indians at the Newcastle coal mines. This encouraged further strikes and the Indians were sent back to the coal mines as prisoners under armed guard. After public denunciation by the Viceroy of India, a commission was appointed which recommended abolition of the poll tax and recognition of Indian marriages. Smuts and Gandhi were able to negotiate an agreement and the recommendations of the Commission were accepted. The Indian Relief Act[40] was passed, which not only implemented these recommendations but abolished the pass laws as well.

This Act, in addition, inaugurated the system of voluntary repatriation. The Indian Government agreed to it in the hope that with a reduction in the size of the Indian community in Natal the European fear of the Indian would lessen and consequently better treatment would be meted out to those who remained. Section 6 of the Act empowered the Minister to provide any Indian with free passage to India on condition that he signed a document abandoning on behalf of himself, his wife and minor children, all further rights of entry to and of domicile in the Union.

In 1920 the Asiatic Inquiry Commission, popularly known as the Lange Commission, recommended that the Union Government further encourage voluntary repatriation by offering improved sea transport facilities. This was done and by the end of 1926 21,780 Indians

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39. Mashia Ebrahim v. Mahomed Essop 1905 TS 59 at 61; Seedat's Executors v. The Master (Natal) 1917 AD 302.

40. Act 22 of 1914.

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48. Kashia Ebrahim v. Mahomed Essop 1905 TS 59 at 61; Seedat's Executors v. The Master (Natal) 1917 AD 302.

49. Act 22 of 1914.

had been voluntarily repatriated under this scheme.[50]

Despite the voluntary repatriation scheme the Europeans in South Africa (and in Natal in particular) faced increasing non-European competition in trade and industry. The Government took steps to introduce a 'civilized labour' policy, in effect a white labour policy, to prevent future competition to European commercial supremacy.

During the following years several Acts were passed, in particular the Apprenticeship Act,[51] the Industrial Conciliation Act,[52] the Wage Act,[53] the Mines and Works Amendment Act[54] and the Liquor Act.[55] The net effect of these Acts was to establish an industrial colour bar which applied to all non-Europeans in the Union and more especially to the Indian community in Natal.

Voluntary repatriation was encouraged still further by the Cape Town Agreement which came about in the following manner:

In 1924 the Class Areas Bill was tabled before Parliament.[56] It empowered the Minister of the Interior to appoint a commission of not more than three persons to investigate any complaint by an urban local authority that a particular area was being infiltrated by Indians. Depending on the findings of the commission, the Governor-General could prevent Indians from acquiring immovable property in that area. The Bill was severely criticized in Parliament, not on the grounds that it was discriminatory in nature, but that it did not go far enough. There were constant demands for repatriation as 'the only solution'[57] as well as cries that 'the Asiatics have got to leave the country'.[58]

The Bill never reached the Statute Book as a result of the fall of the Smuts Government and the consequent dissolution of Parliament, but in July 1925, in response to rising public anger against the Indians, the

50. J.E. Corbett A Study of the Cape Town Agreement (1947) Dissertation for the degree of Master of Arts University of Cape Town 42.
51. Act 26 of 1922.
52. Act 11 of 1924.
53. Act 27 of 1925.
54. Act 25 of 1926.
55. Act 30 of 1928.
56. House of Assembly Debates Vol. 1, col. 1292ff (3 April 1924).
57. Ibid. col. 1299.
58. Ibid. col. 1303.

Pact Government under General Hertzog introduced the Areas Reservation and Immigration and Registration (Further Provisions) Bill[59] which was, in effect, a more drastic version of the Class Areas Bill. The Bill provided that in the event of an urban local authority submitting a report to the Minister of the Interior that a certain area was wholly or largely occupied by a particular class of persons, and should be reserved for residential and/or trading purposes to that class, the Minister was to appoint a commission of not more than three persons to investigate the suitability of the area; that is, to determine whether it was adequate in extent and facilities and whether it was the only area for that particular class in the town. If the commission reported favourably the Governor-General might within six months proclaim the area a class area. Thereafter no member of that class might acquire, lease or renew the lease of any land outside that area. Conversely, no-one who did not belong to that class could acquire or lease land within the proclaimed area.

Press reports, the testimony of those who appeared before a select committee to study the Bill and public opinion of the time generally indicate that by applying this type of measure the Union Government hoped to encourage Indians to leave South Africa of their own accord.[60]

Indian opposition to the Bill was inevitable. Both the Natal Indian Congress and the Indian National Congress (India) claimed that the Bill was a breach of the Smuts-Gandhi agreement of 1914 which had contained an assurance by Smuts that 'existing laws' would be administered 'in a just manner and with due regard to vested rights'.[61] The Indian Government understood this to mean that no new legislation would be enacted after 1[illegible] having the effect of imposing restrictions on Indians. However, the Union Government disagreed with this interpretation and denied that the Bill had in any way breached the Smuts-Gandhi agreement.

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59. House of Assembly Debates vol.5, cols. 6502-3 ([illegible] July 1925).
60. J.E. Corbett op.cit. 51-2.
61. C.F. Andrews 'Documents Relating to the New Asiatic Bill and Alleged Breach of Faith' 1[illegible] as cited by Corbett op.cit. 54.

The Natal Indian Congress organised a mass meeting to protest against the Bill in the Durban City Hall in September 1925. The 23rd February 1926 was designated a National Day of Prayer by Indians throughout South Africa and a deputation of South African Indians left for India early in 1926. Many responsible voices in India also lodged strong protests.

The Government of India first proposed a round table conference in April 1925 in an attempt to forestall the impending legislation. Dr. D.F. Malan, then South African Minister of the Interior, stated in Parliament that the Union Government was not opposed to the idea of a conference.[62] However, the negotiators first could not agree over the basis for holding such a conference. The two Governments clearly viewed the conference from different angles. To the Union Government it was primarily a means to encourage and expedite repatriation with the object of substantially reducing the Indian population in South Africa. To the Indian Government the main objective was to improve the legal position of Indians remaining in South Africa.

One result of the official opposition of the Indian Government to the Areas Reservation Bill and of its negotiations for a round table conference on the 'Indian question', was that on 17 February 1926 Dr. Malan moved the discharge of the Second Reading of the Bill. Instead, it was referred to a select committee (under the chairmanship of Dr. Malan) which was to report to the House on or before 1 April.[63]

The Indian deputation urged the select committee to advise suspension of the Areas Reservation Bill, stressing that if this measure was not taken there could be no hope of a round table conference between the two Governments succeeding, such were the feelings of hostility engendered by the Bill.

On the other hand the select committee heard deputations led inter alia by urban local authorities in Natal, by political bodies, by Agricultural and Farmers' Associations and by Chambers of Commerce who all advocated passage of the Bill that session and no conference at all.

62. House of Assembly Debates vol.6, col.671 (17 February 1926).
63. Ibid. col.676.

One of the key points which emerged from the evidence led before the select committee was that passage of the Areas Reservation Bill would, in all likelihood, mean the end of voluntary repatriation. This was precisely the opposite of all that the Union Government had hoped to achieve by passing the Bill. The deputation representing the Government of India had convinced the select committee that the effect of the enactment of the Bill would be to antagonise Indian opinion both in South Africa and abroad, so that in Natal and the Transvaal the Indians would band together to defeat the Union Government's repatriation policy whilst in India pressure would be exerted on the Indian government to refuse to accept repatriation. Passage of the Bill might have short-term benefits in that it might allay the acute racial fear of the Indians and it would restrict Indian expansion, but it would also mean an open breach not only between the Indian and the European in South Africa but also between India and the Union, and, above all, it would probably mean the end of the voluntary repatriation scheme which was the Union Government's main method of solving the Indian problem. As Corbett put it

> '... the effect of the Bill would in fact, so the proceedings of the Select Committee revealed, defeat its object. On the other hand a conference would mean seeking a settlement by agreement instead of by force, which would consolidate Indo-European relations [in South Africa as well as] Indo-South African relations, and, a more concrete advantage, which, viewed from the [Union] Government's criterion of expediency was likely to carry weight, the acceleration of voluntary repatriation could be discussed'. 64

In the light of these findings, when negotiations for a round table conference were resumed by the Indian Government, and after further informal discussions had been held between the Union Government and the Indian delegation, the Union Government, on 13 April 1926, sent a telegram to the Indian Government offering to hold a round table conference and to suspend operation of the Areas Reservation Bill pending its outcome 'provided that the Indian Government was willing to accept the position that "public opinion in South Africa

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64. Corbett op.cit. 65.

will not view with favour any settlement which does not hold out reasonable prospect of safeguarding the maintenance of western standards of life by just and legitimate means" and provided it was willing "to explore all possible methods of settling the Asiatic question". The decision of the conference would be subject to confirmation by the two Governments'.[65]

The Indian Government accepted these conditions as a suitable basis for a round table conference. The full agreement between the two Governments which constituted the official basis of the conference read as follows:

> 'The Government of the Union of South Africa and the Government of India have been further in communication with each other regarding the best method of arriving at an amicable solution of the Indian problem. The Government of the Union has impressed on the Government of India that public opinion in South Africa will not view with favour any settlement which does not hold out a reasonable prospect of safeguarding the maintenance of western standards of life by just and legitimate means. The Government of India is prepared to assist in exploring all possible means of settling the Asiatic question, and have offered to enter into a Conference with the Union Government for the purpose. Any proposals that the Conference might make would be subject to confirmation by the Governments of the two countries. The Union Government has accepted the offer of the Government of India and in order to ensure that the Conference should meet under the best auspices, have decided subject to the approval of the select committee and Parliament not to proceed further with the Areas Reservation and Immigration and Registration (Further Provision) Bill,[66] until the results of the Conference are available.'

The select committee accordingly recommended the holding of the conference and suspension of the Bill, and Parliament adopted the report of the select committee in a motion introduced by the Minister of the Interior.[67]

The round table conference opened in Cape Town on Friday December 17, 1926, and lasted until January 11, 1927. Those representing

65. Corbett loc.cit. citing Ann 4 2-'26. Further Correspondence between Indian and Union Governments re Areas Reservation Bill SC 9-'26.
66. Corbett op.cit. 65-6 citing SC 9-'26 v-vi.
67. House of Assembly Debates vol.7, col.2722 (2? April 1926).

The Government of India were Sir Muhammed Habibullah, Member of the Governor-General's Executive Council, who was the leader: the Hon. G.L. Corbett, Indian Civil Service Secretary to the Government of India, who was deputy-leader; the Rt.Hon. V.S. Srinivasa Sastri; Sir D'Arcy Lindsay, Member of the Legislative Assembly; the Hon. Sir Phiroze C. Sethna, Member of the Council of State; Sir George Paddison, Member of the Legislative Assembly and Mr. G.S. Bajpai, Deputy Secretary to the Government of India, who was the secretary for the Indian delegation.

The Union delegation consisted of the Hon. J.B.M. Hertzog, Prime Minister; the Hon. Dr. D.F. Malan, Minister of the Interior; the Hon. F.H.P. Creswell, Minister of Defence, the Hon. F.W. Beyers, Minister of Mines and Industries; the Hon. T. Boydell, Minister of Labour; Mr. C.W. Schmidt, Secretary for the Interior; Mr. E. Brande, Principal Immigration Officer, Cape and Mr. [illegible]ring, Chief Clerk, Department of the Interior.

The results of this conference were embodied in a Joint Communiqué issued simultaneously by the two Governments and a Summary of the Conclusions they had reached, more popularly known as the Cape Town Agreement. The Agreement dealt with three major issues. First, a new and more attractive scheme of assisted emigration from the Union was established whereby emigrants were to be transported at the Union Government's expense and bonuses were to be paid to them. Adults of sixteen and over were to receive £20 on arrival in India, children under sixteen were to receive £10 and cripples were to receive pensions. An assisted emigrant wishing to return could do so within three years but not within less than a year, provided he refunded the cost of the assistance he had received. After three years absence Union domicile would be lost.

For its part, the Indian Government undertook to assist the repatriates on their arrival in India and help them settle into their new homes and jobs.

The Union Government hoped that the new provision enabling emigrants to return to South Africa within three years would encourage emigration; they reasoned that Indians would be more likely to emigrate to unknown conditions in India once it was possible to return to South Africa.[68]

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68. House of Assembly Debates vol.8, cols. 1566-7 (16 March 1927).

The second major innovation of the Cape Town Agreement was the so-called 'upliftment clause'. In the third section of the Summary of Conclusions, the Union Government stated that 'it is the duty of every civilized Government to devise ways and means to take all possible steps for the uplifting of every section of their permanent population to the full extent of their capacity and opportunities and accept the view that in the provision of educational and other facilities the considerable number of Indians who [will] remain part of the permanent population should not be allowed to lag behind other sections of the people'.[69]

In accordance with this stated principle the Union Government promised, inter alia, to advise the Natal Provincial Administration to appoint a commission of enquiry into Indian education, to consider sympathetically the question of improving facilities for higher education at the South African Native College at Fort Hare, and to initiate investigations under the Public Health Act into sanitary and housing conditions in and around Durban. Furthermore, the principle of equal pay for equal work which must apply to all employees including Indians and which was contained in the Industrial Conciliation Act[70] and the Wage Act,[71] was to be strictly adhered to. In addition, a rather vague promise was made that when the law with regard to the granting of trading licences was revised, the Indian viewpoint would be considered.

Thirdly, section II of the Summary of Conclusions reasserted the right of entry into the Union of wives and children of Indians domiciled in South Africa (which right had been restricted by the Areas Reservation Bill) in terms of paragraph 3 of the Reciprocity Resolution of the Imperial Conference of 1918.[72]

In the Joint Communique the Union Government stated optimistically that 'in the expectation that the difficulties with which the Union has been confronted will be materially lessened by the agreement which has

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69. House of Assembly Debates vol.8, cols. 509-10 (21 February 1927).
70. Act 11 of 1924.
71. Act 27 of 1925.
72. See Annexure '[illegible]' attached hereto; B. Pachai International Aspects of the South African Indian Question: 1860 - 1971 (1971) 290 ff.

now happily been reached between the two Governments, and in order that the agreement may come into operation under the most favourable auspices and have a fair trial', the Union Government would not proceed further with the Areas Reservation Bill of 1926.[73]

The two Governments agreed to watch the workings of the Agreement and to exchange views from time to time as to any changes which experience might suggest.[74] The Indian Government was requested to appoint an Agent-General in South Africa 'to secure continuous and effective co-operation between the Union Government and that of India'.

So it can be seen that the Cape Town Agreement was a compromise in which India conceded the new repatriation scheme and South Africa conceded the upliftment provisions. It was a valiant attempt to reconcile the opposing European and Indian attitudes towards the solution of the problem, and was a policy which was far in advance of current European public opinion.

As far as repatriation was concerned the Cape Town Agreement proved to be only a temporary stimulant. According to Smuts some twenty years later during the debate on the Asiatic Land Tenure and Indian Representation Bill (1946), in 'the first years the repatriation of Indians with financial assistance from this Government was a success and then reports came back from India from those who had returned to their motherland that their conditions there were far worse than here and that they were far happier in South Africa, with the result that this effort at repatriation came to practically a dead stop'.[75] Available figures[76] do indicate that there was a sharp decline in the number of emigrants especially from 193- onwards.

In addition, it seemed that most of those who took advantage of this scheme to return to India were those poorer labourers who were non-competing and who were economically useful and desirable to the Europeans. The traders who were the main source of friction remained. So it can be seen that the European's fear of competition and expansion from the Indians was only momentarily stilled.

The main advantage gained by the Indians in South Africa was the removal of the threat posed by the Areas Reservation Bill with its

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73. House of Assembly Debates vol.8, col.510 (21 February 1927); Joint Communiqué para. 6.

74. Ibid; Joint Communiqué para. 7.

75. House of Assembly Debates vol.56, col.4167 (25 March 1946).

76. See Annexure 'C' attached hereto.

provisions for compulsory segregation, the restriction of the rights of Indians to own and lease property and the limitation of the right of entry into the Union of Indian wives and children. In compliance with the Cape Town Agreement, the first Agent-General for India, the Hon. V.S. Sastri, was appointed. He was responsible for introducing certain educational reform and established Sastri College, an Indian secondary school, in Durban. An educational committee consisting of educational experts from India was appointed and many of its recommendations in respect of Indian education in Natal were adopted.

However, the expected improvements in respect of housing conditions, sanitation, drainage facilities, water supplies and roads etc. were slow to materialise. Besides this, the Cape Town Agreement had encouraged westernisation among the Indians remaining in South Africa. This had the effect of fostering a desire among the Indians for proper facilities and amenities which could only be found in European areas. In particular, the Cape Town Agreement had imbued the Indian community with a feeling of security, which in turn had encouraged Indian investment, mainly in the field of immovable property. The result of this combination of factors was that for many years predominantly European areas were systematically penetrated by Indians.

Meanwhile, in 1932 a second round table conference was held in Cape Town between representatives of the Governments of India and South Africa. The Joint Communique[77] subsequently issued indicates that the original Agreement of 1927 was re-affirmed and, in fact, extended, in that the two Governments agreed to explore the possibilities of a colonisation scheme for settling Indians both from India and South Africa in other countries.

In 1943, members of Parliament from Natal and the other provinces protested against the large and rapidly increasing scale on which immovable property was being acquired by Indians in the heart of Durban and other traditionally white areas. These complaints led to the enactment of the Trading and Occupation of Land (Transvaal and Natal) Restriction Act of 1943,[78] popularly known as the Pegging Act.

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77. See Annexure 'A' attached hereto.
78. Act 35 of 1943.

The effect of this Act was to prevent Europeans from concluding agreements with Indians, the outcome of which would enable the latter to acquire land or premises in the municipal area of Durban or any other area which might be defined in the Government Gazette. Not only would such a contract be null and void, but a penalty of £100 or six months imprisonment could be imposed on the parties as well. The Pegging Act was intended to be an interim measure, lasting only for three years. After this time it was intended that Parliament should review the situation in Natal and the Transvaal.

The Secretary of the Natal Indian Congress addressed a telegram to the House of Assembly where the Bill was being read stating that the Indians regarded such repressive class legislation as a violation of the Cape Town Agreement. Colonel the Hon. C.F. Stallard, the Minister of Mines, retorted that the Indian community itself had undermined the basis of the Agreement 'by going out of their way to make these purchases [of land] and to disregard the consequences'.[79]

When, after three years, the Pegging Act lapsed, the electorate insisted that a more permanent solution be found to prevent Indians from purchasing immovable property on a large scale. This resulted in the Asiatic Land Tenure and Indian Representation Act[80] being introduced. The Act perpetuated the restriction of Indian property rights and re-embodied the principle of segregation and class areas. Indians were allowed to purchase land, but only in certain prescribed areas. The Act also granted the Indian community the franchise on a communal basis. The franchise clauses were designed to give the Indians in Natal and the Transvaal three representatives in the Assembly and two in the Senate. All the representatives were Europeans. In addition, in order to qualify as a voter, an Indian had to have passed Standard VI and had at least to earn £120 per annum or own property worth £250 or more.

During the second reading of the Bill in Parliament Smuts emphasised that a third round table conference would provide no solution,[81]

79. House of Assembly Debates vol.46, col. 5416 (14 April 1943).
80. Act 28 of 1946.
81. House of Assembly Debates vol.56, cols. 4170-72 (25 March 1946).

that this was essentially a domestic question for Parliament to solve 'which has drifted for many years and [if] it is allowed to drift further, we may drift on to the rocks. We may then come to a stage where this question will become a first class international issue, and the intention now is to prevent it from becoming such'.[82]

Smuts little realized just how soon the Indian question was to become 'a first class international issue', and it was, perhaps, ironic that the enactment of the Asiatic Land Tenure and Indian Representation Act proved to accelerate, and not at all to delay this.

Reaction to these measures in India was sharp and immediate. The Indian Government felt compelled to terminate the trade agreement between the two Governments and to recall Mr. R.M. Desmulch, its High Commissioner, from South Africa. The Indian Government concluded that a situation had arisen which was likely to impair friendly relations between states, and on the 22nd June, 1946, Sir A. Ramaswami Mudaliar, leader of the Indian delegation to the United Nations, wrote to the Secretary-General, Mr. Trygve Lie, requesting that the question of the treatment of Indians in the Union of South Africa be included in the provisional agenda for the second part of the first session of the General Assembly under Articles 10 and 14 of the Charter. The letter stated, inter alia, that passage by the Union Government of the Asiatic Land Tenure and Indian Representation Act constituted a unilateral repudiation by the Union Government of the Cape Town Agreement and the Joint Communiqué of the South African and Indian delegations at the second round table conference in 1932.

The Union Government, when informed of the contents of this letter by Mr. Trygve Lie, promptly conveyed its intention to be present at the assembly and lodged its objection to the jurisdiction of the General Assembly on the grounds that the matter at issue was essentially within the domestic jurisdiction of the Union of South Africa in terms of Article 2(7) of the Charter which states that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter...'.

At the 19th meeting of the General Committee on October 24, 1946,

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82. Ibid. col. 4162.

the representative of the Union of South Africa maintained that since the question concerned not Indian nationals, but Indians domiciled and resident in the Union of South Africa, the question, according to Article 2(7) of the Charter was essentially within the domestic jurisdiction of the Union and should therefore be removed from the agenda.

The General Committee failed to support the request of the Union of South Africa and at its 46th plenary meeting on October 31 of that year decided that the question should be considered jointly by the First (Political and Security) and Sixth (Legal) Committees as it was a matter which concerned them both.

The Joint First and Sixth Committee held a series of meetings on November 21, 25, 26, 27, 28 and 30, at which it discussed the question of the treatment of the Indians in South Africa.[83]

(ii) <u>Legal Effect</u>

(A) <u>Proposition : That the United Nations may always act where treaty obligations are involved</u>

A treaty may be defined as 'a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law'.[84]

It has long been argued that any dispute involving the interpretation of a treaty is, *per definitionem*, essentially an international matter and that this entitles the United Nations to intervene whenever treaty rights and obligations are involved. This claim was supported as early as 1923 by the Permanent Court of International Justice in the <u>Nationality Decrees</u>[85] case as follows:

> '[I]t may well happen that, in a matter which ... is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states and the dispute as to the question whether a state has or has not the right to take certain measures becomes in the circumstances a dispute of an international character.'

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83. <u>Yearbook of the United Nations</u> (1946-47) 144.
84. A.D. McNair <u>The Law of Treaties</u> (1961) 4.
85. <u>Nationality Decrees in Tunis and Morocco</u> 1923 PCIJ, Series B, No.4, 24; Rosalyn Higgins <u>The Development of International Law Through the Political Organs of the UN</u> (1963) 5[illegible].

This conclusion was buttressed in 1950 by an Advisory Opinion of the International Court of Justice in the Interpretation of Peace Treaties[86] case. The contention here, based on Article 2(7) of the Charter, was that neither the Court nor the General Assembly had jurisdiction to examine the case, as such an examination would constitute an interference or intervention in matters essentially within the domestic jurisdiction of States. The Court found that for the purpose of obtaining clarification of a legal nature regarding the applicability of the procedure dealing with the settlement of disputes provided for in the treaties concerned, '[t]he interpretation of the terms of a treaty ... could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court'.

This rule has been accepted by many statesmen. Among those who accepted it was Field-Marshal Smuts himself, who, while addressing the General Assembly on 21 November 1946, stated without hesitation that 'a third exception to the domestic rule is, of course, to be found in treaty obligations',[87] although he went on to deny emphatically that the Cape Town Agreement constituted a formal treaty in any way.

However, some States have argued that any matter which is essentially within the domestic jurisdiction of a State will remain so despite its being the object of treaty obligations. Some support for this claim is to be found in the fact that Article 2(7) refers to matters which are 'essentially' rather than 'exclusively' or 'solely' within the domestic jurisdiction of a state. It runs: '(n)othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State'. The word 'essentially' prompted Judge Krylov in his dissenting opinion in the Interpretation of Peace Treaties case to state that '[t]he wording of this text contemplates that the case might come within the domestic jurisdiction of the State, despite

86. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (majority judgment) 1950 ICJ Reports 70-71.

87. J.C. Smuts Statement in Reply on the Legal Aspects of the Case: Principal Documents Relating to Consideration by the United Nations General Assembly of the Representations of the Government of India on the Treatment of Indians in the Union of South Africa (1947) 76 ff; C.B.H. Fincham Domestic Jurisdiction (1948) 125.

the fact that it has been dealt with in a treaty.[88] Even in that case the matter may still remain essentially within the domestic jurisdiction.[89] Judge Krylov went on[90] to accuse the Permanent Court in the Nationality Decrees case of being the chief means of implanting the false opinion that if a question is regulated by a treaty it ceases to be a matter of purely domestic jurisdiction and of transforming this opinion into a legal assumption.

In a similar vein one of the representatives to the General Assembly, while discussing the Franco-Tunisian question in 1952, blamed the fallacy of the argument that the mere existence of a treaty between France and Tunisia placed the Franco-Tunisian dispute beyond the scope of Article 2(7) or the assignment to the word 'essentially' the same meaning as 'solely'.[91] He pointed out that the attempt by the Belgian representative to replace the word 'essentially' by 'solely' at the San Francisco Conference in 1945 was rejected by a substantial majority,[92] and [illegible] that this rejection clearly indicated the general desire to limit the competence of the United Nations.[93] This accords with the view of Judge Krylov[94] to the effect that stress was laid at San Francisco on the fact that a broader concept of the domestic jurisdiction of the State was primarily necessary for the

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88. Rosalyn Higgins op.cit. 83 claims that the Union of South Africa made such an assertion vis-à-vis the Cape Town Agreement and the treatment of its Indian nationals. The present writer, however, contends that the Union had always claimed that the matter was purely domestic for various reasons but had just as consistently denied that the Agreement constituted a formal treaty.

89. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (dissenting opinion of Judge Krylov) 1950 ICJ Reports 112.

90. Ibid.

91. United Nations GAOR 7th sess., 1st cttee, 545th mtg., para. 29.

92. There were six votes in favour of the substitution and twenty-eight votes against it.

93. See, too, in this regard M.S. Rajan United Nations and Domestic Jurisdiction. (1958) 252.

94. Ibid. 112.

protection of smaller States. C.B.H. Fincham,[95] in considering the effects of the substitution by the sponsoring powers of the word 'essentially' for the term 'solely' which had been used in the Dumbarton Oaks text, wrote:

> 'It is clear that the sponsoring governments felt that the word "solely" might lend itself too readily to a restrictive interpretation, since no domestic dispute of any importance is entirely without repercussions in the outside world. The term "essentially" was supposed to have a somewhat wider connotation.... [However] the sphere of domestic jurisdiction is continually shrinking "as States agree, formally or informally, to handle more and more of their affairs in concert".[96] Apart from the fact that the word "essentially" has a somewhat more liberal flavour, it is difficult to see how its use can change the criteria of law which must be applied. [It must be recognized that] the sphere of domestic jurisdiction ends at the point where treaties and international conventions begin; and it is clear that the dividing line with which we are concerned is not the tenuous boundary between "essentially" and "solely" but the line between matters of domestic jurisdiction on the one hand and matters regulated by international law on the other.'

He concluded[97] that the change of wording was purely verbal and devoid of legal significance and could therefore play no part in the delimitation of the spheres of competence of the United Nations and its members, as here only legal criteria must be used, as laid down in the Nationality Decrees case. While agreeing that legal criteria alone must be used to decide what matters fall under the heading 'domestic jurisdiction' and what matters the United Nations is competent to deal with, the present writer submits that the actual wording of Article 2(7) of the Charter is a legal criterion and cannot simply be dismissed as mere confused verbiage. Had the word 'solely' been used instead of the word 'essentially' the jurisdiction of the United Nations would have been so widened that it would have been difficult to find any treaty that could not be submitted to it. There is weight in the argument[98] that, in the light of the specific prohibition contained in the opening words of Article 2(7), if a matter were essentially within the domestic jurisdiction of a State there could be no intervention in it at all by the General Assembly.

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95. C.B.H. Fincham Domestic Jurisdiction (1948) 100ff.
96. Ibid. 102.
97. Ibid.
98. GAOR 7th sess, 1st cttee, 545th mtg. para. 29.

It has also been argued that owing to the <u>pacta tertiis nec nocent nec prosunt</u> rule, the mere fact that a treaty exists cannot provide the United Nations with jurisdiction over a matter which is otherwise domestic, because the obligations exist only between the States that are party to the treaty and not vis-à-vis third parties. This theory, for example, formed the basis of the argument advanced by the Czechoslovakian representative to the General Assembly in the <u>Interpretation of Peace Treaties</u>[99] case, who said :

> 'It has been argued that the United Nations General Assembly can take up this matter because it concerns alleged breaches of the peace treaties with Bulgaria, Hungary and Romania. This contention is obviously false because everybody knows that the peace treaties ... were concluded between the governments of each country on the one hand, and the countries which were at war with Bulgaria, Hungary and Romania on the other. The parties to the treaties, then, are Bulgaria Hungary and Romania on the one hand and the former enemies of those three countries on the other. The United Nations is not a party to those treaties and it has no right whatsoever to take up matters concerning their implementation.'

The Polish delegation also used this argument to oppose a draft resolution calling on the International Court of Justice for an advisory opinion on this matter. It stated[1] :

> 'The peace treaties were binding only on the signatories and no rights could be deduced from them in favour of third parties. States which had nothing to do with the treaties could not be permitted to decide who was to interpret them and in what manner the interpretation should be made.'

Rosalyn Higgins very skilfully parries the plea that vis-à-vis the United Nations the treaty is <u>res inter alios acta</u> and therefore the United Nations may not discuss the interpretation of the treaty provisions. She admits that the United Nations cannot claim rights or obligations under the treaty because it is not a party to the treaty, but adds

> 'If the argument means nothing more than this, it is correct. But this is not the same thing as denying to one party of a treaty the possibility of guidance on its interpretation by an international organ, even if the organ is a political, rather

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99. GAOR 5th sess, plen, 303rd mtg, para. 126.

1. GAOR 4th sess, Ad Hoc Pol Cttee, 13th mtg, para. 20.

than a legal one. There is no legal logic in the argument that a body interpreting a treaty need be a party to that treaty.'[2]

If the subject matter of the treaty is organic in nature, that is, if it is of national rather than international interest, if it affects the internal policy and laws of a country alone and if it deals with little of interest to a third party, it is arguable that such a treaty will fall essentially within the domestic jurisdiction of a State and that consequently the United Nations may not intervene at all.[3] The most popular example of such a treaty is the protectorate treaty. So, for example, during the discussions of the Moroccan and Tunisian questions in the General Assembly, the Belgian representative denied that the Treaty of Fez, 1912, by which it was agreed that Morocco's external relations would be governed exclusively by France, could serve to remove the question from the latter's domestic jurisdiction. He said[4]

> 'The contractual provisions governing relations between Morocco and France were organic in nature and directly affected the constitutional system of the parties ... and the functioning of their government. Such matters were essentially within the domestic jurisdiction and the United Nations could not intervene in them. The fact that those organic relations were governed by treaties ... in no way affected their nature ... [and] did not make intervention lawful.'

The Belgian representative noted that the position in this regard would have been different under the League of Nations, because Article 15 of the Covenant of the League had established the criterion of the League's exclusive jurisdiction and it followed that an exception based on domestic jurisdiction would not have been valid where the matter had been the subject of a treaty. However, the corresponding Article 2(7) of the Charter of the United Nations had established the new criterion that domestic jurisdiction was fundamental.

Is it possible to argue that the subject-matter of the Cape Town Agreement was organic in nature? It seems not, as the Agreement dealt not only with the treatment of Indians in the Union itself but their

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2. Rosalyn Higgins op.cit. 84.
3. Rosalyn Higgins ibid. notes that if the subject-matter of the treaty deals with matters within the jurisdiction of the United Nations under the terms of the charter, for example, human rights, the United Nations is entitled to consider the matter on this ground alone. The question of human rights is, however, a distinct legal issue and will not be further dealt with here.
4. GAOR 8th sess, 1st cttee, 630th mtg, para. 40.

repatriation to India as well. These measures involved not only South African nationals but also Indian nationals and necessitated action being taken not only by the Union Government in South Africa but also by the Government of India on Indian territory.

In this regard, S.L. Polak,[5] writing in 1927, that is, before the Cape Town Agreement was concluded, contended that matters especially or differentially affecting Asiatics could not be considered as the internal and domestic affairs of South Africa alone.

> 'The very fact that they have been constantly discussed at the Imperial Conferences ... should dispose of such a contention. From the moment that the interests of sections of the population, denied South African citizenship and deriving origin ... from another important part of the British Commonwealth ... are threatened, issues arise far transcending in importance the domestic concern of South Africa. Questions of high policy affecting intra-Imperial and foreign relations are involved.'

Finally, it may be noted that the validity and effect of an international agreement are not matters vitally important to the question of competence before an international court. This allowed the Permanent Court in the Nationality Decrees[6] case to indicate that investigations will not go beyond the point necessary to establish that an agreement exists.

So it seems that the United Nations in most instances will be able to act where treaty rights and obligations are involved; therefore, if the Cape Town Agreement can be considered to be a treaty, the United Nations acted perfectly legally and within its rights by claiming that the Agreement fell within its constitutional powers.

(B) Proposition : That the Cape Town Agreement is a Treaty

(a) The Element of Intention as a Requirement for a Treaty

One of the first points to note is that not every agreement concluded between States is necessarily a treaty. Schwartzerberger[7] lists among the essential requirements of a treaty the following: the parties intended to act under international law, and they intended to create

5. S.L. Polak 'The South African Indian Problem - a Constitutional Point' (192[illegible]) 2[illegible] Indian Review 579 at 5[illegible]3.

6. Nationality Decrees in Tunis and Morocco 19[illegible]3 PCIJ, Series B, No.4, [illegible]4.

7. G. Schwartzenberger Manual of International Law 5 ed. (1967) 151.

international obligations. These requirements, he believes, enable us to distinguish treaties from other agreements which a State may make with an object of international law and, more to the point, distinguish treaties from a mere 'gentlemen's agreement' by which it is intended to create moral obligations only.

This element of intention has been emphasized by other writers as well. For example, D.P. O'Connell[8] writes that 'the name given to the instrument is immaterial provided ... their agreement is intended to create rights and obligations or to establish relationships governed by international law'.

In similar fashion D.J. Devine[9] poses the questions 'Do the parties intend to create international law obligations? Do they intend their government to be regulated by international law?'

General Smuts, addressing the Joint First (Political and Security) and Sixth (Legal) Committee of the United Nations on 21 November 1946[10] contended that the Union Government 'at all stages and at all times' made it perfectly clear that the Cape Town Agreement of 1927 and the Joint Communiqué issued by the second conference of the representatives of the South African and Indian Governments in 1932 renewing that Agreement 'were not, in any sense, instruments giving rise to treaty obligations. What the respective Governments set out to do at the Conference, which resulted in these instruments, was not to enter into any treaty, but merely to formulate mutually acceptable policies to be carried out voluntarily in friendly co-operation towards a solution of a problem essentially within the domestic domain of the Union, but in which the Government of India claimed to have interests and responsibility. It was no more than what is known as a gentlemen's agreement with no legally binding force in international law.'

Smuts's views, at least at first glance, do seem to reflect the attitude of the South African Government both in its actions in South Africa and at the United Nations. On Monday 21 February 1927 the Minister of the Interior, Dr. D.F. Malan, presented the Cape Town

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8. D.P. O'Connell <u>International Law</u> 2 ed. (1970) I 195.
9. D.J. Devine 'Does South Africa Recognize Rhodesian Independence?' (1969) 86 <u>South African Law Journal</u> 438 at 439.
10. GAOR 1st sess, Pt.II, Jt.Cttee, 3.

Agreement to the House of Assembly.[11] During the ensuing discussion he stated that

> '[i]t will also be obvious that the agreement which has been reached is more in the nature of an honourable and friendly understanding than of a rigid and binding treaty ... [and that] the Union Government have not ... surrendered their freedom to deal legislatively with the Indian problem whenever and in whatever way they may deem necessary and just. Nor, on the other hand, have the Government of India bound themselves either permanently or for any limited period, to co-operate with us in the practical solution of our problem in the manner agreed upon.'

Dr. Malan, during the Second Reading of the Trading and Occupation of Land (Transvaal and Natal) Restriction Bill in April 1943,[12] maintained that his attitude as manifested in the correspondence that took place between himself and the Indian Government prior to the conclusion of the Cape Town Agreement 'has constantly been that a solution of the Indian problem is a matter for South Africa and for South Africa only'.

Furthermore, General Smuts in 1946, in discussing the Asiatic Land Tenure and Indian Representations Bill,[13] emphasized that the matter was and always had been a domestic matter and that the Cape Town Agreement amounted to nothing more than an acceptance by the Union Government of a proposal made by the Indian Government, which proposal had proved to be merely a temporary solution.

At the forty-third meeting of the General Committee held in Paris on 22 September 1948, the representative of the Union of South Africa, Mr. E.H. Louw, reaffirmed the position of his Government which adjudged the matter to be one of purely domestic concern and jurisdiction.[14] He pointed out that this was the third successive year in which the Indian Government was seeking United Nations intervention in regard to the legislation affecting South African nationals who were of Indian racial origin and that on both the former occasions the South African delegation had protested that this was an essentially domestic matter falling within the ambit of Article 2(7) of the Charter.

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11. House of Assembly Debates vol.8, cols. 510-11 (21 February 1927).
12. House of Assembly Debates vol.46, col. [illegible]430 (14 April 1943).
13. House of Assembly Debates vol.56, col. 4172 (25 March 1946).
14. Yearbook of the United Nations (1948-49) 304.

Rajan[15] adds that on other occasions the representatives of the Union Government had expressed similar views, the Agreement and the Joint Communiqué having been variously termed 'declarations of policy', 'an honourable and amicable understanding' and 'an arrangement'.

What, then, was the attitude of the Indian Government towards the South African 'Indian question' in general and the Cape Town Agreement in particular? General Smuts maintained in 1947[16] that the Indian Government had always acknowledged the fact that the Agreement was only a gentlemen's agreement with no legally binding force in international law, not only at the conferences in 1927 and 1932 but at all times thereafter as well. Furthermore, in reply to an argument advanced by the Indian representative at the United Nations, it was also pointed out[17] that until the question of the treatment of South African Indians was brought before the United Nations in 1944 the Government of India itself had not recognized the alleged solemnity of the Agreement and the Joint Communiqué and that at no stage before this had India ever claimed that this Agreement had the force of a treaty obligation.[18]

However, during discussions by the First Committee in May 1949[19] the representative of India referred to the Cape Town Agreement and the Joint Communiqué of 1932 as formal contracts and agreements, which, he said, showed conclusively that the issue did not fall within the domestic jurisdiction of the Union of South Africa.

It is also interesting to examine the historical background to the Agreement for evidence of the intention of the parties. It seems clear that both the Indian Government and the Imperial Government interested themselves at a very early stage in the question of the treatment of Indians in South Africa. It will be remembered that the very system of indentured labour itself was not initiated by the Natal Legislative Council acting alone; it needed, in addition, the blessing of the Indian and Imperial Governments. Even before the turn of the twentieth century the Indian Government and the Commissioner of Land

15. M.S. Rajan op.cit. 248n.3.
16. GAOR 1st sess, Pt.II, Jt Cttee, 3.
17. M.S. Rajan op.cit. 248; GAOR 7th sess, Ad Hoc Pol.Cttee 104.
18. Yearbook of the United Nations (1948-49) 307.
19. Ibid. 306-7.

and Emigration in London had temporarily halted the migration of Indian labourers to Natal because of the poor facilities found there and the abuses practised there. The Imperial Government both before and after Union had consistently heeded Indian pleas to exert diplomatic pressure on South Africa in respect of its treatment of Asians.

The problem of the discriminatory treatment of people of Indian origin had also been the subject of discussion at the Imperial Conferences of 1917, 1921, 1924 and 1926[20] as well as at the Prime Ministers' Conferences in the early 1920's.[21] It is arguable that the very fact that these matters especially affecting Asians had been discussed constantly at these conferences should dispose of the contention that they were the domestic and internal affair of South Africa alone.[22] Polak[23] contended further that the Indian and Imperial Governments not only had a right to intervene, but a duty to do so. He added:

> 'From the moment that the interests of sections of the population, denied South African citizenship and deriving origin ... from another important part of the British Commonwealth ... are threatened ... the matter must be diplomatically represented to the Dominion Government ... upon the direct initiative of the Colonial Office itself. The fact that India, under last year's[24] Imperial Conference resolution has now direct relations with South Africa, cannot exonerate His Majesty's Government from the duty of friendly intervention when duly appealed to ... India has an absolute right to call to her aid Great Britain and all the other Dominions that participated in the Conference.'

The Indian representative to the United Nations in 1946 claimed[25] that the fact that negotiations had taken place between the Indian, [Imperial] and South African Governments over many years and that agreements had been signed by them proved beyond doubt that the question of the treatment of the Indians in South Africa had never been solely one of domestic jurisdiction. He explained that he did not thereby mean to imply that India [and Great Britain] enjoyed a special authority

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20. GAOR 8th sess, Ad Hoc Pol Cttee, 90-91.
21. <u>House of Assembly Debates</u> vol.46, cols. 5410-11 (14 April 1943).
22. S.L. Polak op.cit. 583.
23. S.L. Polak ibid. 583-4.
24. 1921.
25. GAOR 8th sess, Ad Hoc Pol Cttee, 99-100.

vis-à-vis people of Indian origin in South Africa, as 'that would patently be an infringement of the Union Government's sovereignty over its nationals'.[26] But it did not follow that the South African Government could adopt the attitude that it and it alone could resolve the problem without reference to any other party.

It does appear that the attitude of the South African Government towards the question of the treatment of Asians in South Africa has been ambiguous. On the one hand, the Government has consistently stated that the matter is internal and domestic and therefore solely its concern. On the other hand, it had always willingly entered into negotiations with both the Imperial and Indian Governments and had accepted their advice on many occasions without deeming it to be an unwarranted interference in South African domestic affairs. It is open to argument whether this pattern of behaviour of the past had in fact created a norm for the future.

Finally, it remains to examine the attitude adopted by the United Nations to the question whether the Cape Town Agreement amounted to an international treaty or not. In June 1946 the Indian Government brought to the attention of the United Nations the problem of the racial discrimination to which South African nationals of Indian origin were subjected by the Union Government and requested the General Assembly to consider this problem. The Joint (Political and Legal) Committee approved a draft French-Mexican resolution which stated that the treatment of Indians in the Union should conform to the international obligations under the agreements concluded between the two Governments and asked the two Governments to report to the next session of the General Assembly on the measures taken to that effect. On 8 December 1946, after full consideration of the matter and prolonged deliberations, the General Assembly adopted the following resolution[27] by thirty-two votes to fifteen, with seven abstentions:

> 'The General Assembly,
>
> Having taken note of the application made by the Government of India regarding the treatment of Indians in the Union of South Africa, and having considered the matter:
>
> 1. States that, because of that treatment, friendly relations between the two Member States have been impaired, and unless a satisfactory settlement is reached, these relations are likely to be further impaired;

26. Ibid. 106.
27. 44(i).

2. Is of the opinion that the treatment of Indians in the Union should be in conformity with the international obligations under the agreements concluded between the two Governments and the relevant provisions of the Charter;

3. Therefore requests the two Governments to report at the next session of the General Assembly the measures adopted to this effect.' [28]

This resolution amounts to clear support by the General Assembly of the international status of the Cape Town Agreement. Pursuant to paragraph 3 of the resolution, reports were submitted by both Governments for consideration by the second session of the General Assembly. These reports were first referred to the Political and Security Committee of the General Assembly, which, on 17 November 1947, adopted a draft resolution by twenty-nine votes to fifteen with five abstentions reaffirming resolution 44(1) of 8 December 1946, requesting the two Governments to enter into another round table conference on the basis of that resolution and to report back to the Secretary-General of the United Nations on the result of the discussions. Although this draft resolution received a substantial measure of support,[29] it failed to be formally adopted because of a ruling that its adoption required a two-thirds majority. The net result of the deliberations on this question during the second session of the General Assembly was that this body failed to make any further recommendations on the subject.[30] Nevertheless, it can be seen that the United Nations clearly regarded the Agreement as international in nature, entitling that body to intervene. This attitude is borne out by resolution 265 (III), adopted by the General Assembly at its 212th plenary meeting on 14 May 1949,[31] which invited the Governments of India, Pakistan and the Union of South Africa[32] to enter into discussions at a round-table conference on the treatment of people of Indian origin in South Africa.

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28. Yearbook of the United Nations (1946-47) 148.
29. Thirty one votes to sixteen with six abstentions.
30. Letter from the Indian Representative, P.P. Pilley to the Secretary-General of the United Nations, dated 12 July 1948, requesting further consideration by the General Assembly of the treatment of Indians in South Africa; N. Mansergh Documents and Speeches on British Commonwealth Affairs (1931-52) (1953) II 908 ff.
31. Forty-seven votes to one, with one abstention.
32. Yearbook of the United Nations (1948-49) 310.

(b) The Element of Registration as a Requirement for a Treaty

Article 18 of the Covenant of the League of Nations reads as follows:

> 'Every treaty or international engagement entered into hereafter by any Member of the League of Nations 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 unless so registered.'

One of the South African representatives to the United Nations in 1946 contended that, because the Cape Town Agreement was 'merely a statement of good intention' which had never been signed or registered as a treaty with the League of Nations Secretariat, it was not to be regarded as a treaty with legally binding consequences in international law.[33] It is true that neither the 1927 Agreement nor its successor of 1932 had been registered with this body. Had they in fact been registered, this would have proved unequivocally that the South African Government regarded them as binding treaties. However, the failure of the parties to register is not necessarily conclusive evidence to the contrary.

Although there existed some doubt as to the effect that a failure to register would have on a treaty,[34] very little light was thrown upon the meaning of Article 18 of the Covenant of the League by any international tribunal. As Lord McNair[35] pointed out,

> '(e) xperience showed that this language was too extensive; literally construed it would mean that ... every time two States reached an accord by means of diplomatic correspondence, for instance, to give facilities in certain territory for a scientific mission, to grant visas for certain persons attending a conference or to permit a "round-the-world" flight, the diplomatic correspondence embodying the agreement ought to be registered.'

As a result, the United Kingdom Government and other Governments, in practice, placed certain limitations on the language of Article 18. So it became customary to register only written treaties or international engagements; oral engagements such as the Non-Aggression Pact entered into by means of spoken declarations at the Geneva Conference in April and May 1922, were not registered.

The Union of South Africa contended that, as the mandate for South-West Africa had not been registered with the League of Nations Secretariat,

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33. M.S. Rajan op.cit. 248.
34. J.L. Brierly The Law of Nations 6 ed (1963) 324.
35. McNair op.cit. 181.

it was not binding in international law. The International Court[36] however, stated that as one of the main purposes of Article 18 was to ensure that sufficient publicity was given to an international engagement and publicity in this instance had been achieved by other means, that is, by publication through League documents, the mandate was binding on the mandatory.

The Cape Town Agreement and the Joint Communique of 1932 were certainly not formal, signed instruments. They were simply engagements embodied in identical statements made by the ministers responsible in the Union House of Assembly and the Delhi Legislative Assembly.[37] They were essentially oral in nature. Using the above guideline, it would seem to have been an extra-ordinary measure to have registered these Agreements, rather than the reverse. When the General Assembly passed resolution 44(1) on 8 December 1946 it simply assumed that the mere existence of the Cape Town Agreement and Joint Communique was sufficient to remove the dispute from the domestic jurisdiction of the Union of South Africa. It paid no attention whatsoever to the fact that the Agreements had never been registered with the League of Nations.

Rosalyn Higgins[38] adds that although, at first glance, this practice of non-registration seems to run counter to Article 102(2) of the Charter of the United Nations (which corresponds substantially to Article 18 of the Covenant),

> 'it is at least arguable that the term "invoke" means to invoke for the purposes of claiming rights or obligations under the treaty; it does not necessarily mean that the unregistered agreement may not be cited before the United Nations as evidence of the international nature of the dispute.'

Surely a similar argument could be applied to the wording of Article 18 of the Covenant of the League. Lord McNair,[39] however, endorses the general rule that

> 'in view of the language of Article 18 it is difficult to escape the view that non-registration was a fatal defect and affected the essential validity of the treaty; and that members of the League having for the period of their membership attached this condition to their ability to enter into binding international agreements with other members, the engagement remained incomplete until that condition was satisfied.'

36. South West Africa Cases (Preliminary Objections) 1962 ICJ Reports 319 at 332.
37. House of Assembly Debates vol.8, cols, 508-9 (21 February 1927)
38. Rosalyn Higgins op.cit. 86-7.
39. McNair op.cit. 183.

McNair[40] claims further that it was the substance of these international agreements which determined their relationship to Article 18 of the Covenant. The following three categories of agreement did not fall within its scope: first, agreements between the Allied Governments in respect of the settlement of claims and counter-claims for goods supplied and for services rendered during the First World War; secondly, agreements relating to loans and other financial transactions between governments; and thirdly, agreements of a purely commercial nature such as sales or the barter of coal for coffee. Clearly, the Cape Town Agreement does not fall within the scope of these exempted types of international agreements, and, had it been written rather than oral in form, non-registration would probably have been regarded as a fatal defect, affecting the validity of this 'treaty'.

(c) The Inter Se Doctrine

The inter-se doctrine constituted another important exception to the rule requiring treaties to be registered. This doctrine, strictly applied, asserted that those relations between countries of the Commonwealth which, had they subsisted between any of them and foreign countries, or between foreign countries per se, would have been regarded as international relations, governed by international law,[41] were not international relations and were not governed by international law. It followed that Article 18 applied only to treaties and engagements which were 'international' and that therefore it did not apply to engagements, under whatever name, entered into between the different self-governing members of the British Empire inter se. This doctrine was derived from the traditional constitutional principle of the unity and indivisibility of the Crown and the common allegiance owed to it by its subjects in the Commonwealth. Although it was aimed at securing the political unity of the Commonwealth in its international relations, it was basically only a constitutional convention, which would be and which, in the course of time, was, in fact, altered.

Had the Cape Town Agreement been concluded earlier, that is to say, before 1921, when the inter se doctrine was in its hey-day, there is little doubt that the doctrine would have been strictly applied, which would have meant that the Agreement would not have been regarded as international in nature or justiciable by the Permanent Court of International

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40. Ibid. 181.

41. J.E.S. Fawcett The British Commonwealth in International Law (1963) 144.

Justice, and registration under Article 18 of the Covenant of the League would not have been the usual practice or at all necessary.

The traditional view of the United Kingdom Government was that Article 18 applied only to treaties and engagements which were international in character and not to those, under whatever name, entered into between the different self-governing members of the British Empire. It did not regard mutual relations between the Commonwealth countries as international relations. The Government's view of this issue was expressed in a dispatch to the Secretary-General of the League dated 27 November 1924. This dispatch followed on the dispute between the Irish Free State and the United Kingdom over the character and effect of the Articles of Agreement for a Treaty between Great Britain and Ireland signed by the British and Irish delegates on 6 December 1921.[42] The Irish Free State Governments challenged the principle that the possibility of international relations between the Dominions and the United Kingdom was precluded by the doctrine of the unity of the Crown, by taking the initiative in January 1924 to register the Treaty with the League of Nations Secretariat under Article 18. The United Kingdom Government immediately lodged a note of protest with the Secretary-General, stating[43] that

> '(s)ince the Covenant of the League of Nations came into force, His Majesty's Government have consistently taken the view that neither it nor any convention concluded under the auspices of the League are intended to govern the relations inter se of the various parts of the British Commonwealth. His Majesty's Government considers, therefore, that the terms of Article 18 of the Covenant, are not applicable to the Articles of Agreement of December 6, 1921.'

However, the Irish Free State Government remained firm in its stand, writing to the Secretary-General[44] that

> '(t)he obligations contained in Article 18 are ... imposed in the most specific terms on every member of the League; we are unable to accept the contention that the clear and unequivocal language of that Article is susceptible to any interpretation compatible with the limitation which the British Government now seeks to read into it.'

Fawcett[45] describes this as the first successful challenge to the inter se doctrine and notes that the Irish Free State went on to register

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42. Ibid. 154.

43. Ibid. 155; R.Y. Jennings 'The Commonwealth and International Law' (1953) 30 British Year Book of International Law 320 at 332.

44. Fawcett op.cit. 155.

45. Ibid. 154-5.

the Supplementary Agreement of December 1925 with the League Secretariat, which, in accordance with its usual practice, permitted registration de bene esse (but which did not undertake to settle the dispute).

The 1926 Imperial Conference expressed no direct opinion on this matter of registration, but the principle was noted there that agreements to which two or more members of the Commonwealth were parties were not to apply between them without express provision, and this implied that such agreements were not registrable as between members of the Commonwealth. It was also mentioned at this conference[46] that the making of a treaty (which was signed by or on behalf of any or all of the Governments of the Empire) in the name of the King as the symbol of the special relationship between the different parts of the Empire would render superfluous the inclusion of any provision that its terms must not be regarded as regulating inter se the rights and obligations of the various territories. The report added that the question was discussed at the Arms Traffic Conference in 1925, where the Legal Committee of that conference laid down that the inter se principle underlies all international conventions.

By [illegible] this constitutional convention had been considerably weakened through the practice of Commonwealth States. An examination of the Index to the League of Nations Treaty Series,[47] which includes the list of registered treaties approximately from 19[illegible]6 to 1932, shows that every Commonwealth country registered treaties with the League Secretariat. Canada registered thirty nine; Australia seventeen; New Zealand eighteen; India twenty nine; and the Union of South Africa twenty one. In a number of these treaties where either the British Empire[48] or Great Britain[49] was a contracting party another Commonwealth country was one of the other contracting parties. That is, the separate signatures of individual Commonwealth countries appeared in the treaties in addition to the signature of the British Empire or Great Britain.

Fawcett[50] mentions several other contradictory instances. For example, the London Naval Treaty[51] was expressed to be a 'Treaty for the Limitation

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46. 1926 Imperial Conference - Summary of Procs and Appends cmd. 27[illegible] 23; R. Y. Jennings op.cit. [illegible].
47. Index to League of Nations Treaty Series, vols. 4[illegible]-88 (treaties 1001-2000) and vols. 89-130 (treaties 2001-3000).
48. Its pre-1926 appellation.
49. Its post-1926 appellation.
50. Fawcett op.cit. 165-6.
51. 1936. League of Nations Treaty Series vol. 184 p. 115

of Naval Armament' between 'The President of the United States of America, The President of the French Republic and His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India'. However, separate plenipotentiaries signed for the United Kingdom, Canada, Australia, New Zealand and India. No restrictions were made to the effect that the treaty did not operate inter se and it was subsequently registered with the League Secretariat under Article 18. South Africa and the Irish Free State refused to participate partly because the form of the treaty, they felt, did not clearly show that the Dominions were participating on a basis of equality with the other signatories.

In 1931 the British Commonwealth Shipping Agreement was adopted on the recommendation of the 1930 Imperial Conference. It was the first formal agreement to be concluded between members of the Commonwealth alone and was registered with the League of Nations by South Africa. South Africa also registered a number of agreements concluded with the United Kingdom on economic relations between Rhodesia and Swaziland.[52] R.Y. Jennings[53] states as well that even after the inter se doctrine had been reaffirmed at the Imperial Conference of 1926, practice by the Commonwealth States was never entirely consistent. He also provides the example of South Africa, which registered a number of inter se agreements after 1926, but asserts that even the Union did not follow any consistent policy.

Fawcett[54] maintains that no clear conclusion can be drawn from practice as to how the Commonwealth countries in this period regarded registration of treaties under Article 18. It appears that practice in the Commonwealth on the registration of treaties was not uniform. All he is prepared to assume is that those agreements between members of the Commonwealth which were not registered were not regarded by their members as treaties or international engagements. The Cape Town Agreement, occurring as it did right in the midst of this period of uncertainty, was not registered either by India or by South Africa, and on Fawcett's reasoning it would appear that neither party regarded it as a treaty.

The Index to the League of Nations Treaty Series[55] indicates that

52. Fawcett op.cit. 167.
53. Jennings op.cit. 333.
54. Fawcett op.cit. 167.
55. Index to League of Nations Treaty Series, vols. 40-88 (treaties 1007-2000).

treaty number 1344, registered with the League in 1928, was a treaty between India and South Africa in connection with errata in certain money orders. The present writer has been unable to prove conclusively that such a treaty did exist - on the contrary, upon investigation, it appears that the index is incorrect. Treaty number 1344 does not concern a treaty between India and South Africa at all - it is a treaty concluded between India and the Irish Free State. If, however, such a treaty was concluded between India and South Africa, this would amount to a strong implication that as South Africa and India were registering mutual agreements at that time, they did not regard the Cape Town Agreement as a treaty with international obligations in tow. In any case, at the very least this treaty, whatever its exact nature, indicates that Commonwealth countries were, at that time, registering treaties <u>inter se</u>.

(2) <u>The Status of the Contracting Parties</u>

Another question arises in connection with the international status of India and the Union of South Africa at the time the Cape Town Agreement was concluded. A contracting party to a treaty must have international personality. That is, a treaty presupposes the capacity in international law to conclude it. Unless it can be proved that the Union Government and India each had this capacity in 1928, i.e. unless they were both fully sovereign, the Cape Town Agreement cannot constitute an international agreement. Rosalyn Higgins[56] contends that this argument has never found widespread support and has been advanced only by a very limited group of States who are all parties to a similar dispute or potentially involved in problems of a like nature. Certainly, this issue was never raised by the General Assembly in relation to the Cape Town Agreement. This body, by passing a number of resolutions referring explicitly to the Cape Town Agreement as an international agreement, simply assumed that South Africa and India did have capacity to enter into international relationships. In all the objections that the South African Government raised to the contention that the Cape Town Agreement was a treaty, it never once mentioned that the Union had been incapable of concluding an international treaty. On the contrary, it seems clear that South Africa and India regarded themselves as fully-fledged members of the international community. As was shown above, South Africa refused

56. Rosalyn Higgins op.cit. 85.

to participate in the London Naval Treaty of 1936 because the treaty did not indicate clearly enough that South Africa would be negotiating on an equal basis with the other signatories.

Furthermore, the emergent statehood of the Dominions and India was marked by their admission to the League of Nations. On the one hand, the Preamble to the Treaty of Versailles included 'the British Empire' among the Allied and Associated Powers, without reference to any of its component parts, but on the other hand, when listing the delegations, it had used the following form[57]:

> '... the High Contracting Parties represented as follows: H.M. the King of the United Kingdom of Great Britain and Ireland and the British Dominions Beyond the Seas, Emperor of India, by [names of British delegates] and for the Dominion of Canada by [names of Canadian delegates], for the Commonwealth of Australia by [names of Australian delegates], for the Union of South Africa by [names of South African delegates], for the Dominion of New Zealand by [names of New Zealand delegates], for India by [names of Indian delegates].'

At the end of the treaty all the delegates' signatures appear in order. In the Annex to the Covenant of the League of Nations the following names are found in the list of original members of the League of Nations: British Empire, Canada, Australia, South Africa, New Zealand, India.

Article 1 of the Covenant reads:

> 'The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant.... Any fully self-governing State, Dominion or Colony not named in the Annex may become a member of the League, if its admission is agreed to by two-thirds of the Assembly.'

In other words, so far as joining the League was concerned, the emphasis was not on statehood but on self-government. In 1923, for example, the Irish Free State was admitted as a member of the League on its own initiative and application. The United Kingdom Government did not participate even formally, although it cannot be doubted that the Irish Free State had strong constitutional links with the United Kingdom. In relation to the other members of the League it would appear that the Union of South Africa and India were fully self-governing States.

Dr. F.S. Malan, the acting South African Prime Minister, stated in Parliament in February 1919[58] that the Union at that time was in an even

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57. Fawcett op.cit. 147.

58. <u>Cape Times</u> 12 February 1919.

Parliament was not merely a sham to put before His Majesty the King. He emphasized that the South African Parliament had nothing to do with the ratification by the British Parliament:

> '[T]he position is this, that until we have given the ratification which is necessary, until all the British Dominions who have signed this have agreed to this ratification, we are, so far as the British Empire is concerned, holding up this final exchange which is necessary before this treaty is brought into force.'

As regards the question of status, Smuts added:[62]

> '[U]ntil last year British Ministers had signed all documents and dealt with all matters affecting the Dominions. But a change had come about in Paris when representatives of the Dominions had, on behalf of the King, for the first time, signed that great document on behalf of the Dominions. The change was that, in future, the representatives of the Dominions would act for the Dominions. This precedent had now been laid down for the future.'

In proposing the motion for ratification of the Versailles Peace Treaty, which was ultimately carried,[63] Smuts said[64] that the self-governing Dominions had latterly received greater and greater legislative powers, so much so that if the British Parliament were then to pass legislation in regard to the Dominions, it would be a revolutionary action. As a result of the Paris Conference

> 'the Dominions would, in future, with regard to foreign affairs, deal through their own representatives.... The British Empire would, therefore, be a league in which all the Dominions would be on an equal basis as regarded their Governments ... [I]n the League of Nations all the Dominions, with England, would stand on an equal footing and would be recognized as such. The only difference would be that England would be a permanent member of the Central Council. Therefore in future all parts of the Empire would equally be consulted in matters of war and peace.'

So it happened that the Dominions and India signed and ratified the Versailles Treaty separately from Britain and were recognized at the same time as being separate members of the League of Nations. The British Dominions became equal members in the Assembly, with a full right to be elected. Some of the other Powers, America in particular, were not very happy with this state of affairs as they felt it gave too large a vote to the British Empire. As Smuts[65] stated in the House of Assembly

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62. Cape Times 10 September 1919.
63. By eighty-four votes to nineteen.
64. Cape Times 11 September 1919.
65. Cape Times 9 September 1919.

> 'I can well understand that in other parts of the world this enormous preponderance which the British will enjoy ... is not looked upon with very great favour .... It took the British delegation at Paris a good deal of time to hammer out this new machinery for recognition of young nations. The Dominions felt very strongly that here was their chance and that if there was to be a League of Nations on which the nations were to be equally represented, then the League should include the British Dominions.'

In addition, as has already been mentioned, the Dominions (including South Africa) had negotiated and registered a number of treaties during the 1920's and 1930's. This, in itself, indicates very strongly that they regarded themselves as fully capable in international law. It is interesting to note that often Great Britain was a party to these treaties and raised no objections to their registration. As C.J.R. Dugard[66] writes, the Mandate for South-West Africa was conferred on South Africa in 1920 as a sovereign independent State, despite the fact that South Africa became fully independent only in 1931, when the Statute of Westminster was passed, s.3 of which declared that 'the Parliament of a Dominion has full power to make laws having extra-territorial operation'. Section 59 of the South Africa Act empowered the Union Parliament to 'make laws for the peace, order and good government of the Union' alone.[67] This section, together with the subordination of a colonial legislature[68] to the British legislature cast doubt on the Union Parliament's competence to legislate extra-territorially in respect of facts and events that occurred outside the territorial limits of the Union.

(e) Form of Treaty

The South African representative to the United Nations in 1946 raised the issue that no formal instrument had been signed and that, therefore, the Cape Town Agreement could not be a treaty. It was simply embodied in identical statements made in the Union House of Assembly by the South African minister and in the Delhi Legislative Assembly by his Indian counterpart.[69] Other member states objected to this argument, maintaining that this procedure, in itself, would not preclude the agreement being regarded as a treaty because any solemn agreement between States

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66. C.J.R. Dugard 'South-West Africa and the Supremacy of the South African Parliament' (1969) 86 South African Law Journal 194 at 195.
67. Walter Pollak 'The Legislative Competence of the Union Parliament' (1931) 48 South African Law Journal 269 at 273.
68. Macleod v. Attorney-General for New South Wales [1891] A.C.455 (P.C.).
69. House of Assembly Debates vol.8, cols. 5[illegible]8-9 (21 February 1927).

constitutes a treaty.[70] Oppenheim[71] states that international law contains no rules prescribing the necessary form of a treaty. A treaty will be concluded as soon as the mutual consent of the parties to be bound becomes clearly apparent. Although most treaties are in written form, signed by the duly authorised representatives of the parties, a treaty may just as validly be made orally. The Permanent Court of International Justice in the case between Norway and Denmark concerning the Status of Eastern Greenland[72] held in 1933 that an oral declaration given by the Minister of Foreign Affairs on behalf of his Government will be binding on the State that he represents provided only that the subject-matter of the declaration falls within his province. In 1961 the International Court of Justice, in its judgment on the preliminary objections in the case concerning the Temple of Preah Vihear[73] stated :

> 'Where, as is generally the case in international law ... the law prescribes no particular form, parties are free to choose what form they please, provided their intention clearly results from it.'

The Court added[74]:

> '[T]he sole relevant question is whether the language employed in any given declaration does reveal clear intention.'

This attitude was reflected by the International Court in the Nuclear Tests case in 1974[75] where it said :

> 'With regard to the question of form, international law [does not impose] any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law [and this] does not require that they should be couched in written form.'

For the purposes of the 1969 Vienna Convention on the Law of Treaties[76] a treaty is 'an international agreement concluded between States in written form'. However, Article 3 of the Convention declares that

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70. Yearbook of the United Nations (1946-47) 148.

71. L. Oppenheim International Law - A Treatise 8 ed. (1955) I Peace 898.

72. 1933 PCIJ Reports, Series A/B, No.53.

73. 1961 ICJ Reports 17 at 31.

74. Ibid. 32.

75. 1974 ICJ Reports 253 at 267-8.

76. D.H. Harris Cases and Materials on International Law (1973) 554.

> '[t]he fact that the present convention does not apply ... to international agreements not in written form shall not affect [inter alia]
> (a) the legal force of such agreements;
> (b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention.'

In other words, the Vienna Convention, although applying only to treaties concluded in writing, explicitly says that States may validly conclude oral treaties.

Furthermore, it is irrelevant that the Cape Town Agreement has always been referred to as an 'agreement' rather than a 'treaty'. According to Oppenheim[77] there is no essential difference between an 'agreement' and a 'treaty'. The binding force upon the contracting parties is the same, despite the names used. He considers that the decisive factor is not its description, which varies considerably, but, rather, whether it is intended to create legal rights and obligations between the parties.

South African treaties of that time were made in a number of ways. So, for example, a treaty between the Union of South Africa and Southern Rhodesia in regard to the avoidance of double death duties was concluded in [illegible] in the guise of an Exchange of Notes between General Hertzog (the then Minister of External Affairs) and Mr. Moffat, the Rhodesian representative. The Note from General Hertzog takes the form[78] of a straight forward letter.

In 1926 a treaty in the form of an Agreement between the Union Government and the Government of the Republic of Portugal was signed at Cape Town,[79] which regulated the use of the water of the Kunene River for the purposes of generating hydro-electric power in and for the irrigation of the mandated territory of South-West Africa. The terminology used was much more formal than that of the Cape Town Agreement; for example, it is essentially a written agreement and ends with the words 'Thus done and signed at the City of Cape Town on the 1st day of July 1926'. Thereafter follow the signatures of the South African and Portuguese representatives who concluded the Agreement. The Agreement states further that it was presented by the Secretary of State for Foreign Affairs to Parliament by command of His Majesty. All of these elements are missing from the Cape Town Agreement.

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77. Oppenheim op.cit. [illegible]8ff
78 Union Government Treaty Series No. [illegible] of 19[illegible]2.
79. United Kingdom Treaty Series No.30 of 1926.

In 1932 and 1933 two informal protocols instead of formal treaties were concluded, which provided for the suspension of inter-governmental debts payable by the Government of the German Reich[80] and by the Government of Czechoslovakia.[81] The fact that they were not termed 'treaties' was irrelevant to their validity. In 1931 South Africa became a party to a Convention for the Regulation of Whaling, signed at Geneva.[82]

Another Agreement, this time between the Union of South Africa and the Swaziland Protectorate, providing for the exemption of double taxation of farmers carrying on business both in the Union and Swaziland, was signed at Cape Town on 6 March 1932 and at Mbabane on 2 March 1932.[83] This was quite different in style from the Cape Town Agreement, once again being very much more formal. The opening paragraphs, for example, read:

> 'Whereas it is desirable that an arrangement be arrived at between His Majesty's Government in the Union of South Africa and the Administration of Swaziland...
> 'Now therefore His Majesty's Government in the Union and the Administration of Swaziland declare that they have agreed and do hereby agree as follows...'

The Agreement concludes:

> 'In witness whereof we duly authorised hereto have subscribed to this Agreement in duplicate,
> 'On behalf of the Union of South Africa
> H.D.J. Bodenstein
> Secretary for External Affairs, Union of South Africa
> Cape Town 6th March 1932
> 'On behalf of Swaziland
> T. Ainsworth Dickson
> Resident Commissioner, Swaziland
> Mbabane 2nd March 1932.'

One can compare the above format with that of the Cape Town Agreement[84] which reads as follows:

> 'It was announced in April 1926 that the Government of India and the Government of the Union of South Africa had agreed to hold a Round Table Conference...'

The Agreement was not signed at all by the negotiating ministers. It simply states in an informal manner what was agreed on. The same applies to the Joint Communique of 1932. However, although the Agreement stands out by virtue of its casual approach, this alone would not be enough to

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80. Union Government Treaty Series No. 9 of 1932.
81. Ibid. No.10 of 1933.
82. Ibid. No.11 of 1931.
83. Ibid. No.2 of 1932.
84. House of Assembly Debates vol.8, cols. 109-10 (21 February 1927) see Annexure 'B' attached hereto.

better position than if it had been independent. At the Paris Peace Conference the South African representatives had enjoyed the same right of participation in the discussions as the representatives of the other Dominions. The Prime Minister of the Union could communicate directly with the Prime Minister of Great Britain, so the possible impression that South Africa was merely a Crown colony had been altogether removed. He added that if a League of Nations were to be established, South Africa would claim the same representation in the League as it had enjoyed at the Peace Conference.

The Governor-General, Lord Buxton, addressing the House of Assembly in September 1919,[59] said:

> 'The Peace Treaty constitutes a great landmark in the history of the Empire. It accords international recognition to the new status of full nationhood of the British Dominions as not only do the Dominions for the first time become co-signatories, with the other Powers, of such an instrument, but under the Covenant of the League of Nations they also become members of the new League on a footing of equality with the other Powers and nations of the world.'

The Treaty was in fact ratified by the King only after he had obtained the separate approval of the Dominion Parliaments. As Fawcett[60] says, this fact becomes even more important when one realizes that the British Government expressed its desire to ratify the Treaty before the Dominion Parliaments could consider it, and Lord Milner, the Colonial-Secretary, contended that the approval of the Dominions was unnecessary and that their initial signature could be taken as equivalent to the tendering of advice to ratify. Led by Canada, the Dominion Governments rejected this view and insisted on laying the Treaty before their respective Parliaments. Once a Dominion Government had secured Parliamentary approval, it drew up its own Orders in Council advising the King to ratify on its behalf.

General Smuts addressed the House of Assembly on 9 September 1919,[61] and proposed a motion whereby the Assembly would ratify the Treaty of Versailles, which had been signed by himself as Prime Minister and by the Minister of Defence in their capacities as plenipotentiaries for the Union of South Africa. He told the House that, despite the British Parliament's ratification of the Treaty, ratification by the Union

59. Cape Times 6 September 1919.
60. Fawcett op.cit. 150.
61. Cape Times [illegible] September 1919.

conclude that it was not a treaty. For all its informality it remains a joint statement of intention between the Governments of India and South Africa and could be labelled a solemn agreement.

This attitude is endorsed by the Nuclear Tests case,[85] where a number of authoritative statements were made on behalf of the French Government concerning its intentions as to future nuclear tests in the South Pacific Ocean. The first statement was contained in a communiqué issued by the Office of the President of the French Republic on 8 June 1974[86] shortly before the commencement of the 1974 series of French nuclear tests:

> 'The office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.'

A copy of the communiqué was transmitted in a Note dated 11 June 1974 from the French Embassy in Canberra to the Australian Department of Foreign Affairs. At a Press conference on 25 July 1974 the President of France said[87]: 'I had myself made it clear that this round of atmospheric tests would be the last'. In addition, statements[88] similar to those above were made on 10 July 1974 in a Note sent by the French Embassy to the New Zealand Minister of Foreign Affairs and at a Press conference held on 11 October 1974 by the Minister of Defence of France. Further statements to this effect were made on 16 August 1974 by the French Minister of Defence and on 25 September 1974 by the French Minister for Foreign Affairs.

In view of what had taken place, the International Court found that France had made public its intention to cease conducting atmospheric nuclear tests following the conclusion of the 1974 series of tests. The Court stated:

> 'It is well recognized that declarations of this kind made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be and often are very specific. When it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if

85. 1974 ICJ Reports 253.
86. Ibid. 265.
87. Ibid. 266
88. Ibid.

given publicity, and with an intent to be bound, even though not made within the context of international negotiations, is binding .... [N]ot all unilateral acts imply obligations ... [t]he intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.'

Thomas M. Franck[89] calls the Court's view as to the legal consequences of such statements an important but not unconscionable extension of prior decisions respecting oral statements. This case makes new law by recognizing that a written or oral undertaking may give rise to legal rights and obligations even when made without a reciprocal or mutual exchange of commitments, outside the context of formal negotiations, and to the world at large or to specified or perhaps even unspecified but ascertainable beneficiaries. One of the most important elements in deciding whether a statement made by a State will be binding on the State is intention. Franck adds[90] that when a State speaks, through an ostensible agent, and the statement contains an express commitment as to a future course of conduct by that State, it should not be necessary to enquire whether the State intends to be bound; it is necessary merely to enquire whether other States with an interest at stake could reasonably assume that the statement constituted a commitment. One should ask whether another State or other States have relied on the statement in any way, and perhaps, one could add, whether they had the right to rely on such a statement. So the Court, in reaching its decision in the Status of Eastern Greenland case referred to above, was impressed by the fact that Denmark, relying on Norway's unilateral 'promise' of non-interference, proceeded to execute plans and projects for its colony. Even if the Union Government did not intend the Cape Town Agreement to be a treaty, it could be argued that, at the very least, it regarded the Agreement as a serious declaration of its intention and that it had thereby committed itself to a particular course of action. The elements of mutuality and reliance by the Government of India are both present here, as the Indian Government took an active part in the negotiations that led to the ultimate formation of the Agreement. Surely it had the right to rely upon the Agreement in the future.

89. Thomas M. Franck 'World Made Law - The Decision of the ICJ in the Nuclear Test Cases' (1975) 69 American Journal of International Law 612 at 615.

90. Franck op.cit. 617.

(e) Developments After World War II

Events following upon the second World War confirmed that Members of the Commonwealth had come to be regarded as sovereign States in international law possessing independent treaty-making powers.

Ministers of Commonwealth countries, including General J.C. Smuts, made significant contributions to the drafting of the Charter of the United Nations. The Charter was signed and ratified not only by the Government of the United Kingdom, but by the Governments of South Africa,[91] Canada, Australia, New Zealand and India as well.[92]

A Conference of Prime Ministers held in London in 1949 resolved that

> '[t]he United Kingdom, Canada, Australia, New Zealand, South Africa, Pakistan and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty and progress.' [93]

This resolution, while stressing the close co-operation of the Dominions, nevertheless evidenced their independent status.

In January, 1951, the Secretary-General of the United Nations addressed a circular to member States requesting information relating to their national laws and practices in the matter of the conclusion of treaties. Following on this request, Memoranda concerning laws and practices of treaty-making in various countries, including the United Kingdom and all the Dominions, were published by the United Nations.[94]

The Memorandum of the South African Government[95] stated that the treaty-making power in the Union was almost exclusively exercised by the Governor-General in Council. Her Majesty was authorized to conclude treaties on behalf of the Union[96] but only exercised this right in respect of treaties between Heads of State. No limitation was placed on the South African Government's treaty making power either by Parliament or the electorate.

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91. House of Assembly Debates vol.55, cols. 1215 ff. (7 February,1946).
92. Halsbury op.cit. 455.
93. (1948-9) 48 Halsbury's Statutes of England 2 ed 454: The Commonwealth Declaration of April 1949
94. United Nations Legislative Series Laws and Practices Concerning the Conclusion of Treaties ST/LEG/SER B/3 (December 1952).
95. Ibid. pp.105 ff. Document cited as No.77.
96. The Status of the Union Act 69 of 1934, section 4(1).

Draft agreements were drawn up by the Department within whose sphere of administration they would fall, in conjunction with the Department of External Affairs[97] and the External Trade Relations Committee (in the case of commercial agreements). Negotiations would then be initiated with the State or organisation concerned through the Department of External Affairs.

Where the treaty took the form of a Heads of State treaty, the requisite Full Powers would be issued by Her Majesty on the advice of her Union Ministers. In all other instances, the South African Executive Council would issue the Full Powers. These would usually be signed by the South African Prime Minister and the Minister of External Affairs.

If an agreement required ratification by the Union, this was to be effected by the deposit of an Instrument of Ratification signed by the Prime Minister and Minister of External Affairs, or, where the treaty was one between Heads of State, by Her Majesty the Queen. Authority to ratify was to be obtained from the Executive Council. No legislation required that treaties be ratified by Parliament, with the exception of the Treaties of Peace Act of 1948[98] which required peace treaties to be ratified only with the prior concurrence of Parliament.

The Memorandum described in some detail the current practice in relation to those treaties which had to be tabled or proclaimed by the Governor-General in the Government Gazette.

It stated that although there was no specific legislation requiring the publication of treaties, the practice of publication had been followed in the Union for a considerable period.

The Memorandum went on to list those Acts of the South African Parliament which had a bearing on the negotiation and conclusion of treaties, together with extracts of their relevant sections.

This document proves conclusively that the real treaty-making power in South Africa was exercised by the Government of the Union. Even where Her Majesty the Queen signed the Full Powers or the Instrument of Ratification of a Heads of State treaty, she always acted on the advice of her Union Ministers. Nevertheless, the Queen remained officially the Head of State, and although the Union, like the other Dominions, formulated an independent foreign policy, close contact was maintained with the Imperial

97. Today called the Department of Foreign Affairs.
98. Act 20 of 1948, section 1.

Government through an improved system of communication.

The two main channels of communication and consultation within the Commonwealth were the Commonwealth Relations Office and the system of Commonwealth High Commissioners. The former body communicated daily with the South African Department of External Affairs.[99] In addition, the Government of the Union of South Africa was represented in London by a High Commissioner, who regularly consulted with the Secretary of State for Commonwealth Relations and other United Kingdom Ministers or departmental officials. The High Commissioners enjoyed similar status and privileges to that of ambassadors.[1] The formal Imperial Conferences were superseded by meetings of the Commonwealth Prime Ministers which continued to be held in London, as from 1944, at irregular intervals.

(f) <u>Developments after the Attainment of Republican Status</u>

In 1960, the South African electorate, in a plebiscite, approved the creation of a republic to replace the Union of South Africa.[2] The Conference of Commonwealth Prime Ministers decided that were this to take place, and the country still desired to remain in the Commonwealth, its Government should request the consent of the other Commonwealth Governments. The Union Cabinet subsequently announced that it wished South Africa to remain in the Commonwealth;[3] and a Prime Ministers' Conference was duly arranged in London for March, 1961.

On 15 March, 1961, a communiqué was issued to the effect that South Africa, on becoming a republic, was to leave the Commonwealth. The communiqué stated that at the meeting of the Commonwealth Prime Ministers in London, Dr. H.F. Verwoerd 'informed the other Prime Ministers ...

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99. Halsbury op.cit. 439.
1. Ibid. Besides this, South Africa enjoyed the right to separate diplomatic and consular representation in foreign countries, although it could request the United Kingdom representative to act on its behalf where it had not appointed its own representative. See Wade and Phillips op.cit. 456. A detailed discussion of the development of the consular and diplomatic corps is contained in Dekker op.cit. 30ff.
2. See Ellison Kahn 'Constitutional and Administrative Law' 1960 <u>Annual Survey of South African Law</u> 1.
3. O. Hood Phillips <u>Constitutional and Administrative Law</u> 5 ed. (1973) 626.

that in the light of the views expressed on behalf of the other member Governments and the indication of their future intentions regarding the racial policy of the Union Government, he had decided to withdraw his application for South Africa's continuing membership of the Commonwealth as a Republic'.[4]

Since its withdrawal from the British Commonwealth of Nations in May, 1961, all control of foreign policy and international relations, including the treaty-making power, has vested entirely in the Government of the Republic of South Africa, without intervention by the Crown.

Participation in international conferences and the negotiation and conclusion of treaties have continued since 1961 in much the same manner as previously. There has been one important change. The Crown's former role in the appointment of South African plenipotentiaries, the issuance of Full Powers and the subsequent ratification of treaties ceased to exist once the State President replaced the Queen (acting through her representative, the Governor-General) as Head of State.[5] The State President, acting on the advice of the South African Executive Council, has, since 1961, exercised the executive government of the Republic in regard to all aspects of its foreign affairs.[6] The new Constitution vests in the State President the power to conclude and ratify international conventions, treaties and agreements[7] as well as those powers and functions as were previously possessed by the Queen by way of prerogative.[8]

The Status of the Union Act and the Royal Executive Functions and Seals Act of 1934 were both repealed[9] as being no longer relevant. In place of the Royal Great Seal, the Constitution[10] provided for the establishment of a Seal of the Republic which must today be used on all public documents on which the Royal Great Seal or the Royal Signet of the Union or the Governor-General's Great Seal were, prior to the commencement of the Act, required to be used. Yet another section[11] provided that 'the will and pleasure of the State President shall be expressed in writing under his signature and every instrument shall be countersigned by a

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4. Ellison Kahn 'Constitutional and Administrative Law 1961 Annual Survey of South African Law 1 at 15; a detailed discussion of the reasons why South Africa left the Commonwealth follows it at pp.15 ff.
5. Republic of South Africa Constitution Act 32 of 1961, section 7.
6. Ibid., section 16(1).
7. Ibid., section 7(3)(g).
8. Ibid., section 7(4).
9. Ibid., schedule 1.
10. Ibid., section 18.
11. Ibid., section 19(1).

2 THE PREROGATIVE OF THE CROWN (AND STATE PRESIDENT) AND TREATY-MAKING

Introduction

Under the British constitutional system the power to conclude treaties,[1] to declare war or the return to peace[2] vests in the Crown as part of the exercise of the prerogative.[3] These propositions have also found favour with the South African Appellate Division. Van den Heever J.A. in Sachs v. Donges NO[4] stated:

> 'As far as I know all constitutional authorities are agreed that in England foreign relations are essentially embraced in the prerogative powers'.

Blackstone, writing in 1765, defined the prerogative as

> 'that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity'. 5

This definition serves to emphasize that the prerogative is an inherent legal attribute unique to the Crown.

Dicey[6] described the modern relationship succinctly when he wrote that the prerogative was 'the residue of discretionary or arbitrary authority, which, at any given time, is legally left in the hands of the Crown'.[7]

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1. W.S. Holdsworth 'The Treaty-Making Power of the Crown' (1942) 58 Law Quarterly Review 175 at 178 quotes the authors of The Federalist, who had made a special study of the English constitution as part of their task of making a new constitution for the United States of America, as saying 'Every jurist of that kingdom and every other man acquainted with its constitution knows as an established fact that the prerogative of making treaties exists in the Crown in the utmost plenitude'.
2. S.A.de Smith Constitutional and Administrative Law (1971) 115; E.C.S. Wade and Godfrey Phillips Constitutional Law 8 ed. (1970) 281.
3. Juridical support for these propositions may be found in the statement by Lord Stowell in The Hoop (1799) 1 C.Rob. 196 at 199; Janson v. Driefontein Consolidated Mines [1902] A.C. 484.(H.L.).
4. 1950 (2) SA 265 AD at 309.
5. Blackstone 12 Co.Rep.74 as cited by de Smith op.cit. 115.
6. A.V.Dicey An Introduction to the Law of the Constitution 10 ed.(1967) 424.
7. This definition was first approved juridically by Lord Dunedin in Attorney-General v. De Keyser's Royal Hotel Ltd. [1920] A.C. 508 at 526; it has also been approved by the South African Appellate Division in Sachs v. Donges NO op.cit. 275.

One of the elements stressed by Dicey is the residual nature of the prerogative. Traceable to the days before Parliament existed,[8] the prerogative cannot today be enlarged by the Crown. On the contrary, Parliament can take away any prerogative power and has frequently done so.[9] The prerogative is the residue at any given time of the rights and powers which the sovereign possessed before the advent of Parliament.

The prerogative is discretionary and arbitrary, in that, although its existence is determinable by the courts, the manner of its exercise falls outside the court's jurisdiction.[10] If an individual is detrimentally affected by the exercise of the prerogative, the courts may not substitute their discretion for that of the executive. The individual's extra-judicial remedy lies, in the case of an alien, in diplomatic means; and, if he is a citizen, in political means.[11]

Another essential feature of the prerogative is that it is a non-statutory attribute of the Crown. It is a power which the common-law recognizes as exercisable by the Crown.[12]

Prerogative powers can basically be classified as the prerogative in foreign affairs or the prerogative in domestic affairs. The former is the ability of the executive to act externally in relation to other States. By virtue of her pre-eminence as Head of State, the Sovereign (or, in the Republic of South Africa, the State President) controls numerous powers in the realm of foreign affairs. Acts done in the exercise of such powers are generally known as Acts of State. The declaration of war and peace as well as the negotiation and conclusion of treaties fall into this category. Wade[13] defines an Act of State as 'an act of the executive as a matter of policy, in the course of its relations with another State'. The King's Bench Division[14] has

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8. For a resume of this historical development see de Smith op.cit. 117ff.
9. Sachs v. Donges NO op.cit. 288.
10. O. Hood Phillips Constitutional and Administrative Law 5 ed. (1973) 230; Sachs v. Donges NO op.cit. at 303,307,311.
11. Hercules Booysen Die Toepassing van Volkereg in die Suid-Afrikaanse Reg - 'n Staatsregtelike Ondersoek. Dissertation for the degree of Doctor of Laws, Port Elizabeth University (1974).
12. Wade and Phillips op.cit. 183, De Smith op.cit. 115.
13. E.C.S. Wade 'Acts of State in English Law' (1934) 15 British Year-book of International Law 98.
14. Fletcher Moulton L.J. in Salaman v. Secretary of State for India [1906] 1 K.B. 613 at 639.

described it as

> 'an exercise of sovereign power [which] cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power; whatever it be, municipal courts must accept it as it is, without question.'

It is generally accepted that Acts of State are not subject to the jurisdiction of the municipal courts and rights alleged to be acquired thereunder cannot be enforced by such courts.[15]

The question arises in South Africa of the extent to which the prerogative rests on principles of English or Roman-Dutch law.[16] The Cape Articles of Capitulation,[17] binding on the Crown in English law, stipulated that the inhabitants of the Cape would preserve all rights and privileges which they had theretofore enjoyed. The attitude of the South African Appellate Division was that these Articles covered the retention of the Roman-Dutch system of law in general and rules of the prerogative concerned with the acquisition, alienation and disposition of property in particular. However,

> '[s]uch questions as ... [the] constitutional position [of the Crown] in regard to matters of government stand on a different footing and no inference affecting them could properly be drawn from the establishment of a system of law differing from that of England'.[18]

This judgement meant that the Crown could not be taken to have foregone its English prerogative rights relating to broad constitutional issues.

Two years later, the Appellate Division once again ruled that '[t]he King's prerogative, save where duly modified, is the same in every part of the Empire'.[19]

This proposition was finally confirmed in 1950[20] by the Appellate Division. Chief Justice Watermeyer[21] noted that since

> 'the Royal Prerogative is as extensive in the Union as it is in England, except in so far as it has in either country been duly modified or abandoned, ... in enquiring into the scope of the Royal Prerogative one must have regard to English and not Roman-Dutch authorities'.

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15. Wade and Phillips op.cit. 265-6.
16. See H.R. Hahlo and Ellison Kahn The Union of South Africa : The Development of its Laws and Constitution (1960) 170.
17. Dated 18th January, 1806.
18. Per Innes C.J. in Union Government (Minister of Lands) v. Estate Whittaker 1916 AD 194 at 203.
19. Per Innes C.J. in Union Government v. Tonkin 1918 AD 533 at 539.
20. Per Van den Heever JA in Sachs v. Donges NO op.cit. at 309.
21. Ibid. p.288.

(a) The Prerogative of Treaty-Making as an Executive Act

In England today the power to negotiate and conclude treaties is vested in the head of the executive, that is, in the Crown, by virtue of the prerogative. This power is exclusively the Crown's.[22]

When South Africa became a Union, provision was made for 'the Executive Government of the Union [to be] vested in the King and [to be] administered by His Majesty in person or by a Governor-General as his representative'.[23] Prerogatives which were not delegated to the Governor-General were reserved for the Crown. Among these was the prerogative of treaty-making (with the exception of agreements of a commercial nature).[24] The South Africa Act did not, therefore, confer on the Governor-General the treaty-making power. This right was exercised by the Crown alone.[25] This is not to infer that the Union Government had played no active role in the negotiations and conclusion of treaties in the years preceding 1931. But in the final analysis of those instances where treaties were negotiated and signed by South African representatives, the Full Powers under which they were authorized to act were issued by the King. This was the position, for example, with the Treaty of Versailles.[26] Even the Mandate for South-West Africa was conferred nominally on the King 'for and behalf of' the Union of South Africa.[27] This clearly indicates that the prerogative of treaty-making vested in the Crown as Head of State.

The evolution of Dominion status culminated in England in the passing of the Statute of Westminster.[28] This Statute was incorporated into the Union by the Status of the Union Act,[29] section 4(1) of which declared that

> 'the Executive Government of the Union in regard to any aspect of its domestic or external affairs is vested in the King...'.

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22. E.W. Ridges in his Constitutional Law 8 ed. (1950) 233 states 'It is part of the prerogative to make treaties, and a treaty in our law can only be made by the Crown, which acts through delegates to whom express authority has been granted'.
23. Section [illegible] of The South Africa Act 9 Edw.VII; ch.9, 1909.
24. H.J. Mandelbrote 'The Royal Prerogative in the Union' (1936) 53 South African Law Journal 426 at 432.
25. F.J. Wessels Die Republiekeinse Grondwet (1962) 165.
26. See above pp. 64-8.
27. See above pp. 16-9.
28. 22 & 23 Geo.5, c.4.
29. Status of the Union Act 69 of 1934.

This ensured that the executive prerogative of the Crown, including the treaty-making process, continued to be governed by those practices and conventions which had hitherto evolved among the members of the British Commonwealth, unless duly modified by Statute. In effect this meant that the Crown concluded treaties on the advice of the South African cabinet.

Once the decision was reached that South Africa should become a republic,[30] a written constitution was drafted. This was accepted by both Houses of Parliament and on 24 April, 1961, it was approved by the Governor-General.[31] It appeared on 31 May, 1961, as the Republic of South Africa Constitution Act.[32] The new constitution retained, as far as possible, the constitution of the Union but some new provisions were, of course, inevitable. A major innovation was the institution of the State President as Head of State.[33] He replaced the Queen, acting through her representative, the Governor-General, and once South Africa left the British Commonwealth of Nations the presence and functions of the Governor-General became totally redundant. All the provisions of the South Africa Act which dealt with the monarchy[34] were omitted. Other statutes concerning the powers of the monarchy were repealed in the Schedule to the constitution.[35] In the words of Wessels[36]:

> 'wat na ons mening by republiekwording gebeur het, is dat die staat bloot die persoon like bande met die kroon deurgesny het en die personele unie so beëndig is.'

The constitution[37] vests in the State President all the prerogative powers that were formerly possessed by the Queen. Apart from this, many of these former prerogative powers are now expressly and

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30. This was achieved by means of a plebiscite held in terms of the Referendum Act 52 of 1960.
31. C.[illegible].J. Steyn Prerogatief en Diskresie by die Uitvoerende Gesag in die Republiek van Suid-Afrika Dissertation for the degree of Doctor of Administration University of the Orange Free State (1970) 119.
32. Act 32 of 1961.
33. Ibid., section 7(1).
34. Sections 2 and 3.
35. These Acts included His Majesty King Edward the Eighth's Abdication Act 2 of 1937; the Coronation Oath Act 7 of 1937; the Royal Styles and Titles Act 17 of 1948.
36. Wessels op.cit. 30.
37. Section 7(4).

Minister' and confirmed by the Seal of the Republic which is kept in the State President's custody. All these provisions have ensured that the Government of the Republic of South Africa has been invested with full power to conclude treaties under whatever name.

individually conferred on him by the constitution.[38] Among these express powers is the ability to conclude and ratify international conventions and agreements.[39] Thus, while the treaty-making power in England remains based on the prerogative, in South Africa it has largely become regulated by statute. This does not necessarily imply that the common law or conventional limitations on the exercise of this right ceased to apply as from 1961 or that all vestiges of the prerogative have disappeared.[40]

When the State President concludes a treaty, he acts in his capacity as head of the executive and binds not himself but the State. In the Republic, as in England, the Head of State is not a free agent. Despite the prerogative or section 7(3)(g) of the Republic of South Africa Constitution Act,[41] the Queen or State President cannot exercise their treaty-making powers at their sole discretion. They must act on the advice of their Ministers. In England, this is the result of a constitutional convention[42] while in South Africa this matter has, since 1934, been regulated by statute.[43] Both the Status of the Union Act[44] and the Royal Executive Functions and Seals Act[45] provided that the King or his representative, the Governor-General, was obliged to act on the advice of his Ministers of State for the Union.

The discretion of the State President has similarly been curtailed by legislation. The crux of section 4 of the Status of the Union Act was incorporated by section 16(1) of the Constitution Act which

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38. G.M. Cockram Constitutional Law in the Republic of South Africa (1975) 49.

39. Section 7(3)(g).

40. This is more fully discussed at p. 103 below.

41. Supra.

42. Hood Phillips op.cit. 230 states that the doctrine of ministerial responsibility is the most important development in modern British constitutional history, and resulted from the discretionary nature of the prerogative. He adds that there are very few occasions nowadays when the Queen can act without or against the advice of her Ministers.

43. Prior to 1934 the Crown, by convention, acted, at first, on the advice of British Ministers, and after 1923, on the advice of Union Ministers.

44. Act 69 of 1934, section 4.

45. Act 70 of 1934, section 6.

provides that

> 'the executive Government of the Republic in regard to any aspect of its domestic or foreign affairs, is vested in the State President acting on the advice of the Executive Council'.

The Interpretation Act[46] provides further that unless the context otherwise requires, or in the case of any statute it is expressly provided therein, the term 'State President' means the State President 'acting by and with the advice of the Executive Council'.

So the State President, like the Queen, is bound to exercise his legal powers in accordance with the advice tendered to him by the Cabinet through the Prime Minister. He has the right to be kept informed and to express his views on the questions at issue but not to override ministerial advice.[47]

In strict law, the treaty-making function is an executive function. Neither the State President nor the Executive Council are bound to consult or even to inform Parliament before entering into a treaty. Even if Parliament subsequently disapproves of the treaty, it will, notwithstanding, be binding on the State in its relationship with the other contracting parties. Nevertheless, for political reasons, Parliament may often be involved in the treaty-making process, despite the lack of a legal obligation to consult it. This stems from the fact that the executive often requires the support of the legislature to give effect to the end it is trying to achieve through the negotiation of the treaty.[48] If Parliament is not consulted, the executive could theoretically bind the State by treaty, which treaty would be impossible of fulfilment without the co-operation of the legislature. This flows from the rule that treaties generally require statutory incorporation before they can affect private rights or initiate a change in the law. Serious international ramifications would result from the refusal of Parliament to approve the treaty.

As a result, a British constitutional convention has arisen to the effect that the Government should not advise the Crown to conclude a treaty unless there is ample ground for supposing that the majority of

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46. Act 33 of 1957, section 2.
47. Hood Phillips op.cit. 86.
48. J.D.B. Mitchell Constitutional Law 2 ed.(1968) 179.

the House of Commons approve of the treaty.[49] In important issues, Ministers are duty bound, before tendering advice, to seek an opportunity to consult Parliament.[50] This convention found judicial support when the Judicial Committee of the Privy Council met to discuss the internationally binding effect and the applicability in Canada of certain I.L.O. Conventions which had been ratified by the Federal Government of Canada. Lord Atkin[51] held:

> 'Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of existing domestic law, requires legislative action .... If the national executive, the Government of the day, decide to incur the obligations of a treaty which involve alteration of law, they have to run the risk of obtaining the assent of Parliament to the necessary statute .... It cannot be disputed that the creation of the obligations undertaken in treaties and the assent of their form and quality are the functions of the executive alone.'

This dictum is expressive of the juridical opinion within the British Commonwealth that the executive branch of government is always competent under international law to bind the State by treaty, regardless of its prospect of subsequently securing implementary legislation.

The procedure often adopted is that many treaties are concluded subject to ratification. Ratification is then withheld until Parliament has approved the treaty either by resolution or by statute.[52]

It is widely accepted that treaties which will impose a financial burden on the State or which will entail alteration of existing law must be approved by Parliament before ratification.

This principle of parliamentary consultation is well-established in South Africa. The early Transvaal Republic[53] had a written constitution which expressly provided[54] that

> '[g]een traktaat of bondgenootskap met buitenlandsche mogendheden of volkeren mag bekragtigd worden, dan nadat de Eerste Volksraad daarover zijn gevoelen heeft

49. Hood Phillips op.cit. 88.
50. I.Jennings Cabinet Government 3 ed. (1959) 487.
51. Attorney-General for Canada v. Attorney-General for Ontario [1937] A.C. 326 at 327.
52. Ridges op.cit. 224.
53. 1896.
54. In article 24.

> kenbaar gemaakt, zullende het traktaat volgens het oordeel van den Eersten Volksraad goedgekeurd en vastgesteld of afgekeurd worden, met uitzondering van die traktaten, welke de Regering bij Wet of Eerste Volksraadsbesluit gemachtigd is aan te gaan.'[55]

In similar fashion, the Volksraad of the Republic of the Orange Free State was required to 'ratify' treaties which the executive made with foreign powers.[56]

Prior to 1961, the Queen was empowered to conclude treaties on behalf of South Africa. According to convention, she exercised these rights on the advice of her Union Ministers. As in England, so in South Africa, the Ministers did not advise the Queen to conclude an international agreement unless there was ample ground for supposing that the majority of the Lower House approved of the move.[57]

When the Kellogg-Briand Pact was introduced into the House of Assembly in 1929, General Smuts made the following statement in connection with this issue:[58]

> 'I am in agreement on the constitutional question that the Crown is the treaty-making power of our constitution, that treaties are made by the executive authority, and, in the last resort, are not dependent upon the approval of the representatives of the people outside the executive authority for their force.
>
> But, of course, it has been felt that that position is not in harmony with the rights of the people, popular rights and democratic self-government as it has developed in more recent times. The result has been that in spite of this strict constitutional position under which the making of a treaty is the prerogative of the Crown, it has become customary to submit all treaties to the legislature for approval.'

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55. De Grondwet der Zuid-Afrikaansche Republiek, Wet No.2, 1896. De Locale Wetten der Zuid Afrikaansche Republiek (1896) 34 at 37. Article 24 translates as follows: 'No treaty or alliance with foreign powers or peoples may be ratified before the First Volksraad has expressed its views on it, and the treaty shall be approved and confirmed or rejected according to the decision of the First Volksraad, with the exception of treaties which the Government is empowered to enter into by law or by resolution of the First Volksraad.' Per J.G. Strydom House of Assembly Debates vol.55, cols. 1216-7 (7 February 1946).
56. J.J. Fouché Die Bevoegdhede van die Staatspresident van die Republiek van Suid-Afrika Dissertation for the degree of Doctor of Laws, University of Stellenbosch (1964) 240.
57. Verloren van Themaat Staatsreg 2 ed (1967) 159.
58. House of Assembly Debates vol.12, cols. 10-11 (28 January 1929).

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56. J.J. Fouché Die Bevoegdhede van die Staatspresident van die Republiek van Suid-Afrika Dissertation for the degree of Doctor of Laws, University of Stellenbosch (1964) 240.
57. Verloren van Themaat Staatsreg 2 ed (1967) 159.
58. House of Assembly Debates vol.12, cols. 10-11 (28 January 1929).

Despite this lucid statement on the importance of executive consultation with the legislature as part of the treaty-making process, in 1946 Smuts, in his eagerness to have South Africa become a founding member State of the United Nations, not only signed the Charter of the United Nations in his capacity as head of Government, but ratified it as well before submitting it to Parliament for approval. This action did not, however, deter him from standing by his original point of view in the ensuing heated debate in the House of Assembly. On that occasion he reiterated[59]:

> 'The ratification of treaties rests with the Crown as part of the exercise of its prerogative, and in South Africa it is exercised by the Governor-General and the Government on behalf of the Crown. From a purely juridical point of view, that is our constitutional position. But that is not the whole matter. As a democratic country we have developed the practice of obtaining Parliamentary approval before ratification by the Crown. That is the practice.'

This speech of Smuts highlights the practice, still prevalent today, of making important treaties subject to ratification. Ratification is then, in turn, not given unless parliamentary approval by way of resolution or statute is forthcoming.[60]

(b) The Prerogative of War and Peace : Its Development in South Africa

The ability to declare war or peace is the ultimate and most important manifestation of any nation's independent status. No country can regard itself as truly sovereign if it does not exercise complete control over this aspect of its foreign affairs. While definite progress towards autonomy for the Dominions had been achieved at the Imperial Conferences of 1923, 1926 and 1930, and while the Statute of Westminster had clarified the powers of the Dominion Parliaments in accordance with the principles expressed at these Conferences by giving those bodies full control over matters of Dominion concern and by removing the last vestiges of legislative

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59. House of Assembly Debates vol.55, cols. 1265-6 (7 February 1946)

60. Ridges op.cit. 224-5 speculates that a convention may be in the making which requires Parliament to be consulted in principle before any important treaty is concluded.

restraints, nevertheless the preamble to the Statute stressed the fact that the Dominions were 'united by a common allegiance to the Crown'.[61] The subsequent South African statute, viz., the Status of the Union Act,[62] which provided inter alia that the King, acting personally or through his representative, the Governor-General, would continue to exercise his executive powers in relation to the Union 'in regard to any aspect of its domestic or external affairs' albeit on the advice of His Majesty's Union Ministers,[63] did nothing to dispel the notion that the British sovereign could declare war on behalf of the British Empire as a whole. However, the Royal Executive Functions and Seals Act[64] by providing for the striking of a Royal Great Seal and a Royal Signet exclusively for the Union did, at least, establish a foundation for independent action in the executive sphere.

Notwithstanding all this, the Statute of Westminster and the two South African Acts did not purport to affect the prerogative powers of the Crown or to touch at all on the problems of Dominion status in international law. It is, therefore, not surprising that in view of the doctrine of the indivisibility of the Crown, to which common allegiance was habitually accorded, it was generally assumed even as late as the beginning of the Second World War in 1939 that, irrespective of the changes that had taken place between the two world wars in the position and status of the Dominions in both their internal and international affairs, separate neutrality, belligerency and peace were inconceivable. Many English constitutional authorities in particular[65] still adhered to the view that many prerogative restraints, including the prerogative of war and peace, were still firmly vested in the British Crown. It was generally believed in regard to these declarations that the component parts of the British Commonwealth of Nations could not act separately and individually, but were bound to heed the decree of the Crown. Such assumptions were soon to be

61. The Statute of Westminster, 1931, 22 Geo.5, c.4, second paragraph.
62. Act 69 of 1934.
63. Ibid., section 4.
64. Act 70 of 1934.
65. See, for example, Arthur Berriedale Keith The Dominions as Sovereign States (1938) 203.

discredited by events surrounding the outbreak of the Second World War. However, until they were so discredited, no Dominion could validly assert true independence in its treaty-making (and breaking) powers, despite the fact that a substantial measure of autonomy in the treaty-making process had increasingly been granted to the Dominions for almost a century.[66]

The ability to declare war and to conclude peace is closely linked with the treaty-making processes of any State. Apart from the fact that many important political treaties are basically treaties of alliance and mutual defence pacts, many other treaties of a purely commercial and technical nature arise out of and depend for their effectiveness on the maintenance of peaceful relations thus established. A declaration of war has the effect of abruptly terminating or at least of suspending the operation of most of these treaties, thereby disrupting not only the peaceful and harmonious co-existence between one State and another but the internal stability of these States as well. It is, therefore, extremely important that sovereign independent States have the unimpeded right to decide for themselves whether or not they are at war with another State, quite apart from any rights they may possess to conclude treaties generally. The negotiation and conclusion of treaties is the exclusive province of the Head of State. As long as the British sovereign could declare war or conclude peace on behalf of South Africa, and because of the 'domino' effect such a declaration would inevitably have on all other pre-existing treaties, it could not be said that South Africa manifested true independence in the treaty-making process.

The declaration of war and peace has traditionally been regarded as the oldest and most important prerogative power of the British Crown.[67] The Crown alone was entitled to determine whether a state of war existed between the sovereign and a foreign power. This principle is illustrated by an incident which occurred soon after the end of armed hostilities in the Second World War concerning one Carl Walter Kuechenmeister, a German

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66. M.H.M. Kidwai 'International Personality and the British Dominions : Evolution and Accomplishment' (1975) 9 University of Queensland Law Journal 76 briefly outlines the developments of the treaty-making power in the Dominions.
67. De Smith op.cit. 133.

national who had originally come to England in 1928. In May, 1939, he applied for British nationality but this had not yet been granted when the war began and he was sent to Australia for internment, where he remained until 1945. He then returned to England and was promptly sent to an internment camp at Beltane School. Fearful that he was soon to be deported, he applied for a writ of habeas corpus, contending that he was no longer an enemy alien. Kuechenmeister's argument was based on the proposition that the war was at an end because war could only take place between sovereign States, and since the unconditional surrender of Germany, the displacement of its central Government and the assumption of supreme authority with respect to that State by the Government of His Majesty and his allies, Germany was no longer a sovereign independent State. The King's Bench Division[68] conceded that while these facts might in international law be regarded as putting an end to the state of war, nevertheless,

> '[i]n the British Constitution ... the King makes both war and peace .... If the King says by an Act of State that the Commonwealth of countries over which he reigns is at war with a particular foreign State, it is at war with that State .... 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.'

As with the prerogative of treaty-making, the prerogative to declare war or peace is, by British constitutional convention, exercised by the Queen on the advice of her Cabinet and especially on the advice of the Prime Minister and Minister of Foreign Affairs.[69] The Cabinet is not obliged to consult Parliament. Parliament can express its disapproval by resolving to denounce the decision or by refusing to vote funds for the war effort but is powerless as a body to declare war or peace. In practice, however, the House of Commons is consulted wherever practicable,[70] partly because of the fund-raising aspect and partly because the Cabinet Ministers are ultimately responsible to the electorate.

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68. R. v. Bottrill, ex parte Kuechenmeister [1947] K.B. 41 at 50.
69. Hood Phillips op.cit. 206.
70. I. Jennings Cabinet Government 3 ed. (1959) 483.

In the United Kingdom, the declaration of war in 1939 against Germany occurred in the following manner. A public notification of a state of war was issued by the Privy Council Office on 3 September, 1939, and this was published on the same date in the <u>London Gazette</u>. There was no Royal Proclamation. The Prime Minister, Mr. Neville Chamberlain, broadcast to the nation at 11 a.m. and made a statement to the House of Commons at 12 p.m.[71]

The problem arose whether this declaration of war on Germany was effective for the Union of South Africa. In the early years of the Union any such declaration would without doubt have been part of the prerogative power of the Crown, conventionally exercised on the advice of the Crown's Ministers. Up to and including the First World War, only British Ministers (and not Dominion Ministers) were consulted.[72] The British declaration of war in 1914 therefore automatically included the Union. No serious thought was given to the necessity of a separate declaration by the Union itself.

The question of the legal possibility of South African neutrality in a British war was, nevertheless, raised in the Union as early as 1911. It ultimately led to a quarrel between Generals Botha and Hertzog in 1913 and was one of the causes of the 1914 rebellion.[73] The issue of neutrality was regarded as important because it was the crucial test of independent status and a large part of the Boer majority resident in South Africa had a strong desire for constitutional liberty.

At the 1923 Imperial Conference a resolution was passed[74] to the effect that

> 'it is for the Parliaments of the several parts of the Empire upon the recommendations of their respective Governments to decide the nature and extent of any action which should be taken.'

This resolution did not transfer the prerogative power of declaring war to the Union executive. It merely gave the Union Government (along with the Governments of the other Dominions) the competence

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71. H.J. Harvey <u>Consultation and Co-operation in the Commonwealth; a Handbook on Methods and Practice</u> (1952) 41 f.
72. See above pp. 8-9.
73. Brooke Claxton 'The Commonwealth and South Africa' (1935) 42 <u>Queen's Quarterly</u> 110 at 113.
74. 1923 Imperial Conference, Appendices to the Summary of Proceedings cmd 1988 p.16.

to decide, once war was declared by the British Crown, the extent of South Africa's <u>active</u> involvement.

In 1926, at the Imperial Conference, it was decided that Dominion Ministers should replace British Ministers in advising the King as regards the affairs of such Dominions.[75]

> 'It is recognized that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of the Government of that Dominion'.

Thereafter, the declaration of war or peace, as far as the Union was concerned, continued to be the prerogative of the English Crown, but, by convention, exercisable on the advice of His Majesty's Union Ministers.

In 1934, with the enactment by the South African Parliament of the Royal Executive Functions and Seals Act,[76] it became possible for the Governor-General, in certain defined circumstances, to exercise the prerogative to declare war on behalf of the Union on the advice of his Union Ministers without consulting the King. Despite this, certain British constitutional authorities, such as Keith, maintained that 'the argument for the right of neutrality is not very strong',[77] and that 'a British declaration of war involved the Dominions in war'.[78] Similarly, Viscount Simonds[79] wrote:

> 'In 1939 it was widely believed that by virtue of the indivisibility of the Crown, to which a common allegiance was owed, a declaration of war by the Crown made on the advice of United Kingdom Ministers would extend automatically to all parts of His Majesty's Dominions, that separate neutrality and separate belligerency were alike impossible; but that the extent of a Dominion's active participation in the war was a matter for the Dominion concerned.'

South African statesmen had long been divided on the issue. The two main protagonists were General Hertzog and General Smuts. When the

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75. 1926 Imperial Conference Summary of Proceedings cmd. 2768 p.17.
76. Act 70 of 1934, section 6.
77. A.B. Keith <u>The Dominions as Sovereign States</u> (1938) 52.
78. Ibid. 47.
79. Halsbury's <u>Laws of England</u> 3 ed. vol. [illegible] (195[illegible]) 454.

former came to power in 1924, it was the avowed object of his National Party to clear up this constitutional question. He attended the Imperial Conference of 1926 determined to secure recognition of South Africa's right to secede and to remain neutral.[80] He came away apparently satisfied that he had achieved this goal. During the debates on the Conference in the Union House of Assembly in March 1928, General Hertzog and the majority of the House expressed the view that South Africa and any other Dominion could not only remain passive in a British war, but could claim absolute neutrality and have this recognized by other States. He declared:[81]

> '[I]t is not unknown to [honourable] members that I am one of those who maintain that the Union ... has, in case of war between Great Britain and any other State, the right to remain neutral and to have her neutrality respected by the belligerents. The Dominions are admitted today to be free and independent countries equal in status to Great Britain and in no way subordinate to her in any aspect of their domestic or external affairs .... Such being the state of independent freedom of the Dominions, on what grounds then could a Dominion which has declared to the world her desire to be neutral in a war in which Great Britain is a belligerent, be denied the right of neutrality?'

Smuts' reply[82] was guarded. He defined the essence of the problem as the existence of

> 'a single kingship in the empire .... The question whether South Africa can remain under that single and common kingship and at the same time be neutral when Great Britain is at war is a very baffling question indeed and one that is difficult to answer'.

In 1935, during the debate in the House of Assembly concerning the status of the Union, Hertzog reiterated:[83]

> 'I say again and I state emphatically my views as to the legal consequences ... flowing from our sovereign independent status, in which is included the right, and the fullest right, of neutrality'.

Hertzog was supported in his point of view by Dr. D.F. Malan,[84]

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80. Brooke Claxton op.cit. 113.

81. House of Assembly Debates vol.10, col.1846 (8 March 1928).

82. Ibid. col.1858.

83. House of Assembly Debates vol.24, col.1779 (19 February 1935).

84. M.P. for Calvinia, ibid. col.1790.

who added that 'freedom without the fullest international right of neutrality simply means that there is no freedom'. This was rhetorical but his point was clear.

In 1938, with the likelihood of war between Great Britain and Germany a real probability, the subject was, once again, broached in the Lower House. By this time the two Generals had put to one side the differences which had for twenty years divided them, and in a great effort of statesmanship endeavoured to unite the country by forming a coalition Government, with Hertzog as Prime Minister and Smuts as Minister of Justice.

In reply to questions put to him by Dr. D.F. Malan, Smuts declared the juridical position to be as follows:[85]

> 'The policy of the Government as far as participation by South Africa in any war ... has been repeatedly laid down by the Prime Minister, by me and by other Ministers, viz. this, that South Africa will not be involved automatically in any way in a war, that South Africa will only take part in any war when the Parliament of the country has passed a resolution to that effect in the interests of South Africa'.

He added[86] that, whereas, in 1914

> 'the fact that we went to war at that time happened automatically in accordance with the status we had at that time .... Today the position is that in accordance with the Locarno Treaty we are not automatically at war, and we can only decide when the time comes according to the circumstances that may then arise, as to what our policy will be'.

The Treaty of Locarno of 1925 was a Treaty of Mutual Guarantee between the United Kingdom, Belgium, France, Germany and Italy.[87] Due to repeated protests and growing concern demonstrated by the Dominions at this time on account of the automatic application of political treaties signed by the Imperial Government without prior consultation with them, a clause was incorporated in the Treaty of Locarno which excluded the Dominions from its application. It was evidence of the Dominions' growing reluctance to become involved in

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85. House of Assembly Debates vol.32, col.1677 (25 August 1938).
86. Ibid. cols. 1678-9.
87. U.K.T.S. 1926, No.28; cmd. 2764.

purely European issues and by inserting this exemption clause the British Government recognized, at the very least, that the Dominions would not be committed to any active obligations that might be incurred by the Imperial Government. Stewart, in his book Treaty Relations of the British Commonwealth of Nations,[88] comments that this exemption clause raised the very significant issue that

> '[i]f His Majesty went to war to fulfil his promise of assistance, would not the Dominions also be at war? Many answered this question in the affirmative. Thus interpreted, the Treaty recognizes the distinction between active and passive belligerency. Although the Dominions might legally be in a state of belligerency they would be morally free to decide whether, and to what extent, they would participate in the enforcement of His Majesty's obligations'.

It is clear that General Smuts did not agree with such an interpretation of the Locarno Treaty. He made no distinction between 'active' and 'passive' belligerency. Either the Union of South Africa was able to remain neutral or it was not.

The essential difference between the respective views of General Smuts and General Hertzog was not, therefore, that the former believed that a British declaration of war would automatically plunge South Africa into the war, while the latter did not; but that Smuts was firmly convinced that

> 'if Great Britain is attacked and came into real danger - not merely that she goes to war in Central Europe as an ally of France, but where England herself is attacked and is in danger - that South Africa will help her .... it is my opinion that when Great Britain really gets into great danger it would be absolutely impossible for South Africa, and it would be morally wrong of us, to keep ourselves out of the war'.[89]

Hertzog, on the other hand, believed that the Union Government should not

> 'poke our noses into matters concerning Poland [or any other European country].... The Union should keep out of European problems which do not affect us ... [and stay out] until the interests of the Union are affected'.[90]

Matters came to a head in South Africa once Britain declared war on Germany on 3 September, 1939. Whereas in Britain the House of

88. (1939) 17, n9
89. House of Assembly Debates, vol. 32, col.1679 (25 August 1938).
90. House of Assembly Debates, vol. 34, cols.27 4-5 (12 April 1939).

Commons had not been consulted before the declaration, in the Union the Parliament played a major role in leading the country into war. The Union House of Assembly met on 4 September and a tempestuous debate ensued. Even at this late hour certain members protested that the country was automatically at war and that the only business of the House was to decide the extent of its active involvement.[91]

For the majority of members, however, that point had already been decided in favour of allowing the Union a separate right of action. The question left to be decided now was whether South Africa should enter the arena of war on the side of Great Britain. The Prime Minister's proposal that

> 'the existing relations between the Union of South Africa and the various belligerent countries will, in so far as the Union is concerned, persist unchanged and continue as if no war is being waged' [92]

was unacceptable to the majority of the House. In its stead, the House carried[93] the motion proposed by General Smuts that

> 'This House declare that the policy of the Union in this crisis shall be based on the following principles and considerations, viz.:
>
> 1. It is in the interests of the Union that its relations with the German Reich shall be severed and that the Union shall refuse to adopt an attitude of neutrality in this conflict.
>
> 2. The Union should carry out the obligations to which it has agreed, and continue its co-operation with its friends and associates in the British Commonwealth of Nations.
>
> 3. The Union should take all necessary measures for the defence of its territory and South African interests and the Government should not send forces overseas as in the last war.
>
> 4. This House is profoundly concerned that the freedom and independence of the Union are at stake in this conflict and that it is, therefore, in its true interest to oppose the use of force as an instrument of national policy.' [94]

The Prime Minister thereupon requested His Excellency, the Governor-General[95] to dissolve Parliament with a view to a general election.

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91. See, for example, the speeches delivered by Mr. Marwick, M.P. for Illovo, House of Assembly Debates vol.36, cols.53-5 (4 September 1939) and Mr. Nicholls, M.P. for Zululand, ibid. cols.34-5.
92. Ibid. col.23.
93. By eighty votes to sixty-seven.
94. House of Assembly Debates vol.36, cols.30-1 (4 September 1939).
95. Sir Patrick Duncan.

This request was refused by the latter,[96] whereupon General Hertzog tendered his resignation, which was accepted. General Smuts was requested to form a new Government.

The alternate course open to the Governor-General, Sir Patrick Duncan, a Scot by birth but by this time a South African national, would have been to accede to General Hertzog's request to put the matter to the electorate. He clearly did not regard this alternate course as either necessary or expedient. Apparently he saw his duty as being limited simply to the question whether a viable Government could be formed and not extending to consulting the electorate on the issue of whether they approved of becoming embroiled in the war or not. The motives behind his actions were most likely two-fold. On the one hand, he may have wished to expedite the entry of South Africa into the war on the side of Great Britain, and it is possible that he saw this as his primary duty as guardian of the prerogative. Certainly, the practical effect of his decision was that South Africa came into the war on the British side with the minimum delay. On the other hand, Sir Patrick Duncan seemed to have decided in his own mind that public opinion in the matter was firmly behind General Smuts and that to call a general election on the eve of a global war would have had too disruptive an effect on the country and would have been most unwise. If the views of members of the House of Assembly accurately reflected the sentiments of the voters they were supposed to represent, the Governor-General was certainly correct in deciding that the majority of the electorate believed that a declaration of war by the Union was imminent and unavoidable. In any event, at the next general election which took place in 1943, Smuts was returned to power with a decisive majority - an event that could not have occurred without at least subsequent ratification by the South African electorate of his war policy. Not a single seat was won by anti-war splinter groups which had proliferated during the war years. In addition, in the House of Assembly the war opposition shrank from sixty seven votes to forty three[97].

On 6 September, 1939, the Governor-General issued a proclamation declaring the existence from that date of a state of war between the Union and the German Reich. In so doing he dispensed with the Royal

96. In a letter from the Governor-General to the Hon. J.B.M. Hertzog dated 4 September 1939 and published in the Cape Times 5 September 1939.

97. Paul Knaplund Britain Commonwealth and Empire (1901-1955) (1956) 361.

Sign Manual under the provisions of the Royal Executive Functions and Seals Act,[98] which authorized such a course on the grounds of urgency. The Proclamation reads:[99]

> 'By His Excellency the Right Honourable Sir Patrick Duncan a Member of His Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, one of His Majesty's Counsel Learned in the Law, Doctor of Laws, Governor-General in the Union of South Africa.
>
> No.197. 1939
>
> WHEREAS it is in the interests of the Union that the peaceful relations with the German Reich be severed and that it be at war with the German Reich:
>
> Now, THEREFORE, under and by virtue of the powers in me vested under section six of the Royal Executive Functions and Seals Act, 1934 (Act No.70 of 1934), I do by this my Proclamation in the name and on behalf of His Majesty the King declare and make known that from this the sixth day of September, 1939, the peaceful relations between the Union and the German Reich are severed and that the Union is, for the purposes of all laws, at war with the German Reich as from the aforementioned date.
>
> God Save the King!
>
> Given under my hand and the Great Seal of the Union of South Africa, at Cape Town, on this the Sixth day of September, One Thousand Nine Hundred and Thirty-Nine.
>
> PATRICK DUNCAN
> Governor-General
>
> By Command of His Excellency the Governor-General-in-Council
> J.C. SMUTS.'

This was the first occasion in South Africa that a break with tradition had occurred. Not only did the declaration of war by the British Crown not automatically include the Union, but the Crown was not even consulted by the Governor-General-in-Council as regards the declaration made by the Union.[1]

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98. Act 70 of 1934, section 6.
99. Proclamation 197 in Extra-ordinary 2676 of 6 September 1939.
1. This independent attitude was not adopted by all the Dominions. In Australia, for example, the Cabinet met immediately after Chamberlain's broadcast. It approved the issue, by the Governor-General (acting on the advice of the Federal Cabinet), of a proclamation of the existence of war as required under the Australian Defences Acts 1903-9. The proclamation was immediately published in a special edition of the Commonwealth Gazette. At 9.15 p.m., the Prime Minister, Mr.Menzies, broadcast to the nation that 'in consequence of Germany's persistence in her invasion of Poland, Great Britain has declared war; and, as a result, Australia is also at war'. See further Harvey op.cit.41; Doeker's analysis of the situation Doeker op.cit.89-90, confirms that Australia regarded the British declaration of war on Germany as automatically binding on it.

The position with respect to the outbreak of war with Italy in June, 1940, was somewhat different, for this involved a declaration of war by Italy on Great Britain, and not a declaration of war by Great Britain itself. None of the Dominions was mentioned in the notification of belligerency of 10 June addressed by the King of Italy to the governments of the Allies.[2] Despite this, certain Commonwealth countries (including Australia) issued proclamations of war which seemed to indicate that they still adhered to the view upholding the indivisibility of the British Crown.[3]

The Union of South Africa persisted in its chosen course of deciding independently whether it would declare war on Italy. A proclamation declaring the existence of a state of war with Italy as from 11 June, 1940, was issued, which was similar in style to the earlier proclamation of war against Germany. Once again the Governor-General acted by virtue of the powers vested in him by section 6 of the Royal Executive Functions and Seals Act.[4]

On this occasion, the South African executive took the lead in proclaiming war. At the time of the proclamation, the Union Parliament was not in session and thus did not give prior thought or approval to this step. It was only on 29 August, 1940, in response to a peace resolution moved by General Hertzog[5] that the Prime Minister, General Smuts, moved a comprehensive amendment re-affirming the Union's intention to abide by its resolution of 4 September, 1939, to enter the war. Smuts stated that

> 'however ardently this House and the people of the Union long for peace and would co-operate zealously for its restoration, the Union cannot make a separate peace with Germany without forfeiting its honour and sacrificing its vital interests .... In view of the entry of Italy into the war on 10 June, 1940, this House approves of the action of the Government in severing relations with and declaring war on Italy on 11 June 1940'. [6]

The Government amendment was carried by eighty five votes to sixty five.

Similar proclamations declaring the Union to be at war with Japan,[7]

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2. Doeker op.cit. 90.
3. Harvey op.cit. 43; Doeker ibid.
4. Proclamation 116 GG Extraordinary 2774 of 12 June 1940.
5. At that time the Leader of the Opposition.
6. House of Assembly Debates vol 40,cols.100-101 (29 August 1940).
7. Proclamation 230 GG Extra-ordinary 2971 of 8 December 1941.

Finland, Hungary, Roumania,[8] and Bulgaria[9] were subsequently issued by the Governor-General on the advice of his Union Ministers.

Some time later, after lengthy debate, the House of Assembly adopted[10] the following motion:

> '[I]n view of the fact that the Union is at war with Germany and Italy, and that Japan, Bulgaria, Hungary, Roumania and Finland are taking an active part in the war on the side of those powers, this House approves the Union's declaration of war also against these countries'.[11]

It is clear that the South African Parliament played a major role in the original decision, in 1939, to go to war with Germany. Thereafter, the executive alone, through the offices of the Governor-General acting in accordance with the Royal Executive Functions and Seals Act, exercised the prerogative of declaring war. The executive obviously believed by then that it enjoyed the support of the Lower House. That this attitude was fully justified was evidenced by the subsequent ratifications of all the proclamations by Parliament.

As a result of South Africa's independent stance throughout the Second World War, Lauterpacht was led to comment[12] that

> '[a]t the commencement and in the course of the Second World War, the various Dominions[13] exercised, in principle, their right to declare war separately from the action taken by Great Britain'.

In the third edition of Halsbury's Laws of England, which appeared in 1953,[14] the learned author wrote that

> '[i]n face of the acceptance of the conduct of Eire, Canada and the Union of South Africa in 1939 [and thereafter], it is difficult to contend that a declaration of war by Her

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8. Proclamation 229 GG Extra-ordinary 2971 of 8 December 1941. The proclamation embraced all three countries.
9. Proclamation 3 GG Extra-ordinary 2979 of 2 January 1942. This proclamation made the state of war retrospective to 13 December 1941.
10. By eighty one votes to fifty five.
11. House of Assembly Debates vol.43, col.536 (17 January 1942).
12. Oppenheim op.cit. 207.
13. Canada reacted in a similar manner to the Union, while Ireland announced her neutrality which she maintained throughout the war and which was recognized by the belligerents.
14. Halsbury op.cit. 455.

Majesty on the advice of United Kingdom Ministers would now extend automatically to the other Members.'[15]

War between South Africa and Japan was terminated by a treaty of peace signed in San Francisco on 8 September, 1951.[16] In the cases of Italy,[17] Bulgaria,[18] Finland[19] and Hungary,[20] the Union Government terminated the state of war by concluding separate peace treaties, all signed in Paris on 10 February, 1947, which provided for the cessation of war and hostilities. In each case the peace treaty was signed separately by representatives of the Union Government.

War between the German Reich and the Union Government has never been officially terminated. This resulted from the circumstances which prevailed after the defeat of the Reich and the destruction of its Government. Great Britain, America, Russia and France in a Joint Declaration issued on 5 June, 1945, assumed supreme authority over Germany, including the control over all powers formerly possessed by the German Government. At the same time they expressly disclaimed any intention to annex the conquered territory. As a result of the Declaration and the various measures taken to implement it, the international personality of Germany was deemed to have been suspended until an independent German Government was set up exercising with relative freedom the right to conclude treaties and international agreements.[21] Germany was ultimately split up into the Federal Republic of Germany (West Germany) and the Democratic Republic of Germany (East Germany), neither of which wished to be

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15. Doeker op.cit. 93 contends that, during the war, Australia changed its attitude towards its automatic inclusion in a war by virtue of a British declaration. As regards the state of war between Australia, Germany and Italy, the proclamations issued by the Australian Governor-General were merely notifications of that state. At that stage, Australia still adopted the view that a declaration of war by the Crown necessarily involved all the Dominions. The war with Japan, Finland, Hungary and Roumania was a different matter. Here, the proclamations were operative instruments, themselves creating a state of war. Australia had thereby also established a precedent for separate action with respect to the declaration of war.
16. Union Government Treaty Series 17 of 1952.
17. Ibid. 15 of 1948.
18. Ibid. 13 of 1948.
19. Ibid. 14 of 1948.
20. Ibid. 1[illegible] of 1948.
21. Oppenheim op.cit. 568-9.

regarded as the successor of the Third Reich.[22]

In 1948, the South African Parliament enacted the Treaties of Peace Act[23] which provided for the carrying into effect of the peace treaties between the Union Government and the Governments of Bulgaria, Finland, Hungary, Roumania and Italy.

Section 3(1) of the Act provides for a possible peace treaty with the successors of the Third Reich, by stating that

> '[w]hereas a treaty of peace is concluded between the Government of the Union and any power not mentioned [above], between whom and the Union a state of war exists at the date of commencement of this Act, or has at any time since the sixth day of September, 1939, existed, the Government may, after such treaty has been ratified with the prior concurrence of Parliament, provide by proclamation that ... such treaty shall for the purposes of this Act thereafter be deemed to be included in the definition of the expression 'the Treaties' in section one contained.'

This provision has never been utilized vis-a-vis Germany.

Since 1961, the declaration of war or peace has been governed by the Republic of South Africa Constitution Act,[24] section 7(3)(i) of which provides that the State President has the power to declare war and to make peace. Such declarations are now controlled by and large by statute. Almost certainly, however, some vestiges of the prerogative remain. The mere incorporation of a prerogative power into an Act of Parliament does not necessarily lead to the conclusion that the legislature intended the prerogative to be replaced entirely. In this particular instance an interpretation of the Republic of South Africa Constitution Act[25] seems to indicate that the South African legislature merely intended to clarify and restate the powers of the State President possessed in terms of the historical prerogative. South Africa had just gained complete independence from Great Britain and in the process had been transformed from a union into a republic, governed by a new Head of State. The most practical method of reflecting these changes was by drafting a new constitution. An important aspect of this new constitution consisted in defining the powers and capacities, rights and duties of this new Head of State. It is notable that his functions

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22. Australia overcame this legal obstacle by issuing a proclamation in 1951 to the effect that while a treaty of peace was pending the formal state of war with Germany was terminated as from twelve noon 9 July, 1951. The full proclamation is contained in Doeker op.cit. 94.
23. Act 20 of 1948.
24. Act 32 of 1961.
25. Ibid.

did not differ materially from those previously exercised by the Queen, either personally or through her representative, the Governor-General. Added to this, section 7(4) of the new constitution provided generally that all the prerogative powers that were formerly possessed by the Sovereign were henceforth to be vested in the State President.

Yet another indication that the legislature intended merely to explain rather than to change the prerogative nature of the powers of the State President lies in the fact that certain English constitutional conventions relating to the exercise of the prerogative were now specifically incorporated into the constitution itself. For example, whereas in England a constitutional convention decreed that the prerogative powers of the sovereign to conclude treaties or to declare war and peace were to be exercised on the advice of her Ministers, in the Republic of South Africa the constitution itself provided that the equivalent powers of the State President in this regard must be exercised on the advice of the Executive Committee.[26] In addition, other traditional constitutional conventions have also survived the change-over from union to republic which have not been expressly incorporated into statute law. One of these ensures that the Executive Council must not advise the State President to declare war or peace unless it is sure that such a move would be supported by a majority of the House of Assembly.[27] Why retain all these constitutional safeguards surrounding the use of the prerogative in the spheres of treaty-making and declarations of war and peace unless the prerogative itself has remained intact?

Finally, certain other statutes should be mentioned which also affect the freedom of the State President in the declaration of war and peace. The Defence Act[28] provides[29] that the State President 'may establish a Council of Defence which shall be constituted in such manner and which shall perform such functions as he may prescribe'. According to Article 2 of the Interpretation of Statutes Act[30] this power must be exercised on the advice of the Executive Committee.[31]

26. Ibid. sections 16(1) and (2).
27. Wessels op.cit. 165.
28. Act 44 of 1957.
29. Section 73.
30. Act 45 of 1961.
31. Fouché op.cit. 259-61 explains comprehensively the powers of the State President under these Acts.

The Defence Act[32] was amended early in 1976,[33] partly as a result of the criticism pursuant to the involvement of the South African Defence Force in the Angolan Civil War in 1975, to the effect that the State President had no authority to dispatch troops to fight outside the borders of the country during times of peace. The net result of these amendments has been to empower the State President (in Council) to mobilise the South African Defence Force and to order it to fight both within and beyond the borders of the Republic of South Africa <u>without</u> the formality of a declaration of war. Traditionally, the definition of 'service in defence of the Republic'[34] has meant military service <u>in time of war</u> (that is, once war has been formally declared) or in connection with the discharge of obligations arising from any agreement between the Republic and any other State (that is, treaties of alliance and defence pacts). Since the amendment[35] it now includes service for the prevention or suppression of <u>any armed conflict</u> outside the Republic, which, <u>in the opinion of the State President</u>, is or may be a threat to the security of the Republic. This amendment effectively dispenses wit the traditional presidential rite of formally issuing a declaration of war before engaging the State's troops in battle. In view of the more recent practices of warfare in which States rarely declare themselves to be at war, this amendment is, perhaps, essential in defining the powers of the State President in this regard. Certainly it is a practical step designed to provide the constitutional authorization to cover such situations as striking at guerilla bases situate outside the Republic whether such strikes take the form of military reprisals, pre-emptive raids or so-called 'hot pursuits', practices which must surely become more prevalent as guerilla warfare aimed at toppling the present South African Government is stepped up. This amendment also attempts to provide the legal justification for sending uninvited South African troops into neighbouring territories in an Angola-type conflict which does not originally involve South Africa but which, because of its close physical proximity to the Republic, may constitute a real threat to the

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32. Act 44 of 1957.
33. By the Defence Amendment Act 1 of 1976.
34. Contained in section 1 of the Principal Act.
35. In terms of section 1(a) of the Defence Amendment Act 1 of 1976.

security of South Africa. In this way these alterations to the principal Act effectively sidestep the necessity to actually declare war and extend even further the powers of the State President-in-Council possessed in terms of the historical prerogative

Furthermore this extended definition of 'service in defence of the Republic' is explicitly 'deemed to be service in time of war against an enemy'[36] thus enabling the State President to compel members of the South African Defence Force to 'perform service against an enemy at any place <u>outside</u> the Republic'[37] which they have hitherto been compelled to do only 'in time of war'[38] - that is, traditionally, once war has been formally declared. From the viewpoint of public international law, there seems to be no real difference between the situation in which the State President orders South African troops abroad only after war has been declared and the one in which the armed forces are dispatched abroad without such declaration and simply when the State President opines that such a course of action is necessary to prevent or suppress 'any armed conflict outside the Republic which ... is or may be a threat to the security of the Republic'.[39]

It is an established principle of international law today that any aggressive warfare is illegal.[40] The presence or absence of any formal declaration of war is irrelevant in evaluating whether the action of the State President in sending troops to fight outside the Republic is aggressive or not. The Defence Amendment Act would afford no defence in such a situation because a State will not be able to avoid incurring international responsibility by hiding behind its own legislation. The question whether a statute conforms with international law is for international law to decide. This fact induced Judge Lauterpacht in his separate opinion in the <u>Norwegian Loans Case</u>[41] to declare that

> '[n]ational legislation ... may be contrary ... to the international obligations of the State. The question of conformity of national legislation with international law is a matter of international law ... It is not enough for a State to bring a matter under the protective umbrella of its legislation ... in order to shelter it effectively from any

36. By the amended section 95(1) of the principal Act.
37. Ibid.
38. Ibid.
39. Defence Amendment Act 1 of 1976, section 1(a).
40. Article 2(4) of the Charter of the United Nations.
41. (1957) ICJ Reports 9 at 37

control by international law.'[42]

Therefore, if the State President should choose to exercise the discretion granted to him under the Defence Amendment Act of 1976, the international community would ignore the legislation and would instead ask only one question - was the action one of aggression or one of self-defence? Only if it fell into the latter category would it be justified in the eyes of the world.[43]

One final question arises in connection with the extended powers of the State President to 'declare war' and that is whether this prerogative operates outside the republic. The matter was recently considered by the House of Lords in the case of Nissan v. Attorney-General.[44] As a result of the civil strife between the Greek and Turkish communities in the Republic of Cyprus in December 1963, the Governments of the United Kingdom, Greece and Turkey appealed to the Government of Cyprus to arrange a cease-fire and offered their joint services with a view to helping to resolve the difficulties giving rise to the occasion. This offer was accepted by the Government of the Republic of Cyprus in a communiqué issued on 25 December, 1969, and pursuant to this agreement British troops were dispatched to Cyprus on the following day. The respondent, a British subject, claimed against the Crown damages in respect of breach of contract and trespass arising out of the occupation by British troops of an hotel in Cyprus of which he was tenant during this period. The essential question thus posed to the court was whether such actions as securing food and shelter in peace-time for troops situate abroad are Acts of State and, if so, whether the British Crown is immune from prosecution by British citizens.

In the course of its decision, the court held that there was nothing unconstitutional about the presence of British troops in Cyprus as there was no doubt that it was within the prerogative of the Crown to make treaties.[45] Lord Pearce in his judgement discussed the British

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42. The jurisprudence of the Permanent Court of International Justice was similarly emphatic in the course of its decision on the Treatment of Polish Nationals in Danzig 1932 PCIJ Rep., Ser.A/B, No.44 at p.24 where it held that 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.... [T]he question of the treatment of Polish nationals ... must be settled exclusively on the basis of the rules of international law'.

43. Article 51 of the Charter of the United Nations.

44. [1969] 1 All E.R. 629 (H.L.).

45. Per Lord Reid at 637.

Government's action in terms of the prerogative in grea.. r depth. H stated:[46]

> 'I find the que on of the prerogative difficult. There is an attractive simp ty about the view that the prerogative operates only within th m. And there seems something odd in finding it employed on gn soil by a visiting Sovereign who is only there by suffer e of the true Sovereign of the realm. Yet the prerogative is the power which directs the movements of forces abroad and through the centuries until comparatively recent times it was the source of all their disciplinary procedure. The prerogative was the warrant for the presence of British troops in Cyprus. Therefore the prerogative is operating within the lines of the army when it is on foreign soil. Of course it cannot operate against an alien in an alien land. But when Sovereign and subject meet through the operation of the prerogative in an army overseas, there see s no inherent reason why the prerogative should not be valid. It seems reasonable that he should, as part of his allegiance, be under a duty to the Sovereign in respect of the prerogative right which is for the protection of that realm of which he is a subject. Therefore, not without some doubt, I think the view that the prerogative applied and that the Crown were exercising it is probably the correct view.'

Though this issue has not yet come up for consideration before a South African court, it is unlikely that a different conclusion would be reached. Apart fro the fact that the South African court would, in all likelihood, regard the above decision in the light of persuasive authority, especially in view of the fact that South African courts have consistently accepted that the prerogative rests on principles of English law and not Roman-Dutch law,[47] it may be justified on the grounds that the subject has unquestionably given the State resident-in-Council a e hand in the conduct of foreign policy in general. It would, therefore appear that if the State President exercised his right to send South African troops beyond the borders of the Republic on sufferance of the foreign Sovereign or without such sufferance but in defence of the Republic, this action could be justified in terms of the prerogative.

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46. At 652.

47. ee above p. 81.

3 NEGOTIATION AND CONCLUSION OF TREATIES

(a) Appointment of South African Plenipotentiaries

The Republic of South Africa Constitution Act[1] attributes to the State President the power 'to enter into and to ratify international conventions, treaties and agreements'[2]. Usually, the first step with regard to the conclusion of a treaty is the appointment and use of an agent who will negotiate and enter into the treaty on behalf of the Republic. With this in mind the South African Constitution[3] empowers the State President 'to appoint and to accredit, to receive and to recognize ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers'. In the Republic, as elsewhere generally, the appointment of agents or plenipotentiaries is a function of the executive arm of Government.

Once a decision has been taken to enter into international negotiations with a view to concluding an international agreement, the negotiating team is usually chosen from officials attached to the interested State Department as well as from officials attached to the Department of Foreign Affairs. Where negotiations are to take place by correspondence, the Department of Foreign Affairs will generally be responsible for the handling of the diplomatic correspondence. However, in the case of treaties of a technical nature such as treaties for the avoidance of double taxation, the parties may allow the particular State Department which would ultimately administer the treaty to conduct the correspondence, at least until the stage is reached where the parties are _id idem_ about all technical aspects.

Depending on the nature of the negotiations and the wishes of the participating States, the agents may be furnished with special documents showing that they are legally entitled to carry on the negotiations. In the case of multilateral treaties and international conferences it is

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1. Act [illegible] of 1961.
2. Ibid., section 7(2)(g).
3. Ibid., section 7(2)(d).

customary for all plenipotentiaries to be in possession of proper documents in order to attend the conference where the treaty is being negotiated. The draft rules of procedure of the conference or the constitution of the organisation under whose auspices the conference is held will set out any such requirements. In addition, a note or a telegram must often be sent to the conveners of the conference within a certain period before its commencement, which note or telegram indicates precisely who will be attending the conference. On occasion (but this is unusual) such a note or telegram may be all that is required. If credentials are requested, the draft rules of procedure of the conference will usually indicate how these must be formulated; if not, this information may be obtained from the Secretariat of the conference.

In the case of bilateral treaties it may not be necessary to furnish agents with such documents, as, for example, where the negotiators of both States are known to each other. Where negotiations take place by correspondence or by an exchange of notes between the respective Governments, the procedure with respect to the appointment of plenipotentiaries and the furnishing of credentials is frequently very informal.

Where credentials are necessary, the Executive Committee must authorize the Minister of Foreign Affairs to issue them on its behalf. This is done by way of a Minute, a typical example of which states:

> 'Ministers have the honour to inform the State President that the twentieth General Assembly of the United Nations on ... decided that an international conference of Plenipotentiaries shall be held to consider ... and to draw up an international convention with regard to ....
>
> Ministers have the honour to inform the State President that arrangements have been made to hold the conference from ... to ....
>
> Ministers further have the honour to advise the State President that attendance of the conference in the name of the Republic of South Africa is desirable.
>
> Ministers therefore have the honour to recommend that the State President may be pleased to approve that (the Government of) the Republic of South Africa participate in the conference and that the following persons be appointed as Plenipotentiaries to represent (the Government of) the Republic of South Africa at the conference ....
>
> Ministers also have the honour to recommend that the State President may be pleased to approve that the Minister of Foreign Affairs take the necessary steps in that connection.'

This is followed by the issue of credentials by the Minister of Foreign Affairs, which document names those persons who will represent the Republic. Next to the name of each person nominated will be indicated the capacity in which he will attend the conference. The precise title required by the constitution of the organization under whose auspices the conference will be held or, by the draft articles of procedure, will be used. Examples of such titles are: leader of the delegation, delegate, alternative delegate, representative, alternative representative, adviser and observer. Credentials will be issued in respect of all the members of the delegation. Usually more than one person will be appointed as delegate to cater for the situation where one negotiator is suddenly indisposed. The credentials authorize delegates

(a) to attend the conference and to take part in the discussions;

(b) to vote during the proceedings;

(c) to sign the Final Act[4] of the conference.

On occasion credentials will be included with the Full Powers to sign the envisaged treaty, which procedure will be explained in the section on Full Powers below.[5] The text of the credentials for the Vienna Conference on treaties, for example, reads as follows:

> 'WHEREAS an International Conference of Plenipotentiaries will be convened in Vienna on the 26th March, 1968, to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it may deem appropriate;
>
> AND WHEREAS it is expedient that fit and proper persons be accredited to represent the Republic of South Africa at the Conference aforesaid;
>
> NOW, THEREFORE, I, [NAME], Minister of Foreign Affairs of the Republic of South Africa, have authorized and appointed and do by these presents authorize and appoint, the following persons to represent the Republic of South Africa at the Conference aforesaid:
>
> HIS EXCELLENCY, [NAME], Ambassador Extraordinary and Plenipotentiary of the Republic of South Africa in Vienna: Representative and Chairman of the Delegation;
> [NAME], Law Adviser, Department of Justice of the Republic

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4. A.D. McNair The Law of Treaties (1961) 24 defines 'Final Act' as 'a formal statement or summary of proceedings of a congress or conference, enumerating the treaties or conventions drawn up as a result of its deliberations'.

5. See pp. 129ff. below.

of South Africa: Representative;
[NAME], Under Secretary, Department of Foreign Affairs of the Republic of South Africa: Representative;
[NAME], Minister-Counsellor, South African Embassy, Vienna: Representative.

IN WITNESS WHEREOF I have signed and sealed these presents at Cape Town on this the ... day of March in the year of Our Lord, One thousand Nine hundred and Sixty-eight.'

(b) Negotiation of Treaties

Formal negotiations to conclude a treaty with foreign Governments will be initiated once the work is thoroughly assessed by

(i) the State Department which will administer the treaty and, if necessary, the Minister in charge;

(ii) the Department of Foreign Affairs and, if necessary, the Minister of Foreign Affairs;

(iii) the Treasury in the event of treaties with financial implications;

(iv) the inter-departmental Foreign Trade Relations Committee in the case of commercial treaties;

(v) the Prime Minister's Department or, perhaps, the Administration of South-West Africa where the treaty will affect South-West Africa;

(vi) the Cabinet in treaties of an important nature; and/or

(vii) the Executive Committee in the case of negotiations where credentials are necessary.

Negotiations may take place on both technical and/or on diplomatic levels. The rules of international law itself prescribe neither the form nor the procedure for the making of international engagements[6] and the Republic of South Africa Constitution Act of 1961, unlike the constitutions of various other States which differentiate between formal and informal types of treaties, does not make any provision for different treatment to be meted out to different types of treaties - it simply makes mention of 'conventions, treaties and agreements'.[7] There is no essential difference between them as far as their binding force upon the contracting parties is concerned.[8] The term 'treaty' has traditionally been reserved for more solemn, protracted agreements such as treaties of peace and alliance, and

6. McNair op.cit. 6.
7. Republic of South Africa Constitution Act 32 of 1961, section 7(2)(g).
8. L. Oppenheim International Law - A Treatise 8 ed. (1955) I Peace 898.

border treaties,[9] where there has been a tendency to use the term 'agreement' when everyday, practical issues have been negotiated, for example, air and visa agreements. The term 'convention' is most often employed to describe multi-lateral law-making treaties[10] of general interest, such as conventions for the codification of public international law. It may also be used for bilateral treaties where complex issues, such as the avoidance of double taxation, are negotiated. However, there is no absolute rule which stipulates that one title should be employed above another in any given circumstances.

South African practice regarding negotiation varies according to the nature and significance of the particular treaty. The following comprise the main types of treaties to which the Republic is party:

(i) Treaties between Heads of State. McNair[11] describes these as 'historically the oldest, and, in practice, the most orthodox form, in the case of treaties of an important character'. This is a formal treaty negotiated by Heads of State, as for example, the Extradition Treaty between the Republic of South Africa and the Republic of Botswana, 1969,[12] the preamble to which provides:

> 'The State President of the Republic of South Africa and the President of the Republic of Botswana ...
> have agreed to conclude a treaty ... and have for this purpose appointed as their Plenipotentiaries ....'

(ii) Treaties (conventions or agreements) between States. This is a formal treaty negotiated on behalf of States. According to McNair[13] 'in a period ... when revolutionary changes in Governments and in forms of Government are so frequent, and when many new States are governed by Ministers who ... possess little international experience, there is a great deal to be said in favour of all important and permanent international agreements being made as between States .... [as this form] is likely to attract greater sanctity'. An example of this type of treaty is the Cultural Agreement between the Republic of South Africa and the Federal Republic of Germany, 1962.[14] The preamble reads:

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9. McNair op.cit. 22.
10. Ibid.
11. McNair op.cit. 18.
12. Republic of South Africa Treaty Series 2 of 1969.
13. McNair op.cit. 17-8.
14. Republic of South Africa Treaty Series 3 of 1962.

'The Republic of South Africa and the Federal Republic of Germany, endeavouring to provide friendly co-operation ... and to further mutual understanding between their respective peoples, have agreed as follows:'

(iii) Treaties (Conventions or Agreements) between Governments. This format is often used in the Republic to negotiate formal treaties. South African practice in this regard accords with international practice where this form has become increasingly common.[15] Examples are visa agreements and agreements for the avoidance of double taxation.

(iv) Protocol. This is yet another formal type of agreement which is often an addendum to an existing treaty. Take, for example, the Protocol of 1967[16] amending 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, signed at Cape Town on 28 May 1962, the preamble to which reads:

'The Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland,
Desiring to conclude a Protocol...
Have agreed as follows:'

It should be noted, however, that a Protocol may also stand alone and complete in itself as did the Protocol between the Government of the Republic of South Africa and the Government of the French Republic which governed the installation of a scientific space tracking station in South Africa, 1964.[17]

(v) Exchange of Notes. This is a more informal type of treaty negotiation but no less binding than its more formal counterparts. The validity of negotiating international agreements in this way has been approved by the South African Appellate Division in the case of S v. Eliasov.[18] On 19 November, 1962, an extradition agreement had been concluded between the Republic of South Africa and the Federation of Rhodesia and Nyasaland.

15. Oppenheim op.cit. 495; McNair op.cit. 19.
16. Republic of South Africa Treaty Series 4 of 1967
17. Ibid. 1 of 1964.
18. 1967 (4) SA 583 (AD); See, too, C.J. . Dugard 'The Treaty-Making Process' (1968) 85 South African Law Journal 1.

This agreement had been duly published in the Government Gazette (under Proclamation R44 of 1963) as required by section 2(3) of the Extradition Act.[19] The Federation was, however, dissolved with effect from 31 December 1963. Prior to the dissolution, an exchange of notes, designed to ensure the continued application of the said agreement as between the Republic and Rhodesia, had taken place on 23 December, 1963, between representatives of the Government of the Republic and of the Government of the constituent territory of Southern Rhodesia. On that date the then Prime Minister of Southern Rhodesia, in a note addressed to the Acting Accredited Diplomatic Representative of the Government of the Republic, proposed that, in view of the impending dissolution of the Federation, the existing agreement of November 1962 'should continue to apply as between the Republic of South Africa and Southern Rhodesia'. The note concluded in the following way:

> 'If the foregoing proposal is acceptable to the Government of the Republic of South Africa, I have the honour to suggest that this letter and your reply in that sense should be regarded as constituting an agreement between our Governments with effect from the dissolution of the Federation of Rhodesia and Nyasaland.'

On the same day the Acting Accredited Diplomatic Representative of the Republic sent this reply:

> 'I have the honour to confirm that the proposal in your letter, as quoted above, is acceptable to the Government of the Republic of South Africa, and that your letter and this reply should be regarded as constituting an agreement between our Governments with effect from the dissolution of the Federation of Rhodesia and Nyasaland.'

The court a quo[20] held that no valid extradition agreement existed as it had not been published in the Government Gazette as required by the Extradition Act.[21] However, by the time the matter went on appeal, the requirement of publication had been satisfied, so the Appellate Division was able to rule that the extradition treaty as constituted by the exchange of notes was of full force and effect.[22]

Because there are fewer formalities involved, the format of exchange of notes is often chosen to negotiate treaties of a routine type and to amend existing treaties. However, even weighty matters may be negotiated

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19. Act 67 of 1962.
20. S v. Eliasov 1965 (2) SA 770(T).
21. Act 67 of 1962, section 2(3).
22. S v. Eliasov 1967 (4) SA 583 (AD) at 591.

by an exchange of notes, as was, for example, the so-called Simon town Agreement concluded between the Republic and the United Kingdom in 1955.[23]

(vi) Arrangement. This is another informal type of treaty negotiation between Governments. One example is the Air Navigation Arrangement with the United States of America of March and September 1933.[24]

(vii) Understanding or Memorandum of Understanding. McNair[25] defines this as being used to an increasing extent 'to denote an informal but nevertheless legal agreement between two or more States, particularly when that agreement forms a step in the process of tidying up a complicated situation'. It may be used to elucidate involved situations as was the Understanding between South Africa, the United Kingdom and Swaziland over Sugar, 1964;[26] to serve as a temporary ruling as did the Understanding with Botswana over Air Services, 1966;[27] or to serve as a subsidiary agreement to a treaty as did the Memorandum of Understanding Subsidiary to a Customs Union Agreement with the Governments of Botswana, Lesotho and Swaziland, 1969.[28]

The various types of treaties mentioned in the list above have one element in common, namely, they are all in written form and, while the vast majority of international agreements negotiated by the Republic of South Africa are in writing, there is nothing in the rules of international law to prevent the negotiation of oral agreements which may be equally binding in nature. The Vienna Convention on the Law of Treaties, to which the Republic subscribes although not a signatory, defines[29] a treaty as 'an international agreement concluded in written form' but qualifies this statement by providing further[30] that

> 'the fact that the present Convention does not apply ... to international agreements not in written form shall not affect
> (a) the legal force of such agreements;
> (b) the application to them of any of the rules set forth in

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23. Exchange of Letters Constituting an Agreement on Defence Matters between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of South Africa of 30 June 1955: United Nations Treaty Series No. 3495 vol. 248 p.192; also, C.J.R. Dugard 'The Simonstown Agreement: South Africa, Britain and the United Nations' (1968) 85 South African Law Journal 142; G.G.Lawrie 'The Simonstown Agreement: South Africa, Britain and the Commonwealth' (1968) 85 South African Law Journal 157.
24. Union Government Treaty Series 3 of 1933.
25. McNair op.cit. 13.
26. Not listed in the Republic of South Africa Treaty Series.
27. Ibid.
28. Republic of South Africa Treaty Series 6 of 1969.
29. The Vienna Convention on the Law of Treaties, article 1.
30. Ibid., article 3.

> the present Convention to which they would be subject under international law independently of the Convention.'

International law 'independently of the Convention' has never prescribed any set format for the negotiation and conclusion of treaties but has, nevertheless, encouraged treaties to be in writing and to be registered with the Secretariat of the United Nations,[31] in this way facilitating both proof of the agreement and avoiding the hazards of secret treaties. Oral agreements, however, are certainly not without binding force although whether they may be labelled as treaties is debatable, especially in the light of the <u>Legal Status of Eastern Greenland</u>[32] case. Here certain public statements by Ihlen, the Norwegian Foreign Minister, to the effect that Norway would raise no 'difficulties' over Denmark's extension of sovereignty to Eastern Greenland were considered by the Permanent Court of International Justice to be binding on Norway although not constituting a treaty. Furthermore, according to the decision of the ICJ in the recent <u>Nuclear Tests</u> case[33] unilateral statements made publicly and with an intent to be taken seriously are to be regarded as binding. If this is the case, an oral agreement concluded between two States must, <u>a fortiori</u>, be regarded as binding on the parties.

Once the desirability of a treaty on a particular topic has been informally agreed upon between the Republic and another State and once both parties declare their willingness to enter into negotiations, the States must appoint negotiators who will meet to plan the text of the treaty, or it may be agreed that one party prepare a draft treaty for consideration and comment by the other party. Whenever the Republic initiates bilateral negotiations, the administering State Department will draw up this draft treaty in conjunction with the legal advisers of the Department of Foreign Affairs. Once the negotiators of both States agree on the wording of a text they will initial each page of the text <u>ne varietur</u>.[34] Each keeps a copy of the initialed text.

It is often desirable at this stage of the negotiations to determine whether any constitutional obstacles must be overcome by each respective

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31. Article 102(1) of the Charter of the United Nations provides that 'every treaty ... entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it'. Failure to register a treaty will not invalidate it but 'no party to any such treaty ... may invoke that treaty ... before any organ of the United Nations' : Article 102(2) of the Charter of the United Nations.
32. 1933 PCIJ Series A/B No. 53.
33. 1974 ICJ Reports 253, discussed above at pp.72-3.
34. A fuller discussion of the practice of initialling a text <u>ne varietur</u> is presented on p.143 below.

State before the treaty becomes operational. South African embassies abroad can be of help in this regard. The question then arises of the consequences of failure on the part of the South African Government to overcome any such constitutional obstacles. The Vienna Convention is clear on this point. It provides[35] that 'a party may not invoke the provisions of its internal law as justification for a failure to perform a treaty'. It may happen that the State finds itself in the position of being bound, on the one hand, to observe its commitments on an international level even while, on the other hand, it is unable to do so because of its own constitutional limitations. A contracting party has not only the right but the duty to satisfy itself that the domestic procedures necessary to the final acceptance of the treaty have been observed. The Convention continues:[36]

> '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. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'.

This means that in the normal course of events the South African Government should examine its constitutional position in advance and take steps to ensure that it is not overstepping the limits of its authority.

During negotiations any questions of a technical or legal nature could be referred to the relevant Department of State or to the Department of Foreign Affairs. The question whether Full Powers will be necessary will also be discussed during these negotiations.

The Republic has generally accepted and applied the principle of the <u>alternat</u> vis-a-vis bilateral treaties. According to this principle the text of a treaty is twice signed in the original. Each party then retains an original text in which its name is mentioned before that of the other party in the introductory and closing clauses and in which the signature of its representative appears first. In other words, one text gives priority to one State while the other gives priority to the second State. To put on record the use of the <u>alternat</u> in the text of a treaty, the words 'in duplicate' will appear in the concluding paragraph after the word 'done'. An example of the <u>alternat</u> is provided

35. Article 27.
36. Article 46.

by the Extradition Treaty between the Republic of South Africa and the Republic of Botswana.[37] The South African version reads:

> 'The State President of the Republic of South Africa and the President of the Republic of Botswana -
>
> desiring to regulate by mutual agreement the relations between their two countries in the sphere of extradition of criminals;
>
> have agreed to conclude a treaty to that effect and have for this purpose appointed as their Plenipotentiaries:
>
> The State President of the Republic of South Africa:
> Dr. The Honourable Hilgard Muller
>
> The President of the Republic of Botswana:
> The Honourable Moutlakgola Palgrave Kediretswe Nwako.
>
> The Plenipotentiaries, after having exchanged their respective full powers, found to be in good and due form, have agreed as follows: ....'
>
> 'For the Republic of South Africa:
> Cape Town, this twenty-seventh day of February, 1969
> H. Muller
>
> 'For the Republic of Botswana:
> Gaberones, this fourth day of March 1969
> M.P.K. Nwako.'

The Botswana version reads:

> 'The President of the Republic of Botswana and the State President of the Republic of South Africa -
>
> desiring to regulate by mutual agreement the relations between their two countries in the sphere of extradition of criminals;
>
> have agreed to conclude a treaty to that effect and have for this purpose appointed as their Plenipotentiaries:
>
> The President of the Republic of Botswana:
> The Honourable Moutlakgola Palgrave Kediretswe Nwako
>
> The State President of the Republic of South Africa:
> Dr. The Honourable Hilgard Muller.
>
> The Plenipotentiaries, after having exchanged their respective full powers, found to be in good and due form, have agreed as follows: ....'
>
> 'For the Republic of Botswana:
> Gaberones, this fourth day of March 1969
> M.P.K. Nwako
>
> 'For the Republic of South Africa:
> Cape Town, this twenty-seventh day of February 1969
> H. Muller.'

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37. Republic of South Africa Treaty Series 2 of 1969

Each State chooses the language in which it wishes to negotiate. The Republic of South Africa Constitution Act[38] states that 'English and Afrikaans shall be the official languages of the Republic and shall be treated on a footing of equality and enjoy equal freedom, rights and privileges.' From this stems the principle that the Republic will use both English and Afrikaans in negotiating bilaterial treaties with other countries. So, unless there are unusual circumstances which would justify a deviation from this norm, South African negotiators will indicate to the other contracting State that a bilateral treaty must be concluded in both official languages. Similarly, the other contracting State will indicate which language it wishes to use. All the languages chosen will be mentioned by name in the conclusion of the treaty, for example:

> 'IN WITNESS WHEREOF the abovementioned Plenipotentiaries have signed the present Treaty and affixed thereto their Seals
>
> Done at ... in duplicate in the ... languages on ....'

It will also be decided during negotiations whether there will be one or more authentic texts. Where there is to be more than one authentic text, the conclusion of the treaty will be worded as follows:

> 'Done ... in the Afrikaans, English and German languages, all three texts being equally authentic.'

Where there is to be only one authentic text, the wording may provide:

> 'Done in the Afrikaans, English and German languages, all three texts being of equal force and effect, provided that if there is any uncertainty concerning the interpretation of the Treaty, the English text shall prevail.'

Where more than one language is involved all texts or one only should be indicated as authentic. Where there are three texts and two only are authentic, this may give the impression that the third language is being discriminated against.

There is no rule relating to the sequence of the texts in the different languages or to the sequence of the names of the languages in the conclusion of a treaty. However, a text placed above or to the left of another text generally enjoys priority and a language mentioned in the conclusion before another language will enjoy priority. Whenever there is a common language or whenever one language only is indicated as authentic, that language will enjoy priority. In all other

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38. Act 32 of 1961, section 108(1).

instances the texts, and the names of the languages in the conclusion are arranged alphabetically or follow the alternat. However, while the application of the alternat is simple when the treaty has been concluded in two languages only, its application becomes more complex when a bilateral treaty has been negotiated in more than two languages, such as a treaty between South Africa and Belgium which will normally be negotiated in English, Afrikaans, French and Dutch. In such an event, South Africa and Belgium must decide which of their official languages will have priority *inter se* before the alternat is used. An alternative arrangement would be to arrange the languages alphabetically.

In the case of an exchange of notes other considerations prevail. Given the less formal nature of an exchange of notes, it is not as important to insist on the strict use of all the official languages. The different possibilities include the following:

(i) Whenever the exchange of notes is between a Foreign Minister and an ambassador it is quite acceptable for them to use the languages they usually use in dealing with one another; for example, in a Visa Agreement between the Union and the Netherlands in 1952,[39] one note was in Afrikaans and the other in Dutch; and in the Agreement in 1967 between the Government of South Africa and the Government of the United States of America amending the Air Transport Agreement of 23 May 1947,[40] both notes were in English.

(ii) Whenever both States insist on the use of their official languages, both notes may be drawn up in two or three languages.

(iii) When both States do not use the same language it is generally accepted that each will sign in its own language(s). In the case where, for example, the first note is in German and an English-speaking State answers in English, the following form may be used:

> 'I have the honour to refer to your note of today's date, which, in the agreed English translation/version, reads as follows: ....'

In this way both languages are given equal status. If the parties wish the equality of the languages to be made even clearer, the following

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39. Union Government Treaty Series 12 of 1952.
40. Ibid., 3 of 1968.

form, as adopted in the Kunene River Treaties of 1964[41] and 1969[42] between South Africa and Portugal may be used. Here the Portuguese Minister of Foreign Affairs sent a note in Portuguese which was answered by the South African Minister of Foreign Affairs in English:

> 'I have the honour to refer to your note of today's date, the text of which in the English language, which shall have equal authority as the Portuguese text....'

As far as multilateral treaties are concerned, these may be concluded in one language only; in more than one language, none of them taking priority; in more than one language with the condition that in the event of a clash in meaning, the text of one shall take priority. Where treaties are negotiated under the auspices of the United Nations or any of its specialized agencies all the languages used are classified authentic. The United Nations Charter, for example, is in English, French, Spanish, Russian and Chinese, and all five languages are authentic.

If multilateral treaties of a technical nature are concluded among States, some of whose languages do not extend to all the necessary technical terminology, it might be advantageous to mention in the treaty that the texts in one of the languages used shall govern. Whenever all the languages used in multilateral treaties are classified authentic, the problem remains which text is to prevail in the event of a clash. The Vienna Convention[43] has attempted to cover this situation by providing that

> '[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.'

It adds:[44]

> 'A version of the treaty in a language other than one of those in which the text was authenticated shall be considered as authentic only if the treaty so provides or the parties so agree.'

McNair[45] states that 'there is ample authority for the view that the two or three texts should help one another, so that it is permissible to interpret one text by reference to another'. This implies that the

41. Ibid., 7 of 1964.
42. Ibid., 1 of 1969.
43. Article 33(1).
44. Article 33(2).
45. McNair op.cit. 433.

attitude should be taken that all the texts have the same meaning. If so, the fact that different languages are used may then be turned to advantage. If there are, for example, four texts, one of which is unclear, the meaning should be sought in the other texts which should all have the same meaning, and the unclear text may be brought into line with all the other texts. This line of approach was, in fact, adopted by the International Law Commission. The Vienna Convention goes on to provide:

> 'The terms of the treaty are presumed to have the same meaning in each authentic text.[46]
>
> Except where a particular text prevails in accordance with paragraph 1, when a comparison which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted.' [47]

McNair[48] adds that tribunals dealing with a treaty written in two or more languages of equal authority will sometimes seek to ascertain the 'basic language', that is, the working language in which the treaty was negotiated and drafted and regard that as the most important.

Negotiations today are frequently conducted by means of formal notes between the Minister of Foreign Affairs, acting on behalf of his Government, and the resident diplomatic agent of the other country. An exchange of notes generally results from oral discussions of the subject matter but is, on occasion , the outcome of correspondence in which the proposal has been put forward and discussed in advance. This hammering out of details of the agreement in advance is important as it enables the ultimate treaty to be concluded by the simple exchange of notes.

The negotiations are usually initiated by representatives of the embassies or by the Department of Foreign Affairs. The procedure is informal. The Minister of Foreign Affairs will address a note to the ambassador proposing the specific agreement. If the proposed conditions are acceptable to the addressed Government, the note containing those provisions and a confirmatory reply are deemed to constitute as well as to evidence the agreement reached between the two Governments.

Two notes or letters which have been exchanged will not automatically constitute a treaty. This exchange will be regarded as nothing further than diplomatic correspondence unless it is quite evident from the wording of the exchange that both Governments regard it as creative of

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46. Article 33(3).
47. Article 33(4).
48. McNair op.cit. 434.

a treaty and, furthermore, that constitutional authorization has been obtained - (in South Africa this entails authorization by the Executive Committee). The wording at the close of the note which initiates the exchange and at the beginning and close of the replying note will indicate the purpose of the exchange of notes. If the first note ends with the words:

> 'Should the Government of ... agree with the abovementioned provisions, this letter and your affirmative reply thereupon shall constitute an Agreement between our two Governments'

and the second note begins:

> 'I have the honour to refer to your letter of ... which in the agreed English translation reads as follows ....'

and ends:

> 'I have the honour to confirm that the Government of ... agree to the abovementioned conditions and regard your letter and this reply as constituting an Agreement between our two Governments,'

it is clear that the notes are meant to constitute a treaty.

Depending on the circumstances, the importance of the treaty and the degree of publicity which both States wish to assign to it, the notes may be exchanged by post, personally by both signers, or signed and exchanged during a formal ceremony.

The following documents are sent to the archives for safe-keeping:

(i) the original note/letter received from the other State;

(ii) a certified copy of the South African note/letter;

(iii) the original or certified copy of the Full Powers (if any) of the other State;

(iv) a certified copy of the Full Powers (if any) issued by the Republic.

Bilateral treaties may be divided into four parts: the heading, preamble, body and conclusion.

The heading consists of the title, the names of both States, and the subject-matter of the treaty. The preamble will first identify the contracting parties - it might state, for example, whether this is a treaty between Heads of State or Governments, and this will be followed by such words as 'have agreed as follows'. Introductory paragraphs may be inserted between the names of the contracting parties and these words. The precise wording of the preamble will differ according to the nature and importance of the treaty. Each paragraph begins with such words as 'whereas', 'desiring', 'resolved', or 'determined' written in capital letters.

There is no special manner of dividing the <u>contents</u>, although the different points agreed on are strictly controlled by numbers. It is important to note that the numbers where texts are in different languages must correspond throughout.

The <u>conclusion</u> usually consists of either of the following two paragraphs:

(i) where the plenipotentiaries are named:

> 'IN WITNESS WHEREOF the abovementioned plenipotentiaries have signed the present Treaty and affixed thereto their seals.
> DONE at ... in duplicate in the ... languages on . ..'

(ii) where the plenipotentiaries are not named:

> 'IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments have signed and sealed the present Agreement
>
> DONE at ... in duplicate in the ... languages on ....'

Below these paragraphs are the words:

'For (the Government of)[49] the Republic of South Africa:

For (the Government of) ....'

(c) <u>Cabinet Approval</u>

The constitutional requirements of the Republic prescribe that authority must be obtained from the Executive Committee in respect of the following acts in connection with both bilateral and multilateral treaties:

(i) the issue of credentials to attend international conferences;

(ii) signature of a treaty with or without reserve as regards ratification;

(iii) ratification of a treaty;

(iv) accession to a treaty; and

(v) suspension or denunciation of a treaty.

Generally, no special authorization is necessary for signing the Final Act of a treaty because the issue of credentials implies an automatic right of such signature.

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49. The treaty will be 'For the Government of the Republic of South Africa' when it is a treaty between Governments. In all other instances it is simply signed 'For the Republic of South Africa'.

The authority of the Executive Committee is given by means of a Minute of the Executive Committee which sets out the proposed treaty negotiations, which authorizes the Prime Minister, State President or Minister of Foreign Affairs to take the necessary action,[50] and which is signed by the State President and a second member of the Cabinet, usually the Prime Minister.

An explanatory Memorandum is often attached to the Minute. This states that the Minute seeks the approval of the State President for the action proposed, for example, ratification and the completion of an instrument of ratification by the Minister of Foreign Affairs.

Because of the technical content of many treaties it is usual for the Department which will ultimately be responsible for the administration of the proposed treaty to draw up a draft-Minute and to submit it for approval through the Department of the Prime Minister. And, as treaty negotiations with foreign powers inevitably affect the Republic's international relations, the Department of Foreign Affairs usually has an interest in the matter as well. It is established practice, therefore, for the Department of the Prime Minister, preparatory to submitting the draft-Minute to the Executive Committee, to submit it to the Department of Foreign Affairs for initialing. Before the latter will initial the draft-Minute, it will check the wording and decide whether the proposed treaty is desirable from the point of view of the Republic's relationship with the other State. Thereafter the draft-Minute will be sent to the Clerk of the Executive Committee. After the Minute has been approved by the Cabinet, the stamp of the Clerk of the Executive Committee is affixed, together with the date and a number. This date indicates the date of approval. Only copies which bear the stamp are used or consulted in connection with the treaty negotiations. The number provides for easy future reference.

Where a bilateral treaty is to be signed, the Cabinet will only be approached once the proposed text has been approved by the legal advisers of the South African Government and once both States are ad idem over its contents. Any further modifications mean that the Cabinet must be approached afresh.

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50. This is in keeping with article 7(2) of the Vienna Convention on the Law of Treaties which bestows a general validity on treaties negotiated by a State President, Prime Minister or Minister of Foreign Affairs.

The Minute of the Executive Committee in regard to the signing of bilateral treaties should contain an introductory paragraph in which the background of the treaty is briefly described:

> 'Ministers have the honour to inform the State President that the Government of the Republic of South Africa and the Government of ... are desirous of concluding a treaty (agreement, convention) with regard to ... (by means of an exchange of notes).'

A further paragraph will describe the attitude of the South African Government:

> 'Ministers have the honour to advise that the Government has investigated the text of the treaty (agreement, convention, exchange of notes) and agrees with it.'

In a final paragraph the State President will be asked to approve of the treaty and to direct the Head of State, Head of Government or Minister of Foreign Affairs to take the necessary steps to implement it. Where the treaty is between Heads of State this paragraph may read:

> 'Ministers therefore have the honour to recommend that the State President may be pleased to approve that the Treaty be signed in the form of the attached drafts in ... (languages) and to appoint ... as the State President's Plenipotentiary for this purpose.'

Where the treaty is between Governments this paragraph may read :

> 'Ministers therefore have the honour to recommend that the State President may be pleased to approve that the Treaty be signed on behalf of (the Government of) the Republic of South Africa in the form of the attached drafts in ... (languages) and that the Minister of Foreign Affairs take the necessary steps in that connection.'

Where the treaty is subject to ratification, the words 'subject to ratification' will be inserted after the words 'be signed' in this final paragraph. Later on, when approval for ratification is sought, reference may be made in the new Minute to the Minute authorizing the signature, to the place and date of signature and to the provisions in the treaty which call for ratification. The final paragraph of the new Minute will depend on whether the treaty is between Heads of States, in which case it might provide that

> 'Ministers therefore have the honour to recommend that the State President may be pleased to confirm and ratify the Treaty',

or, where the treaty is one between States or Governments, the Minute might be worded in the following manner:

> 'Ministers therefore have the honour to recommend that the State President may be pleased to approve that the Treaty be confirmed and ratified on behalf of (the Government of) the Republic of South Africa and that the Minister of Foreign Affairs take the necessary steps in that connection.'

In the event of denunciation or suspension of a bilateral treaty, a typical example of the final paragraph of the Minute might state:

> 'Ministers may be pleased to approve that (the Government of) the Republic of South Africa denounce (suspend) the Treaty (as from ...) and that the Minister of Foreign Affairs take the necessary steps in that connection.'

The Minute dealing with a multilateral treaty will consist of an introductory paragraph in which the background to the treaty is briefly stated, followed by a paragraph in which the Government's attitude is made evident. The conclusion contains recommendations to the State President and any reservations. The text of the treaty will be attached where the Minute seeks approval for signature or accession. The following example of a Minute requesting approval for signature of a multilateral treaty may be cited as typical:

> 'Ministers have the honour to inform the State President that the twentieth General Assembly of the United Nations on ... unanimously adopted the text of a Treaty on ..., and that the Treaty was opened for signature on ...
>
> Ministers further have the honour to inform the State President that the Government of ... in its capacity as depositary authority invited South Africa to sign the treaty.
>
> Ministers further have the honour to advise that the Government has investigated the text of the Treaty (a copy of which is annexed hereto) and are of the opinion that it will benefit the Republic of South Africa to become a party to the Treaty (with the reservation that ...).
>
> Ministers therefore have the honour to recommend that the State President may be pleased to approve that the Treaty be signed on behalf of (the Government of) the Republic of South Africa (with the reservation that ...) and that the Minister of Foreign Affairs take the necessary steps in that connection.'

The words 'subject to ratification', 'subject to acceptance' or 'subject to approval' may, if necessary, be inserted after the words 'South Africa' in the final paragraph above.

An example of a Minute in regard to multilateral treaties requesting ratification, acceptance or approval is as follows:

> 'Ministers have the honour to point to the Minute of the Executive Committee number ... of ... concerning the signing of the Treaty about ... and to inform the State President that the Ambassador Extraordinary and Plenipotentiary of the Republic of South Africa in ... signed the Treaty in the name of (the Government of) the Republic of South Africa on ....
>
> Ministers further have the honour to state that the signing of the Treaty by the Ambassador as a result of article ... of the Treaty is subject to ratification (acceptance, approval).

'Ministers therefore have the honour to recommend that the State President may be pleased to approve that the Treaty be confirmed and ratified (accepted, approved) on behalf of (the Government of) the Republic of South Africa (with the reservation that ...) and that the Minister of Foreign Affairs take the necessary steps in that connection.'

The final paragraph of a Minute requesting accession to a multilateral treaty may state:

'Ministers therefore have the honour to recommend that the State President may be pleased to approve that (the Government of) the Republic of South Africa accede (adhere) to the Treaty (with the reservation that ...) and that the Minister of Foreign Affairs take the necessary steps in that connection.'

Finally, an example of the final paragraph of the Minute requesting the denunciation or suspension of a multilateral treaty is the following:

'Ministers therefore have the honour to recommend that the State President may be pleased to approve that (the Government of) the Republic of South Africa denounce (suspend) the Treaty (as from ...) and that the Minister of Foreign Affairs take the necessary steps in that connection.'

The documents cited above illustrate the present practice in the Republic of South Africa to seek approval for all necessary action with respect to the ratification, acceptance, approval and accession to treaties. This internal procedure of examination and approval by a competent body shows that, in the constitutional procedure, the executive is the sole treaty-making organ. The initiative in the entire treaty-making process belongs to it. Present South African practice indicates, therefore, that approval of Cabinet is sought in all cases where South Africa proposes to ratify or accede to both bilateral and multilateral treaties, whether these treaties are politically significant or not. Indeed, it could well be argued that in these times when the Republic is becoming increasingly isolated in diplomatic circles, that all treaties it does negotiate have political significance, whatever their subject-matter may be. In the light of this it is extremely unlikely that Cabinet approval would not be sought.

(d) Issuance of Full Powers

Full Powers will be issued once the approval of the State President, acting on the advice of the Executive Committee, has been given. The term 'Full Powers' is used to indicate two types of official authorization in connection with treaties. First, it clothes the agent with power to represent and negotiate on behalf of his country, Head of State or Government at international conferences; and secondly, it grants him authority to sign the treaty. Thus the Vienna Convention[51] defines 'Full Powers' as 'a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, or for accomplishing any other act with respect to a treaty.' Often two separate documents are issued but this is not essential - a single document covering both aspects is acceptable as well. Full Powers will not, however, confer on the agent power to bind his principal, except in those cases where the signing of a treaty alone suffices for this purpose.[52]

Whereas an agent usually requires Full Powers both to negotiate and sign multilateral treaties, he will seldom require Full Powers to negotiate bilateral treaties. During the course of the latter negotiations it will be decided whether Full Powers are essential for signature or not. Although there are no standard legal requirements in this regard as far as the Republic is concerned, it is important to protect the Republic against the possibility of a dispute arising at a later date over whether the agent had authority to sign. So, whenever there is no provision in the treaty for ratification, it is considered advisable that Full Powers be issued and exhibited. In most formal bilateral treaties a provision will be inserted which governs the question of Full Powers. However, in less weighty bilateral treaties where the agents are well known to each other, and where they are certain that they have authority to sign and that their Governments will not repudiate at a later date, the necessity of Full Powers will often be dispensed with. An example of this would be in the case of an exchange of notes between an accredited ambassador of a foreign country on the one hand and the South African Minister of Foreign Affairs on the other to modify an existing treaty.

The Vienna Convention on the Law of Treaties[53] states:

> 'In virtue of their functions and without having to produce Full Powers, the following are considered as representing their State:
>
> (a) Heads of State, Heads of Government and Ministers of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
>
> (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
>
> (c) Representatives accredited by States to an international

51. Article 2(c)
52. McNair op.cit. 120-1.
53. Article 7(2).

> conference or to an international organization or to one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.'

In conformity with this Article, the State President, Prime Minister and Minister of Foreign Affairs of the Republic will not generally be issued with Full Powers when signing treaties themselves. All other agents will be issued with Full Powers. This practice is in accordance with Article 7(1)(b) of the Vienna Convention.[54]

If an agent purports to negotiate, authenticate or adopt the text of a treaty on behalf of the Republic without possessing the necessary Full Powers, it appears that his action will be without legal effect unless the Republic thereafter ratifies it. The Vienna Convention[55] provides that 'an act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorised to represent a State for that purpose is without legal effect unless afterwards confirmed by that State'. While ordinary diplomats have a clear authority to initial a treaty as an indication of their approval of the draft, this will not bind their State and a formal, authorised signature must follow.[56]

These Articles of the Vienna Convention should be read together with Article 46 which provides that a treaty made in violation of a provision of internal law of a State regarding competence to conclude treaties is not thereby avoided unless the violation was manifest and concerned a rule of internal law of fundamental importance. A violation is said to be manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith. As D.P. O'Connell remarks, these provisions appear to 'minimise the dependence of treaty validity upon constitutional law and [they have] been applauded for this achievement'.[57]

The State President himself may issue Full Powers, but he will do so only as regards treaties between Heads of State. The Minister of Foreign Affairs will issue Full Powers in connection with all other types of treaties or in his absence the Acting Minister of Foreign Affairs or the Prime Minister in his capacity as head of Government may issue the necessary documents.

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54. This provides that 'a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for expressing the consent of the State to be bound by the treaty if he produces appropriate Full Powers'.
55. Article 8.
56. D.P. O'Connell International Law 2 ed. (1970) I 216.
57. O'Connell op.cit. 217.

Article 7(1) of the Vienna Convention simply states that

> '[a] person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for expressing the consent of the State to be bound by a treaty if
> (a) he produces appropriate Full Powers ....'

It does not stipulate the form that the Full Powers must take. There is no international standard to which Full Powers must conform[58] although it seems that they may be rejected as inadequate if they do not declare the agent's competence in the manner required by customary constitutional conventions under the South African system. Certainly the mere existence of diplomatic status does no more than raise a presumption of competence to conclude agreements. This status alone, without Full Powers, will not suffice to negotiate and sign treaties.

As far as bilateral treaties are concerned, where the treaty is between Heads of State, the Full Powers will be in both official languages; while Full Powers in regard to less formal treaties will be in English or in Afrikaans, depending on the circumstances. So, for example, where the other party is the Government of the Netherlands or Belgium, the Full Powers will be in Afrikaans only but where the other party is an English-speaking country, the Full Powers will be in English.

Full Powers issued by the State President will be co-signed by the Minister of Foreign Affairs under the words 'By order of the State President in Council'. Thereafter, the Full Powers, together with a copy of the Minute of the Executive Committee, are sent to the Prime Minister's secretary with the request that they be submitted to the State President for signature and stamping.

Example of Full Powers in respect of a bilateral treaty issued by the State President:

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, Greetings!	Aan Almal en Iedereen wat Hiervan kennis mag neem, Saluut!
WHEREAS negotiations have taken place on the terms of a Treaty between the Republic of South Africa and the Republic of Botswana for the extradition of criminals:	NADEMAAL onderhandelings oor die bepalings van 'n Verdrag tussen die Republiek van Suid-Afrika en die Republiek Botswana vir die uitlewering van oortreders plaasgevind het;

58. Gunther Doeker The Treaty-Making Power in the Commonwealth of Australia (1966) 119.

AND WHEREAS it is necessary that a fit and proper person be invested with Full Power and Authority to sign the said Treaty on behalf of the Republic of South Africa;

EN NADEMAAL dit nodig is dat 'n geskikte en gepaste persoon met Volmag en Bevoegdheid beklee word om genoemde Verdrag namens die Republiek van Suid-Afrika te onderteken;

NOW, THEREFORE, reposing special trust and confidence in the discretion and integrity of Dr. the Honourable Hilgard Muller, Minister of Foreign Affairs of the Republic of South Africa, I have named, constituted and appointed him as Plenipotentiary and Representative having Full Power and Authority to agree to, conclude and sign the aforementioned Treaty on behalf of the Republic of South Africa with such Plenipotentiary or Representative as may be vested with similar Power and Authority on the part of the Republic of Botswana.

SO IS DIT DAT ek, uit hoofde van my besondere vertroue in die oordeel en onkreukbaarheid van Sy Edele dr. Hilgard Muller, Minister van Buitelandse Sake van die Republiek van Suid-Afrika, hom aanstel as Gevolmagtigde en Verteenwoordiger met Volmag en Bevoegdheid om die voormelde Verdrag namens die Republiek van Suid-Afrika aan te gaan en te onderteken met die Gevolmagtigde of Verteenwoordiger wat met soortgelyke Volmag en Bevoegdheid deur die Republiek Botswana beklee mag word

GIVEN under my Hand and the Seal of the Republic of South Africa at Pretoria on this the .... day of .... One Thousand Nine hundred and Sixty-eight.

GEGEE onder my Hand en die Seël van die Republiek van Suid-Afrika te Pretoria op hede die .... dag van .... Eenduisend Negehonderd Agt-en-sestig.

STATE PRESIDENT.

STAATSPRESIDENT.

By order of the State President-in-Council.

Op las van die Staatspresident-in-Rade.

Example of Accompanying Minute

DIE SEKRETARIS

Voorgestelde Uitleweringsverdrag tussen die Republiek van Suid-Afrika en die Republiek Botswana : Staatspresident se Volmag aan die Minister van Buitelandse Sake.

1. Onderhandelings oor 'n uitleweringsverdrag tussen Suid-Afrika en Botswana is gevoer, en eenstemmigheid oor die teks van 'n verdrag is bereik.

2. As gevolg van 'n versoek van die kant van Botswana neem die voorgestelde verdrag die vorm aan van 'n verdrag tussen Staatshoofde. Voorsiening word bepaal dat die twee Staatshoofde Gevolmagtigdes aanstel om die verdrag te sluit.

3. Die voorgestelde verdrag is onderworpe aan bekragtiging en sal in werking tree dertig dae na die datum warop die bekragtigingsoorkondes uitgeruil is.

4. Die owerhede van Botswana het aangedui dat Sy Edele M.P.K. Nwako, Minister van Staat, as die President van Botswana se Gevolmagtigde aangestel sal word.

5. Die Departement van Justisie het die Uitvoerende Raad se goedkeuring vir die aangaan van die verdrag verkry, asook goedkeuring dat Sy Edele dr. H. Muller, Minister van Buitelandse Sake, as die Staatspresident se Gevolmagtigde vir die doel aangestel word.

6. Dit word beoog dat die voorgestelde verdrag deur die Minister van Buitelandse Sake te Pretoria onderteken word en deur die Gevolmagtigde van Botswana te Gaberones.

7. In die voorgestelde verdrag word bepaal dat volmagte deur die Gevolmagtigdes gewissel word.

8. Die volgende dokumente word ter insae aangeheg:-
   (a) Minuut van die Uitvoerende Raad nr. 1355 soos op 7 Augustus 1968 goedgekeur;
   (b) Afrikaanse en Engelse tekste van die voorgestelde verdrag.

9. 'n Volmag waarin Sy Edele dr. H. Muller, Minister van Buitelandse Sake, as die Staatspresident se Gevolmagtigde aangestel word, word aangeheg vir voorlegging aan die Minister van Buitelandse Sake en mede-ondertekening deur hom indien hy daarmee akkoord gaan.

PRETORIA.
Augustus 1968.

DIE MINISTER VAN BUITELANDSE SAKE

Met verwysing na die laaste paragraaf van Uitvoerende Raadsminuut nr. 1355 soos goedgekeur op 7 Augustus 1968, word die Volmag waarin u as die Staatspresident se Gevolmagtigde aangestel word om die voorgestelde Uitleweringsverdrag met Botswana te onderteken, voorgelê vir mede-ondertekening deur u indien u daarmee akkoord gaan.

SEKRETARIS VAN BUITELANDSE SAKE

Example of Full Powers in respect of a bilateral treaty issued by the Minister of Foreign Affairs

WHEREAS negotiations have taken place on the terms of an Agreement between the Government of the Republic of South Africa and the Government of Portugal relative to the Cabora-Bassa Project.

AND WHEREAS a text acceptable to the Government of the Republic of South Africa and the Government of Portugal has been formulated;

AND WHEREAS the Government of the Republic of South Africa have examined the draft Agreement aforesaid and deem it desirable that the Agreement be concluded with the Government of Portugal;

AND WHEREAS it is necessary that a fit and proper person be invested with full power and authority to conclude the said Agreement on behalf of the Government of the Republic of South Africa;

NOW, THEREFORE, I, HILGARD MULLER, Minister of Foreign Affairs of the Republic of South Africa, do hereby certify and declare that

ABRAHAM JACOBUS FRANCOIS VILJOEN

Ambassador Extraordinary and Plenipotentiary of the Republic of South Africa in Portugal, is by these Presents named, constituted and appointed as Plenipotentiary and Representative having full power and authority to agree to, conclude and sign the aforementioned Agreement on behalf of the Government of the Republic of South Africa with such Plenipotentiary or Representative as may be vested with similar power and authority on the part of the Government of Portugal.

IN WITNESS WHEREOF I have signed and sealed these Presents at Pretoria on this the day of August in the year of Our Lord One Thousand Nine Hundred and Sixty-nine.

(Sgd) H. Muller

There is no settled international custom regarding the handing over or display of Full Powers. Many States prefer their plenipotentiaries to exhibit, but not to hand over, Full Powers to other States. Whenever the two States do not follow the same procedure they should consult each other on the matter. The procedure chosen will sometimes then appear in the text of the treaty. The most common usage, however, is to exchange Full Powers. This ensures that both States have absolute proof that the plenipotentiaries of the other State are duly authorized to sign the treaty. In practice Full Powers are usually issued, not at the commencement of negotiations, but when the treaty negotiations are virtually completed or where the treaty is already in its final form. In any event, authority to sign is only issued after the text has been approved by the Executive Committee. This is the general practice of States in this regard.[59]

The original copy of the Full Powers of the other negotiating State will be sent to the archives (or a certified copy thereof if the other State only displays but does not hand over its original Full Powers), together with the original or certified copy of the Full Powers issued by the Republic. Such safeguarding of Full Powers is especially important when the treaty is not subject to ratification.

Full Powers to sign multilateral treaties will be issued upon authorization by the Executive Committee that the treaty be signed and that the Minister of Foreign Affairs take the necessary steps to effect signature.

If the Minute of the Executive Committee indicates who will be the plenipotentiaries, the Minister of Foreign Affairs must certify in the Full Powers that certain persons have been appointed by the Government:

> 'NOW, THEREFORE, I ... Minister of Foreign Affairs of the Republic of South Africa do hereby certify and declare that the Government of the Republic of South Africa have authorized and appointed ... as Plenipotentiary and Representative with Full Power and authority to ....'

If not, the Minister will certify that he appoints certain persons as plenipotentiaries:

> 'NOW, THEREFORE, I ... Minister of Foreign Affairs of the Republic of South Africa do hereby certify and declare that I have authorized and appointed ....'

Full Powers to sign a treaty are sometimes included in the Full Powers to negotiate a treaty (credentials). In such a case the Minister of Foreign Affairs certifies in the Full Powers that certain persons are appointed as representatives of the Republic at the conference and that certain persons may sign the treaty on behalf of the Republic. The following specimens of Full Powers may be cited as typical:

59. Kaye Holloway Modern Trends in Treaty Law (1967) 36 n.29.

Example of Full Powers to sign a multilateral treaty

FULL POWER

WHEREAS the Governments party to the International Sugar Agreement of 1958 (as extended by the Protocols of 1963 and 1965) decided to extend for a further period of one year the International Sugar Agreement, which is due to expire on the 31st December, 1966;

AND WHEREAS a Protocol for the purpose of extending the said Agreement has been opened for signature in London from the 14th November until the 30th December, 1966;

AND WHEREAS the Government of the Republic of South Africa deem it desirable that the aforesaid Protocol be signed on behalf of the Republic of South Africa;

AND WHEREAS it is expedient that a fit and proper person be invested with Full Power to sign the said Protocol on behalf of the Republic of South Africa;

NOW THEREFORE, I, HILGARD MULLER, Minister of Foreign Affairs of the Republic of South Africa do hereby certify and declare that I have authorised and appointed, and do by these presents authorise and appoint

CAREL PIETER CRONJE DE WET

Ambassador Extraordinary and Plenipotentiary of the Republic of South Africa in London, with Full Power and authority to sign the above-mentioned Protocol on behalf of the Government of the Republic of South Africa.

IN WITNESS WHEREOF I 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-six.

Example of Full Powers to sign a multilateral treaty subject to ratification, acceptance or approval

FULL POWER

WHEREAS the Sixteenth Congress of the Universal Postal Union will convene in Tokyo on the 1st October, 1969;

AND WHEREAS it is expedient that fit and proper persons be invested with full power to sign on behalf of the Republic of South Africa the Acts drawn up by the Congress, subject to ratification or approval by the Government of the Republic of South Africa;

NOW, THEREFORE, I, HILGARD MULLER, Minister of Foreign Affairs of the Republic of South Africa, do hereby certify and declare that the Government of the Republic of South Africa have authorised and appointed and do by these presents authorise and appoint

MICHAEL CORNELIUS STRAUSS

Postmaster General of the Republic of South Africa

and as his alternate

NICOLAAS JOHANNES ALBERTUS JORDAAN

Deputy Postmaster General, Staff and Posts, to be their plenipotentiaries with full power to sign on behalf of the Republic of South Africa the Acts drawn up by the Congress, subject to ratification of amendments to the Constitution and approval of the other Acts by the Government of the Republic of South Africa.

IN WITNESS WHEREOF I have signed and sealed these presents at Pretoria on this the day of September in the year of Our Lord One Thousand Nine Hundred and Sixty-nine.

Example of Full Powers to represent the Republic and to sign a treaty subject to ratification

FULL POWER

WHEREAS the United Nations have convened a Conference on Road and Motor Transport in Geneva on 23rd August, 1943, for the purpose of concluding a new world-wide Convention on Road and Motor Transport;

AND WHEREAS it is expedient that fit and proper persons be invested with Full Power to represent the Government of the Union of South Africa and to sign, on behalf of the Government of the Union of South Africa, such Convention on Road and Motor Transport as may be concluded by the Conference;

NOW, THEREFORE, I, DANIEL FRANCOIS MALAN, His Majesty's Prime Minister and Minister of External Affairs for the Union of South Africa, do hereby certify and declare that the Government of the Union of South Africa have authorised and appointed and do by these presents authorise and appoint

HERMANN REINHOLD RICHARD BRUNE, Leader of the Delegation, and
ABRAHAM JACOBUS FRANCOIS VILJOEN, Adviser,

to be their plenipotentiaries with Full Power and authority to represent the Government of the Union of South Africa at the said Conference, and do also by these presents authorise and appoint

HERMANN REINHOLD RICHARD BRUNE

to sign, subject to subsequent acceptance by the Government of South Africa, such Convention on Road and Motor Transport as may be concluded by the Conference.

IN WITNESS WHEREOF I have signed and sealed these presents at Pretoria on this the day of August in the year of Our Lord One thousand Nine hundred and Forty-nine.

Full Powers will be lodged with the Secretariat of the conference at which the treaty is being negotiated (whenever the treaty is signed at the close of a conference), or with the depositary authority (when the treaty is signed at a later date). Full Powers in regard to treaties which must be signed at the United Nations must be deposited at least twenty-four hours before the signing ceremony.

The text of Full Powers could in exceptional and urgent circumstances be telegraphed ahead. The actual Full Powers must in such a case be sent on as soon as possible. The United Nations stipulates the following procedure where it is the depositary authority:[60]

> 'In some exceptional cases and for reasons of urgency, if, for example, there is a time-limit, cabled credentials may be accepted provisionally but the cable should also originate from the Head of State, Head of Government or Minister of Foreign Affairs and shou d be confirmed by a letter from the Permanent Delegation or the Plenipotentiary certifying its authenticity. The text of the cable should also state the title of the agreement referred to and whether the Plenipotentiary is authorized to sign subject to later acceptance, and should specify that ordinary credentials are being sent immediately by mail.'

After a multilateral treaty has been signed, a certified copy of the Full Powers issued to the South African plenipotentiary are sent to the archives together with a copy of the treaty certified by the depositary authority or organization. This is especially important when the treaty is not subject to ratification.

(e) Signature

Once the negotiations are concluded and the treaty has been drawn up in proper form, the next step in the making of a treaty is the signature of the plenipotentiaries. A comprehensive definition of signature is embodied in the Report of the Committee for the Progressive Codification of International Law of the League of Nations.[61] This states that

> 'a signature is the sign affixed by negotiators at the foot of the provisions on which they have agreed. It presupposes that each signatory is fully in agreement with the other signatories: it establishes the assent of each of the negotiators to the final result of the negotiations and the reciprocity of these assents.'

At its fourteenth session in 1962, the International Law Commission formulated the view that signature, subject to confirmation, has, in addition to authenticating the text of the treaty,'the primary effect' of establishing 'the right of the signatory State to become a party'.[62]

60. U.N. Document LEG 103/01(1)/AL of 11 July 1949.
61. Publications of the League of Nations V. Legal, 1927, v.16, Doc. c.211 1927 v.
62. U.N. Document (A/5209) Article 11 and Commentary; Kaye Holloway op.cit. 63.

South African treaties are generally signed by the negotiator, who is the bearer of an instrument of Full Powers. However, the text of a treaty itself may indicate who is to sign the treaty. In formal, bilateral treaties the signatory will often be indicated in the preamble, as happened, for example, in the extradition treaty between the Republic of South Africa and the Republic of Botswana of 1969.[63]

The Minute of the Executive Committee may also be of assistance in solving the problem of who is to sign a treaty as it often specifies that person by name:

> 'Ministers therefore have the honour to recommend that the State President be pleased to approve that the treaty be signed in the ... (languages) and to appoint [NAME] as the State President's Plenipotentiary for this purpose.'

Article 7(2) of the Vienna Convention on the Law of Treaties allows Heads of State, Heads of Governments and Ministers of Foreign Affairs to sign treaties by virtue of their office without Full Powers. In South Africa the Head of State seldom signs treaties himself. This is more in the sphere of activity of the Minister of Foreign Affairs who may sign personally or authorize someone to sign on his behalf. Hence the provision in the Minute of the Executive Committee, commonly present in treaties between Heads of State, that the Minister of Foreign Affairs will take the necessary steps in regard to signature.

If neither the text of the treaty nor the Minute mention who is to sign and if the Minister of Foreign Affairs is empowered to take the necessary action, he will decide exactly who is to sign. If signature is to take place in the territory of the other State, he will usually authorize the head of the diplomatic or consular mission to sign. In the absence of such a person, he may appoint a special plenipotentiary. If signature is to take place in South Africa, he will generally sign most important treaties personally and appoint senior officials (often the Secretary of Foreign Affairs) in the Department of Foreign Affairs to sign the others.

In certain circumstances a Cabinet Minister may sign the treaty:

(i) where an Act of Parliament provides for this: see, for example, the Prisons Act;[64]

(ii) where a Cabinet Minister is nominated as the plenipotentiary of the State President in treaties between Heads of States;

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63. Republic of South Africa Treaty Series 2 of 1969.

64. Act 8 of 1959, section 30(1).